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REPORTS OF CASES

IN THE

Supreme Court of Nebraska

JANUARY AND SEPTEMBER TERMS, 1941,
AND JANUARY TERM, 1942

VOLUME CXL

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

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1941

W. J. MOSS, APPELLANT, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE.

299 N. W. 345

FILED JULY 11, 1941. No. 31100.

Reversal. The judgment in this case reversed and the cause remanded for further proceedings consistent with the rules of law stated in *Prudential Ins. Co. v. Central Nebraska Public Power and Irrigation District*, 139 Neb. 114, 296 N. W. 752.

APPEAL from the district court for Phelps county: FRANK J. MUNDAY, JUDGE. *Reversed.*

John C. Hartigan and *Melvin Moss*, for appellant.

R. O. Canaday and *P. E. Boslaugh, contra.*

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

SIMMONS, C. J.

This action originated as one in eminent domain, brought by the power district, to acquire a right of way across lands owned by the appellant, W. J. Moss. Its present status is that of an action to recover compensation for land taken and consequential damages to the remainder of the land not taken. It is here on appeal by Moss from a judgment of the district court awarding him $319.

A jury was waived and the case was tried to the court. Plaintiff (Moss) offered evidence that the value of his land before the taking was $50 an acre, that 6.5 acres were taken, and that the consequential damages to the remainder of his land (a 240-acre tract) were $10 an acre. Various elements of consequential damages were testified to by plaintiff and his witnesses.

Defendant (power district) offered evidence of a somewhat lower value of the land taken, that 6.38 acres were taken, that of the remainder 45 acres were irrigable from defendant's system, that the building of defendant's project and the availability of water had increased the value of plaintiff's land, and contended that this increase was a special benefit which could be deducted from the consequential damages, and that plaintiff was entitled to recover only for land taken.

The trial court found that plaintiff was entitled to recover "the sum of $319 as the amount of his damage because of the taking" of his land.

The case was tried in the district court before this court heard and determined the case of *Prudential Ins. Co. v. Central Nebraska Public Power and Irrigation District,* 139 Neb. 114, 296 N. W. 752. From the evidence offered by the defendant, its reception in evidence over the plaintiff's objection, and the trial court's finding and judgment, it is evident that the trial court accepted the defendant's theory of the law of the case, which this court rejected in the above cited case. It is evident also that the trial court did not allow the plaintiff any recovery for consequential damages, and that in reaching that conclusion it followed erroneous rules as to the determination of damages and allowable deductions. The situation does not call for a further discussion of the facts.

The judgment is reversed and the cause is remanded for further proceedings in accord with the rules of law stated in the case above cited.

REVERSED.

JOHN A. CREIGHTON HOME FOR POOR WORKING GIRLS, APPELLEE, V. ANNE WALTMAN ET AL., APPELLANTS.

299 N. W. 261

FILED JULY 11, 1941. No. 31104.

1. **Charities.** An equity court has inherent jurisdiction, conferred by the Constitution, over the administration of charitable trusts.
2. **Constitutional Law.** It is beyond the power of the legislature to limit or control the exercise of that jurisdiction.
3. **Trusts.** An equity court should act in the granting of remedial orders, necessary for the proper accomplishment of the purposes of a trust, when the need is shown and so as to prevent the purposes of a trust being defeated in whole or in part.
4. ———. When necessary to accomplish the primary purpose of a trust, secondary restrictions on investments that may be made with trust funds may be altered by an equity court.
5. ———. If at any time powers granted to a trustee by the court are shown to be improper or the trustee fails in the proper performance of its duties, the powers of the trustee may be changed by the court. The trustee may also be changed.
6. ———. An equity court may authorize the investment of trust funds in common and preferred stocks under conditions that safeguard the investment and an adequate income return consistent with that safety, in order that the primary purpose of the trust may be more effectively secured, although such investments were not authorized in the instrument creating the trust.
7. ———. A corporation, organized under the provisions of chapter 24, art. 6, Comp. St. 1929, is not restricted by the provisions of section 24-605, Comp. St. 1929, to the lawful investments named in the section, when other securities in which its funds may be invested are specified in its articles.
8. ———. The rules as to the personal liability of trustees for acts done within the scope of the duties and powers of the trustee are set out in the opinion, and the rule as to the liability of the plaintiff's board as established by the district court is approved, subject to its being construed, if occasion requires, in the light of decisions of this court and applicable established principles.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed as modified.*

Walter R. Johnson, Attorney General, Edwin Vail and *Amos Thomas,* for appellants.

Kennedy, Holland, DeLacy & Svoboda and *Edward F. Leary, contra.*

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

SIMMONS, C. J.

John A. Creighton, by his will, bequeathed to his executors in trust the sum of $50,000 (together with certain residuary sums); one-half of said sum was to be used to purchase a site and build thereon "a home for poor working girls" and the remaining one-half to be invested "in interest-bearing securities" and the "interest derived therefrom" was to be applied "to the support of the said charity." The validity of this bequest was determined in *In re Estate of Creighton*, 91 Neb. 654, 136 N. W. 1001, and the trust there considered to be a "public charity."

The trustees received the gross sum of $177,453.80 from the estate.

Subsequently, in 1913, "The John A. Creighton Home for Poor Working Girls," a corporation (plaintiff herein), was formed under the provisions of the statutes relating to charitable organizations. Thereafter the trustees under the will, on petition to the district court for Douglas county, Nebraska, submitted their resignations and requested that plaintiff be appointed as trustee to administer the charity, so that a body be had capable of maintaining the charity and insuring a continuity of purpose and plan and maximum benefits. They further prayed that the court by its orders should safeguard the administration of the trust and that the supervising power of the court be reserved and exercised. That court, by its decree, accepted the resignations and appointed the plaintiff as trustee in the establishment and maintenance of the charity. That court further decreed: "In order that there be no doubt as to the continuing supervisory power of this court of equity over the administration of the said charity it is hereby expressly provided that the said corporation in the operation of the said charity and in all its acts as such trustee is subject to the powers of the court of equity respecting the administration of public charities."

Thereafter the plaintiff, as successor in trust, assumed

the responsibilities of said trust, and under the supervisory power of the court has been administering said charity.

Plaintiff's articles of incorporation provide: "The funds and money of this corporation may be invested in loans secured by first mortgages upon real estate of at least double the amount of the loan; or in loans secured by railroad bonds; or in city, county, state or government securities; or in loans to individuals or corporations when secured by collateral of a value six times the amount of such loan to the individual or corporation." It will thus be noted that the investments that could be made from the funds of said trust were restricted both by the will and by the articles of incorporation of plaintiff. It appears that the home has been established and successfully operated for a number of years. The trustee has not only preserved the original trust funds, but by judicious management has increased the amount of trust fund assets, so that, at the time of the hearing in the court below, it had on hand some $184,000 in cash, $59,000 in interest-bearing securities, and $90,000 in real estate, including the home building and furnishings.

The trustee, by petition filed in the district court for Douglas county, recites the history of this trust and sets out that, because of the economic depression that has existed for some years in Nebraska, the nation and in the world, and the resultant changes in and effects upon business conditions, methods, and concepts, it has been impossible to obtain for investment "interest-bearing securities" paying reasonable returns; and that investments such as it is authorized to make under its articles are either not available, or are of doubtful value and subject to wide price fluctuations, and that because of this situation it presently has uninvested and unproductive a large part of the trust funds. The trustee further sets out that there are available for investment sound securities in the form of preferred and common stocks which accord to the owner a reasonable return upon the investment and which would make it possible for the safe continued operation of the home. The trustee further sets out that the returns presently received on in-

vestments which it has authority to make are negligible and insufficient to insure the continuance of the home as contemplated by the creator of the trust. As to this feature of the case the trustee prays that the terms of the trust may be altered so that the field of investments which it may make be broadened to include selected preferred stocks and seasoned common stocks.

The attorney general was made a party to the action and appeared as a representative of the public interest. Certain occupants of the home were made parties and appeared representing the beneficiaries of the trust. The issues presented by these parties will be discussed later herein.

Trial was had. The court made extended findings of fact and conclusions of law and entered its decree in the following language:

"It is considered, ordered, adjudged and decreed:

"(A) That the Home for Poor Working Girls Trust, established by Paragraph Tenth of the Last Will and Testament of John A. Creighton, deceased, be broadened to effectuate the intention of the Testator, and to permit the continuation of said public charity and to preclude the failure and collapse of said charity, by modifying the investment powers of the Trustee Plaintiff and Applicant, the John A. Creighton Home for Poor Working Girls, a corporation, to permit the Trustee, in its discretion, to invest its Trust Fund in securities other than 'interest-bearing securities.'

"(B) That the investment portfolio of the said Trust fund shall be divided as between interest-bearing securities (as herein elsewhere defined), selected preferred stocks (as herein elsewhere defined), and seasoned common stocks (as herein elsewhere defined) according to the discretion of the Trustees of the Plaintiff and Applicant, but in no case shall more than one-half of the Trust fund available for investment be invested in any one of the three aforedesignated classes of securities, provided:

"(1) A selected preferred stock, permissible for investment of the Trust fund, shall be construed to mean a preferred stock upon which dividends have been declared and

paid continuously, without interruption, for not less than five (5) years, prior to the investment.

"(2) A seasoned common stock, permissible for investment of the Trust fund, shall be construed to mean a common stock upon which dividends have been declared and paid continuously, without interruption, for not less than ten (10) years prior to the investment.

"(3) Interest-bearing securities, permissible for investment of the Trust fund shall be construed to mean promissory debt obligations of Governments, Federal and State; municipalities; public corporations; and private corporations, but as to the notes, bonds or debentures of private corporations, such securities, or if refunding obligations, the preceding securities, shall have been outstanding not less than three (3) years without default or waiver of default.

"(C) That the Trustees or Directors of the Plaintiff and Applicant corporation are hereby declared not to be, nor become, personally liable in the selection of investments thereof, nor in their depreciation, except upon the affirmative demonstration of fraud or negligence in the selection of investments, or the want of exercise of such reasonable care as prudent men would use in the selection of their own investments but made with a view of the preservation of the investment while realizing a reasonable return thereon.

"(D) That the Plaintiff and Appellant corporation be, and it is hereby, authorized to amend its Articles of Incorporation to conform to the enlarged investment jurisdiction and the limitations thereon hereinabove conferred and imposed, respectively, and to express the responsibility of the individual Trustees or Directors of the said corporation as herein above set forth.

"(E) That the Court does hereby retain continued supervisory control over the administration of the Trust, including annual reports from the Trustee and their approval.

"(F) That the costs be and they are hereby charged against the Plaintiff and Applicant to be paid out of the Trust fund herein involved."

The attorney general and the occupants of the home appeal.

Before entering upon a discussion of the assignments of error it may be well to point out that the obvious primary purpose of Mr. Creighton in establishing this trust was that poor working girls might have a home and that that home have financial support of an enduring nature. To that end he provided funds for the physical plant and funds to be held in trust to furnish income to be applied to the primary purpose. As a means to the accomplishment of that end he provided that a part of the trust funds be invested in "interest-bearing securities" and that the interest be used to support his worthy charity. Obviously, both from the terms of the will and as a practical proposition, it is necessary that the principal fund be preserved and also that it be made to produce an effective income. Otherwise, the purpose of the trust and Mr. Creighton's charity would fail. The requirement as to the investment of the funds was one which, at the time the will was made, had been demonstrated to be safe by economic standards and practices then in force. It had received, not only sanction as a safe business practice, but the approval of legislative bodies and courts. It is likewise obvious that the economic situation now existing is one which could not reasonably have been foreseen by Mr. Creighton at the time the trust was created.

Must the limitation imposed almost four decades ago remain unaltered?

Appellants present the proposition that certain statutory provisions, to wit, chapter 30, art. 18, Comp. St. Supp. 1939, and section 27-601, Comp. St. Supp. 1939, prevent the granting of relief requested by the plaintiff. A construction of the provisions of the statutes cited is unnecessary. The trust here was created by the Creighton will. It is a public charity. Trustees named in the will qualified and received the trust for administration. Subsequently they presented to the district court for Douglas county a petition declaring the provisions of the trust, accounting for the funds in their possession, resigning as trustees, and asking for the appoint-

ment of the plaintiff as trustee. That court, exercising its inherent jurisdiction over the administration of charitable trusts, appointed the plaintiff as trustee and retained jurisdiction over the administration of the trust. The right to exercise that jurisdiction and the validity of that action are not challenged. That court is not being asked to take jurisdiction over a trust in the possession of the plaintiff. The court has that jurisdiction. The powers of the plaintiff stem from the order of the court appointing it as trustee. As trustee it is an instrumentality of the court, and exercises its power over the trust, not by virtue of its incorporation, but by virtue of its appointment by the court. The continued exercise of its power as trustee rests upon authority given it by the court and not upon its articles of incorporation.

The established construction of the Constitution and the jurisdiction of the district courts of the state in the administration of trusts are clearly stated by Judge Eberly, speaking for the court, in *Burnham v. Bennison,* 121 Neb. 291, 236 N. W. 745:

"It may be said that, by the terms of the Constitution, district courts in Nebraska are vested with 'chancery jurisdiction.' Const. art. V, sec. 9. This we have construed as vesting district courts with equity jurisdiction which they may exercise without legislative enactment. *Matteson v. Creighton University,* 105 Neb. 219. Indeed, this court is committed to the view that, not only is equity jurisdiction conferred by the terms of the Constitution, but as thus conferred it is beyond the power of the legislature to limit or control. That, while the legislature may grant such other jurisdiction as it may deem proper, it cannot limit or take from such courts their broad and general jurisdiction which the Constitution has conferred upon them. *Lacey v. Zeigler,* 98 Neb. 380. One of the well-recognized grounds of equity jurisdiction thus conferred on, and available in, courts of this state, by virtue of this constitutional provision, is the supervision of the administration of trusts. *Matteson v. Creighton University,* 105 Neb. 219; *Gotchall v. Gotchall,* 98 Neb. 730." It necessarily follows that the district court

for Douglas county has jurisdiction of the subject-matter and of the property in this trust. It has for years been exercising that jurisdiction in the administration of this trust. It has the power and the duty to continue to do so. The statutes cited are not controlling.

Appellants contend that "no sufficient case was made out for the exercise of equity jurisdiction to change or alter the plan or scheme of operation of the charitable trust." Appellants concede "that equity exercises inherent jurisdiction over charitable trusts," but argue that the evidence does not show that the estate may be totally lost to the beneficiaries if the change is not made. It appears from the evidence that the average interest yield on book values of securities held by the trust has declined from 10.19 per cent. in 1916 to 2.55 per cent. in June, 1940; that this decline has been gradual and persistent; and that the disbursements for the year ending June 29, 1940, exceeded the trust income, and that it has been difficult, if not impossible, to secure safe investments within the field of securities specified by the will.

The argument is that the institution could continue to operate upon a restricted basis, if necessary, without the change being granted. It must be remembered that the purpose of the trust was that the home be operated. That purpose will be defeated to the extent that operations are restricted. The trustee is not required to wait until operations are materially restricted or suspended before moving to correct the situation, if it can be corrected by proper means. Neither should an equity court delay remedial orders before granting relief until such time as the purpose of the trust is defeated, in whole or in part. Sufficient cause has been shown to justify the use of the equity powers of the court to prevent the defeat of the purposes of the trust, bearing in mind the fact that the court retains at all times supervisory control over the administration of the trust.

We come, then, to the question, "should the powers of the trustee as to investments which it must make be broadened in the manner requested?" The secondary restriction

on investments made in the will and in the authority given the trustee by the court must yield to the primary purpose of the trust, which is the effective operation of the home. The primary object is to preserve the trust property so that it may be used to the greatest advantage to the beneficiaries. This property must produce an income. To do so it must be safely invested in productive property. The present base of investments is shown to be inadequate to the need. The broader base proposed permits a wider diversification of investments, assuring a better balanced investment of the funds of the trust, and should tend to safeguard the preservation of the principal fund. The restrictions proposed largely remove the element of speculation from the purchase of common and preferred stocks. It permits a proper exercise of the business judgment of the trustee, controlled by the honesty and integrity of the men who manage the trust, guided, as they must be, by a high purpose to make the trust successfully serve the purpose for which it was created. If at any time the powers granted by the court are shown to be improper or the trustee fails in the proper performance of its duties, the powers of the trustee may be changed by the district court. The trustee may also be changed.

In *Matteson v. Creighton University,* 105 Neb. 219, 179 N. W. 1009, this court had for consideration the proper disposition of another of Mr. Creighton's trusts. There, owing to changed conditions and without legislative enactment or the authority of the instrument creating the trust, the sale of real estate and the investment of the proceeds in interest-bearing securities were approved. The primary purpose of the trust was served by so doing.

This entire matter is discussed in its various angles in 2 Scott, Trusts, secs. 167, 227.11, and 3 Scott, Trusts, sec. 381. See, also, 1 Restatement, Trusts, 645, sec. 227; 65 C. J. 683, 805.

The conclusion is that an equity court may authorize the investment of trust funds in common and preferred stocks under conditions that safeguard the investment and an adequate income return consistent with that safety, in order

that the primary purpose of the trust may be more effectively secured, although such investments were not authorized in the instrument creating the trust.

The plaintiff, on its own motion, suggests a further requirement as to the earnings of corporations be made by a modification of paragraph B (1), (2) and (3) so as to read as follows (the modifying words being shown in italics):

"(1) A selected preferred stock, permissible for investment of the Trust fund, shall be construed to mean a preferred stock upon which dividends have been *earned,* declared and paid continuously, without interruption, for not less than five (5) years, prior to the investment.

"(2) A seasoned common stock, permissible for investment of the Trust fund, shall be construed to mean a common stock upon which dividends have been *earned,* declared and paid continuously, without interruption, for not less than ten (10) years prior to the investment.

"(3) Interest-bearing securities, permissible for investment of the Trust fund shall be construed to mean promissory debt obligations of Governments, Federal and State; municipalities; public corporations; and private corporations, but as to the notes, bonds or debentures of private corporations, such securities, or if refunding obligations, the preceding securities, shall have been outstanding not less than five (5) years without default or waiver of default, *and the earnings of such corporations (as distinguished from dividends) have been at least twice the interest charges, on the average, during such five years period.*"

This modification of the decree appears to be in the interest of further safeguarding the funds of the trust and it is approved.

Appellants direct attention to paragraph D of the decree authorizing plaintiff to amend its articles of incorporation to conform to the enlarged investment jurisdiction granted. Appellants point out that plaintiff was incorporated under the provisions of chapter 24, art. 6, Comp. St. 1929, and contend that section 24-605 thereof prevents an extension of the powers of investment beyond those expressed therein.

The provisions of the section necessary to be considered are: "All the funds received by any such corporation shall be used * * * or shall be invested, and the income thereof used * * * for the exclusive purpose set forth in the articles of association." Clearly this part of the act contains no restrictions upon the investments to be made, but, standing alone, is a broad grant of power to use the principal fund or to invest and to use the income, for the purposes declared in the articles. The section then provides: "Such corporation may take property by gift, purchase, bequest, or devise, and it shall be lawful to invest the same upon mortgage or in or by loan on railroad stocks or bonds, or any city, county, state, or government securities." This is a legislative description of lawful investments; it is not exclusive of other investments, and obviously not intended to be so, for by the proviso following the corporation is limited to investing such funds in such lawful securities *only* where the securities in which its funds shall be invested are not specified in the articles. The proviso is: "Any such corporation may, in its articles of agreement, specify the kind of securities in which its funds shall be invested, and that no part of its funds shall be invested in any other securities than those named in its articles, or where the securities shall not be specified in the articles of agreement, then such funds shall *only* be invested in such securities as are specified in this article." Clearly, the statute contemplates that the articles may authorize investments in securities other than those named in the act, and that the limitation to the lawful investments named in the act is only applicable where the articles make no provision as to the securities in which investments may be made. To construe the act as urged by appellants would be to hold the proviso to be surplus language.

Bearing in mind the fact that the plaintiff has not received the funds involved in this action in its own right, but holds them as an instrumentality of the court and subject to the court's control, it may be questioned whether the provisions of the act apply to funds so placed in plaintiff's

possession. But not deciding that, it is apparent that it may provide in its articles for the investment of its funds in investments other than those set out in the statute as lawful investments. The court, having control of the fund and having determined to extend the powers of investment of the plaintiff over the fund, properly authorized the plaintiff to amend its articles, so as to embrace the grant of power.

Finally, appellants call attention to paragraph C of the decree defining the liability of the directors of the plaintiff and assert that this court in *In re Estate of Linch*, 136 Neb. 705, 287 N. W. 88, stated that "A trustee, in the management of a trust estate, is required to use that degree of care and diligence that an ordinarily reasonable and prudent man would use in his own business under like or similar circumstances," and contend that having so defined the liability it should not be otherwise stated.

Plaintiff's board of trustees serve without pay. Of necessity, the proper administration of this trust calls for the unselfish, civic-minded service of men of high integrity, experience and training in the investment and administration of large sums of money. Plaintiff seeks a decree defining that liability in order that the men now serving, and those who later may be called upon to serve, may know the extent of the personal liability which they assume in serving this trust. The request is in the nature of one for a declaratory judgment. The granting of the request will aid materially in the retaining and securing of proper men to administer the trust. The creator of the trust did not define the standard of responsibility to be required of the trustees. No statute is cited defining the liability. The court may therefore fix the standard. The trial court properly undertook to define that liability. Is the statement made in the decree a correct definition of the liability? This court has on many occasions defined the liability as applied to facts then before it. For instance, in *First Trust Co. v. Exchange Bank*, 126 Neb. 856, 867, 254 N. W. 569, is this statement:

"A trustee is not an insurer and is not absolutely bound for the results of his acts. As a general rule, the measure

of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate. 26 R. C. L. 1280, sec. 130. He must act honestly and faithfully, in what he believes to be the best interests of the *cestui que trust.* He must exercise sound discretion. He is bound to proceed with diligence in investigating the nature of the proposed investment, and to use such care in deciding as, in general, prudent men of intelligence and integrity in such matters would employ in their own affairs when making a permanent investment in which the primary object is the preservation of the fund, and the secondary one that of obtaining an income therefrom. *In re Buhl's Estate,* 211 Mich. 124, 12 A. L. R. 569. If he invests in property, it ought to be property which yields an actual income, and which has a valuation in the general sense of the community, founded on that income, and not on remote eventualities and a succession of contingencies. 26 R. C. L. 1307, sec. 161."

Again, in *Masonic Bldg. Corporation v. Carlsen,* 128 Neb. 108, 130, 258 N. W. 44, this court cited with approval the following from 3 Pomeroy, Equity Jurisprudence (4th ed.) sec. 1079: "It is well settled that every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or fortgetfulness, is a breach of trust. The term therefore includes every omission or commission which violates in any manner either of the three great obligations already described: of carrying out the trust according to its terms, of care and diligence in protecting and investing the trust property, and of using perfect good faith."

The matter is again considered and discussed in *In re Estate of Linch, supra* (the appellants quote from the syllabus). The difficulty comes, not in the statement of a rule of liability, but in its application. No objection to the rule, as stated by the trial court is seen. It must be construed, if occasion arises, in the light of decisions of this court and established principles which are applicable. It is limited, of course, to acts done within the scope of the duties and powers of the trustee.

The judgment of the trial court, as modified herein, is affirmed.

AFFIRMED AS MODIFIED.

STATE, EX REL. MERVYN J. WARREN, APPELLANT, V. EMIL RAABE ET AL., APPELLEES.
299 N. W. 338

FILED JULY 11, 1941. No. 31115.

1. **Mandamus.** In the enforcement of judgments against municipal corporations, the writ of mandamus is a substitute for the writ of execution and may properly be used, as provided by statute, to enforce satisfaction of a judgment against a county.
2. ———. A judgment for a debt secured in a court of competent jurisdiction in this state is a condition precedent to the issuance of a writ of mandamus to compel the proper officers of a county to proceed to collect the necessary amount of money to pay off such adjudicated indebtedness.

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

Cowan & Grady, Abbott, Dunlap & Abbott, Gross & Crawford and *Crofoot, Fraser, Connolly & Stryker,* for appellant.

Fay H. Pollock and *Robert R. Moodie, contra.*

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

SIMMONS, C. J.

Relator prays for a writ of mandamus directing that the respondents, within legal limits, proceed to levy taxes in an amount sufficient to pay certain warrants issued by the county of Stanton held by him. The respondents are the county of Stanton, its board of commissioners, and its board of equalization.

Relator alleges that he is the owner and holder of certain warrants issued by the county of Stanton in the aggregate sum of $92,838.75, and that he brings this action for him-

self and all others similarly situated; that during the years 1919 to 1922, inclusive, Robert Z. Drake, doing business as Standard Bridge Company, performed work and furnished materials and supplies to the county; that claims were filed, audited and allowed in the sum of $542,439.34 and warrants were issued therefor; that $441,019.31 of said warrants was paid by the county and $101,420.03 remains outstanding and unpaid; that in an action in the district court for Stanton county, October 2, 1922, wherein the Standard Bridge Company was plaintiff and the county and its board of commissioners were defendants, the validity of said warrants was an issue, and it was specifically adjudged that said warrants were valid obligations of the county; that all of said warrants were presented for payment, payment refused, and the warrants registered for payment; that levies were made and from the funds provided payments of said warrants were made in the order of registration; that the last payment was made in 1937; that plaintiff's warrants were not reached in the order of registration and not paid; that it is the duty of respondents to include said warrants in the annual estimates and to levy a tax in an amount sufficient to pay the interest and principal up to the statutory limit; that the respondents since 1938 have refused to perform said duty although sufficient time to do so has passed; that the county denies liability on said warrants remaining unpaid after having recognized the indebtedness and made payments thereon for over 20 years, during which time the warrants changed ownership from time to time in reliance thereon; that respondents have refused to take any action to provide funds for the payment of the warrants; that relator has no plain and adequate remedy in the ordinary course of the law, has suffered irreparable damage and will continue to suffer harm and damage if respondents are not compelled by mandamus to make the necessary estimates and levy the taxes up to the statutory limit to secure funds to pay the warrants.

After motion to quash and demurrer, respondents answered, challenging the right of relator to a writ of man-

damus, presented the issue as to whether or not relator has a plain and adequate remedy in the ordinary course of the law, admitted that no levy has been made for the purpose of paying the warrants held by relator and admitted that the county denies liability on the warrants held by the relator, and denied that he has suffered, or will suffer, irreparable injury if the writ does not issue.

Respondents pleaded various provisions of our Constitution and statutes, including limitations on county indebtedness, and alleged facts relating to the assessed value of the property of the county, the amount of funds which could be produced by levies if made; that the warrants show on their face that they were issued for sums greatly in excess of the amount of the levy and that each of the warrants held by relator was for the payment of orders given under "Unit Price" contracts in excess and in contravention of statutory and constitutional limitations and when there were no funds legally available for payment thereof; that no emergency existed for the repair of the bridges for which the warrants were issued and that the law as to emergency repairs was not followed; that the county board has no authority to audit or allow the claims for which relator's warrants were drawn; that the warrants are void; that the contracts and orders for bridges in excess of legal limits were made and entered into pursuant to collusion and connivance between the then county board and Drake as evidenced by the unlawful allowance of claims and issuance of warrants, the manipulation of county records and by the acts of the commissioners in assisting and cooperating in the drafting of the pleadings in the action against the county, in failing to present defenses and in admitting liability of the county and validity of the warrants. The respondents further allege that the county was overcharged for the materials furnished and work done. By reason of these and other defenses, respondents contend that no levy may legally be made to pay the warrants.

Relator for reply denies generally, and further pleads that a suit was brought by taxpayers in 1922 against the

county and its officers to enjoin the collection of taxes to pay certain warrants, among them the ones involved in this action; that a demurrer to the petition was sustained and the action dismissed; that subsequently another taxpayer's action was brought to restrain the payment of these warrants and to have them declared illegal and void; that demurrers to said petition were sustained and the action dismissed; that an appeal was taken to this court and here said action dismissed by stipulation of the parties, wherein the county was benefited by a credit upon a judgment of the Standard Bridge Company against it; that the county, since 1922, has had knowledge of all these matters, retained the benefits thereof, used the bridges, made levies to pay a large part of the warrants and is now estopped to deny their validity and to refuse payment; that the taxpayers' suits constitute an adjudication of the validity of the warrants; that the relator, knowing of this history of the warrants and relying thereon, was lead to believe that the warrants would be paid; and that the respondents are guilty of laches and should not be permitted to question the validity of the warrants or said litigation and that the statute of limitations prevents the respondents from asserting the invalidity of said warrants and said judgments.

The three pleadings just reviewed, together with exhibits, comprise some 200 pages of the transcript.

The evidence, largely documentary, is equally voluminous. The trial court denied the writ of mandamus for which relator prayed. Relator appeals.

The question first presented is, "Is mandamus a proper remedy?"

The relator's contention that he has no adequate remedy at law is based on the general situation presented by the pleadings and the evidence, rather than upon any particular fact, either alleged or proved.

The warrants held by the relator are in the nature of promises to pay. It is patent that relator has not secured a judgment upon his warrants in a court of competent jurisdiction in this state. The county denies the validity of the

warrants and its liability thereon. Relator's position is that the facts pleaded, and, he contends, proved entitle him to the writ.

The applicable provisions of our statute are as follows: "The writ of mandamus may be issued * * * to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station." Comp. St. 1929, sec. 20-2156. "This writ may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." Comp. St. 1929, sec. 20-2157. "Whenever any judgment shall be obtained in any court of competent jurisdiction in this state for the payment of a sum of money against any county * * * it shall be the duty of the county board * * * to make provisions for the prompt payment of the same." Comp. St. 1929, sec. 77-1809. "If the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to meet and pay the current expenses for the year in which the levy is made, and also to pay the judgment remaining unpaid, it shall be the duty of the proper officers * * * to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments." Comp. St. 1929, sec. 77-1810. "If any such corporate authorities, whose duty it is, under the provisions of this article, to so levy and collect the tax necessary to pay off any such judgment, shall fail, refuse, or neglect to make provisions for the immediate payment of such judgments, after request made by the owner or any person having an interest therein, * * * he or they having such interest may apply to the district court of the county in which the judgment is obtained * * * for a writ of mandamus to compel the proper officers to proceed to collect the necessary amount of money to pay off such indebtedness." Comp. St. 1929, sec. 77-1813.

The statutes last above cited (Comp. St. 1929, secs. 77-1809, 77-1810, 77-1813) were before the circuit court of appeals, eighth circuit, in *United States v. Saunders*, 124 Fed. 124, wherein it was said (p. 126): "In the enforcement of judgments of the national courts against municipal

and quasi municipal corporations, the writ of mandamus is the legal substitute for the writ of execution to enforce judgments against private parties." See, also, *Village of Oshkosh v. State of Nebraska,* 20 Fed. (2d) 621.

In *Snower v. Hope Drainage District,* 2 Fed. Supp. 931, the court said (p. 933): "The writ of mandamus is the substitute for the writ of execution when the judgment debtor is a municipal corporation." It is a proceeding "in the nature of an execution to enforce satisfaction." *Carter County v. Schmalstig,* 127 Fed. 126.

In 58 A. L. R. 122, the rule is stated: "As a rule a judgment for a debt is a prerequisite to any proceeding by mandamus to compel a levy and collection of a tax for the payment of the debt."

"The writ of mandamus, when so issued, is the final process of the court for the enforcement of its judgment, and performs, in substance and effect, the office of a writ of execution." 4 Dillon, Municipal Corporations (5th ed.) 2695.

"We have seen that it is a general rule, relating to the writ under consideration, that it will not lie if there be a plain and complete remedy by the ordinary processes of the law; and this principle has been applied to the mode of compelling municipal corporations to meet their liabilities and obligations. Therefore, it has been generally, but not uniformly, held, if the creditor may bring suit against the corporation and obtain a judgment, which may be enforced and rendered effectual by ordinary execution, that mandamus will not lie to compel payment, in advance of judgment recovered; and this view, under the conditions just stated, is the one most consistent with principle, when the matter stands wholly unaffected by legislation. When judgment is rendered, and there is no property subject to execution out of which it can be made, mandamus will lie, and is the proper remedy, to compel the levy and collection of the necessary tax to pay the judgment. When the claim is reduced to judgment, the duty to provide for its payment becomes perfect, and if it can be paid in no other way, it

must be done by the levy and collection of a tax for that purpose, and this duty will be enforced by mandamus." 4 Dillon, Municipal Corporations (5th ed.) 2675. This court followed the above rule in *State v. Knievel,* 5 Neb. (Unof.) 219, 97 N. W. 798.

That the allowance of a claim by a county board is not a judgment within the meaning of the statute under consideration is clearly established by the holding of this court in *Custer County v. Chicago, B. & Q. R. Co.,* 62 Neb. 657, 87 N. W. 341. This court there held "that the existence of judgments against the county at the time of the levy is a condition precedent to a valid exercise of the power by the county board to levy a tax for the payment of judgments." That being true, the existence of judgments is likewise a condition precedent to "a writ of mandamus to compel the proper officers to proceed to collect the necessary amount of money to pay off such indebtedness."

The statute clearly contemplates that the fact of the indebtedness, upon which the duty to levy the tax is based, must be determined in a prior action. Here the relator proposes that the duty to pay the tax shall be determined in the mandamus action, without the prior adjudication of the indebtedness contemplated by the statute.

If, as relator alleges, and, as he contends, has proved, the warrants held by him are based upon claims duly audited and allowed and the county is indebted to him, and is under a legal obligation to pay him the amount due upon his warrants, then it is clear that he may maintain an action at law to recover a money judgment against the county. *Ayres v. Thurston County,* 63 Neb. 96, 88 N. W. 178. He has, therefore, an adequate remedy in the usual course of the law. "It is the general rule in all courts that mandamus cannot be used when there is a complete and adequate remedy provided by statute." *State v. Morehead,* 101 Neb. 37, 161 N. W. 1040.

Were these warrants the promise of a private individual, it is patent that execution could not issue to enforce their payment, unless and until judgment were secured. Man-

damus as a substitute for execution should not issue upon them.

To authorize the issuance of the writ, relator relies upon the decision in the cases of *State v. Buffalo County*, 6 Neb. 454; *State v. Cather*, 22 Neb. 792, 36 N. W. 157; *State v. Weir*, 33 Neb. 35, 49 N. W. 785; *State v. Board of County Commissioners of Cass County*, 53 Neb. 767, 74 N. W. 254; *State v. Farrington*, 80 Neb. 628, 114 N. W. 1100. These will be considered in the order given.

(1) *State v. Buffalo County, supra*, states the rule: "When a claim against the county is finally adjudicated, and the law clearly provides for the levy of a tax to pay such claim, and the board of county commissioners refuse to levy such tax, the remedy is by mandamus to compel the levy of the tax, and not to subject the county to costs of litigation for the neglect of its officers." It will be noted in the *Buffalo County* case that the allowance of relator's claim and the validity of the contract upon which it was based had been previously adjudicated by a decision of this court. While it appears that the warrants had not been put in judgment, it seems clear that the defenses of the county had been adjudicated.

(2) *State v. Cather*, 22 Neb. 792, 36 N. W. 157, finds that "It is the duty of the county board to provide for what is due." A peremptory writ issued requiring the board to estimate the amount due and at the proper time levy taxes for the payment of the same. The original briefs in the above case are not available. An examination of the cases cited in the headnotes reveals the following regarding the cases cited by the relator: *State v. Dodge County*, 10 Neb. 20, 4 N. W. 370, by the provisions of the statute under which the bonds were issued, "no judgment at law * * * is contemplated," for it was made the duty of the commissioners to levy and cause the tax to be collected, and the act provided that they might "be compelled by mandamus to do so." *State v. Lancaster County*, 13 Neb. 223, 13 N. W. 212, decided only a question of procedure on appeal. *Lancaster County v. State*, 13 Neb. 523, 14 N. W. 517, was an application for a

writ to compel county commissioners to act upon a claim. The respondent cited the provisions of the statute allowing appeals to the district court from disallowed claims. It is obvious that this court did not determine in the *Cather* case the question we are now considering.

(3) *State v. Weir,* 33 Neb. 35, 49 N. W. 785, was an application for a writ to compel county commissioners to include in the estimate of expenses certain audited and allowed claims and to levy and collect a tax to pay the same. No appeal was taken from the allowance of the claims and their justness was not questioned. A writ was issued requiring the commissioners to include the claims in the estimates and at the proper time levy a tax to pay the same. The briefs in that case reveal that the respondents presented, as the question to be determined, the necessity of meeting the current expenses of the county before it could be compelled to pay "debts already incurred." That was the question primarily considered by this court. The matter now being considered was not determined, although the statute regarding mandamus in case a judgment was not paid, heretofore discussed, was cited.

(4) The decision in the *Cass County* case merely held that a peremptory writ would issue in favor of one who had conclusively established the right to have a warrant issued for an allowed claim. It does not involve nor decide the question now presented.

(5) In *State v. Farrington,* 80 Neb. 628, 114 N. W. 1100, a writ of mandamus was asked commanding the defendants to revise their estimates and levy and to include therein an amount sufficient to pay the claims of the relator. Clearly the claims had not been reduced to judgment. On appeal to this court relator contended, and briefed at length, that mandamus was a proper remedy. As the opinion states, respondents contended that there had been no valid allowance of the claims and that relator's cause was barred by the statute of limitations. Respondents briefed those propositions and paid little if any attention to relator's contention that mandamus was a proper remedy, except as it related to

the statute of limitations. This court held: "The allowed claims stand in the character of a judgment against the county, imposing on it a continuing duty to make payment." The cause was reversed, with directions to issue the writ. The cause was again before this court on a second appeal in 86 Neb. 653, 126 N. W. 91. Upon this second appearance respondents briefed and argued their contention that "the relator is not entitled to a writ of mandamus because his claims have not been reduced to judgment." To this contention relator in his brief answered that "it should have been presented in a motion for a rehearing on the former appeal." This court said that this question was "directly involved in the former appeal and determined against the respondents" and that the respondents were evidently satisfied with the opinion because they did not ask for a rehearing. Respondents urged this court to reexamine the questions involved in the former appeal and correct any manifest error therein. Discussing that proposition generally this court said: "The erroneous decision may be overruled and disregarded in subsequent litigation between other parties, but between parties to the suit and their privies it is the law and measures their rights and duties." It is obvious that this court, in the opinion just discussed, did not close the door to a further consideration of this problem.

We find nothing in our former holdings which prevents the statement of a sound rule, consistent with our statutes, to be followed in cases such as the one at bar.

It is not necessary to discuss or decide the other matters presented in the appeal. The judgment of the trial court denying a writ of mandamus, as prayed by the relator, is affirmed for the reasons here stated.

AFFIRMED.

C. W. NEILL, APPELLANT, V. DAKOTA COUNTY, APPELLEE.
299 N. W. 294

FILED JULY 11, 1941. No. 31142.

1. **Paupers.** Valid claims by a physician against a county for treating poor residents at the expense of the county are such claims only as are authorized by statute.
2. ———. A physician relying on county funds raised by taxation for payment of compensation for services performed for poor residents must ascertain at his peril the power of county officers to bind the county for such compensation.
3. ———. In an action by a physician against a county on traversed claims for compensation for services performed for poor residents, the burden is on him to prove performance of services authorized by statute at the expense of the county.
4. **Appeal.** Where a jury is waived by the parties to an action at law in the district court, the findings of the trial judge on issues of fact are equivalent to the verdict of a jury and will not be reversed on appeal, if supported by sufficient evidence.

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

Joseph E. Marsh, for appellant.

Malcolm R. Smith, contra.

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

ROSE, J.

This is a controversy between C. W. Neill, plaintiff, a practicing physician, and Dakota county, defendant, over claims for professional services alleged to have been performed by him for poor residents at the direction and expense of the county. There was no regularly appointed and acting county physician during the time plaintiff performed the services for which he demands compensation. The claims included separate fees or charges in individual cases during June, July, August, September, October, November and December, 1937, and January, February, March and April, 1938. The sum of the claims presented to the county board for allowance was $1,625.50. They were examined

and audited by the county board April 22, 1938, with the result that items to the extent of $942 were rejected as unauthorized or disallowed in part as excessive, and claims amounting to $683.50 were approved.

Plaintiff appealed to the district court from the order of the county board rejecting or reducing items amounting to $942 and, by petition, pleaded his claims therefor. The answer of the county was a general denial and put in issue the validity of the items of charges or fees comprising the rejected claims for $942 presented to the district court on appeal from the county board.

In the district court a jury was waived and a trial resulted in a judgment against defendant for $343.33. Plaintiff appealed to the supreme court, contending that the only judgment that could properly have been entered in the district court under the evidence and the law was one for the full amount of his disallowed claims for $942.

Valid claims by a physician against a county for treating poor residents at the expense of the county are such claims only as are authorized by statute. A physician relying on county funds raised by taxation for compensation for services performed for the poor must ascertain at his peril the power of county officers to bind the county for such compensation. The statute provides:

"The county board of each county shall be the overseers of the poor and are vested with the entire and exclusive superintendence of the poor in such county." Comp. St. Supp. 1939, sec. 68-104.

"It shall be the duty of the county board in each county, to provide for all such persons, except as above defined, who have a legal settlement therein, and as are unable to earn a livelihood, in consequence of any unavoidable cause, the necessaries of life." Comp. St. Supp. 1939, sec. 68-105.

The burden was on plaintiff to prove performance of services authorized by statute. In attempting to prove services in the individual cases itemized in the rejected claims for $942, plaintiff testified that the services were authorized by the county commissioners or their agents, but he did not

introduce any writing by any county officer or record of the county board to that effect. Max F. Weekley and John Sohn were mentioned by plaintiff as county officers who orally authorized services performed by him for poor persons. Weekley was county assistance director charged with the duty of caring for the relief of paupers, including medical care, and the county attorney admitted in open court: "Weekley's written authorization will bind the county in his classification as assistance director for Dakota county." It was stipulated by the parties that Sohn was a member of the county board while plaintiff performed the services in question. Plaintiff did not prove that the persons for whom he performed services as a physician were within the class of poor persons described in the statute. Both Weekley and Sohn testified as witnesses at the trial in the district court and their testimony is positive to the effect that unauthorized claims in the itemized list of plaintiff equalled the sum of the items disallowed by the district court. The findings of the district court are in harmony with the preponderance of the evidence on the issue of unauthorized claims, are equivalent to the verdict of a jury and are not erroneous as to plaintiff. It follows that the appeal to the supreme court is without merit.

AFFIRMED.

ROYAL HIGHLANDERS, APPELLEE, V. GILMORE R. WISEMAN, APPELLANT: GEORGE M. MULLEN ET AL., CROSS-APPELLANTS.
299 N. W. 459

FILED JULY 11, 1941. No. 30977.

1. **Insurance.** The decision of the department of trade and commerce (insurance) remains in full force until reversed by final judgment of the district court or on appeal from that tribunal.
2. ———. Where a statutory enactment exists for the creation of a corporation or a change in its corporate form, with powers as here assumed, and there has been a *bona fide* attempt by such corporate authorities to comply with the requirements thereof including proper notice to all parties in interest as provided

therein, and where the proceedings of such corporation in accomplishing the proposed transformation have been submitted to the director of insurance, and by him examined, and approved by his order duly entered, and his certificate of approval and incorporation has been duly issued to such applicant, and thereafter it openly and continuously exercises the corporate powers evidenced thereby, and no appeal is prosecuted from the order of approval of the department of insurance, such corporation is thereby constituted at least a corporation *de facto* under its new form of organization and presumptively a corporation *de jure.*

3. ———. The board of directors of what is herein denominated and described as a mutual legal reserve life insurance company is its governing body, and lawfully vested with the management of its ordinary corporate affairs, possessing within the limits of its authority full discretionary powers, and which, in the honest, lawful and reasonable exercise thereof, are not subject to control by stockholders, or by courts at the instance of stockholders.

4. **Corporations.** The accepted principle is that the wisdom and expediency of corporate business policies and the methods of executing them are left to the discretion and decision of the board of directors. In the absence of usurpation, or fraud, or gross negligence, or transgression of statutory limitations, courts of equity will not interfere at the suit of dissatisfied stockholders merely to overrule the discretion of directors on questions of corporate management, policy or business.

5. **Insurance.** Under the facts in this record, such corporation's legal existence as a mutual legal reserve life insurance company is not subject to collateral attack by private individuals or by the state; nor can it be questioned on direct attack by private individuals, but only by the state.

6. ———. By the mutualization of the Royal Highlanders, a former fraternal organization, accomplished in the instant proceeding, the identity of the company was not changed. A new corporation is not created. The old corporation continued with new powers. The title to the assets continues in the same company and it is not relieved from its liabilities. The obligations of its contracts remain unimpaired.

7. ———. All insurance contracts issued prior to May 4, 1937, were continued in full force and were evidenced by the application for membership, the certificate of insurance, the edicts or by-laws of the society, and the fraternal laws under which such policies were issued.

8. ———. The right of policyholders to participate in the distribution of surplus of this insurance company depends entirely

upon the existing contract between the policyholder and the company. The rights of the members of the Royal Highlanders whose membership and policies antedated May 4, 1937, are unchanged.

9. ———. The powers and duties of the insurance commissioner or superintendent are limited to those defined by statute.

10. ———. Where the board of directors is vested with the power, either generally or by specific provision, to determine the time, amount or method of distribution of surplus to the policyholders entitled thereto, the court will not ordinarily interfere, in absence of showing of fraud, or bad faith, or a clear transgression of a legislative mandate.

11. ———. Upon due consideration of the evidence in the record, we find that in limiting the distribution of surplus funds to $810,724.97 the board of directors has violated no provisions of statutes applicable to that subject, has not exceeded its statutory powers, is in all respects carrying out its contracts in good faith, and is not transacting business fraudulently. We further find that the action taken by such board of directors, both as to amount and method of distribution, is reasonable and in all respects justified by the facts disclosed and established by the evidence, as clearly within their legitimate discretion.

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

Harry Grimminger and *Beghtol, Foe & Rankin,* for appellant.

Flansburg & Flansburg, for appellee.

Jackson B. Chase, Loren H. Laughlin, John C. Mullen, William H. Thomas and *Wilber S. Aten,* for cross-appellants.

Heard before SIMMONS, C. J., ROSE, EBERLY, CARTER and MESSMORE, JJ., and MEYER and ELLIS, District Judges.

EBERLY, J.

In this proceeding Gilmore R. Wiseman is appellant, George M. Mullen, C. E. Walsh, Estelle Guye and Rena Hyatt appear as cross-appellants, and the Royal Highlanders is appellee. The appellant and cross-appellants seek a review of the judgment entered in the district court for Lancaster county in favor of the appellee herein, and against

the appellant and cross-appellants, wherein that court "finds generally in favor of the Royal Highlanders, * * * upon each and all of the issues presented by the pleadings in this case;" approves the determination of the board of directors of the Royal Highlanders that there was $810,-724.97 properly available for distribution to the policyholders thereof, and approves the terms, manner and form of the distribution of that sum made by such board. This judgment also determined that the order of the department of insurance directing that such board of directors make an additional distribution to such policyholders of the sum of $514,885.90 over and above the sum of said $810,724.97 was improvidently made and entered, and the same was set aside and reversed. The correctness of this determination is presented by this appeal.

We do not overlook, in this connection, the attack upon the legality of the present corporate organization of the Royal Highlanders as being wholly unauthorized by the statute (now Comp. St. Supp. 1939, sec. 44-415) from which its corporate powers in its present corporate form are derived. However, all parties to this litigation are in apparent agreement that immediately prior to the present change of this corporate entity it had been duly organized and incorporated as a fraternal insurance company and for many years had been successfully carrying on business as such. But a situation had been developed in the affairs of this organization which clearly indicated the wisdom of changing the Royal Highlanders, a fraternal society, into a mutual legal reserve life insurance company. Proposed amended articles of incorporation to accomplish that purpose were accordingly adopted by a two-thirds vote of the board of directors. The form of the communication by which the proposed change was to be submitted to the membership was approved, and also the form of the proxy by and through which the membership would accept or reject such proposition was duly approved by such board of directors. Thereafter on March 10, 1937, an application for change of charter was filed with the department of insurance. This applica-

tion set forth the amended articles, the proposed communication to the policyholders calling the special meeting and the form of proxy whereby the policyholders were each given the right to express his approval or disapproval of the proposed change; and there was also made a part thereof a financial statement which disclosed that the total admitted assets of the Royal Highlanders just before March 1, 1937, was $4,611,579.82, and that the total surplus of the company at that time, that is, assets over liabilities, was in the amount of $2,177,645.87, and that the society was 189.47 per cent. solvent. On March 10, 1937, the department of insurance entered an order approving all steps taken "under and by virtue of the provisions of the statutes, section 44-415," and also directed that the Royal Highlanders call a meeting of its policyholders to be held at 10 o'clock a. m. on April 24, 1937, at its home office at 1321 Sharp Building, Lincoln, Nebraska, for the purpose of voting upon the proposition to adopt the amended articles and to change the Royal Highlanders into a mutual legal reserve life insurance company, in the manner, upon notice, as directed by the terms of the aforesaid order. As a part of the aforesaid order the following was included: "The department of insurance further directs that there shall be no distribution of any of the assets of the company, but that all present funds shall be maintained and devoted to the same purposes as heretofore existed in such company." This order further directed that the results of such election be reported to the department on April 24, 1937. It appears that a paper document including all the matters approved by the department, and including a complete copy of its order of March 10, 1937, was immediately mailed to each policyholder as directed. The election was held. The total membership of the Order at that time was 8,017. Five thousand five hundred and forty-three (5,543) votes were duly cast in favor of the mutualization plan, and 107 votes were cast against it. A two-thirds vote was the legal requirement to carry and adopt the proposition submitted; 98.1 per cent. of those voting were in favor of the proposed plan. This vote was re-

ported to the department, and its final order approving the mutualization and permitting the filing of the amended articles of incorporation was entered by the department on May 4, 1937. The Royal Highlanders immediately filed and published its amended articles as a mutual legal reserve life insurance company, made its deposit of the required amount of $125,000 to the insurance department, and was issued a certificate to do business as such company, which certificate has been regularly renewed from year to year. The Royal Highlanders immediately dissolved its 197 lodges scattered through 15 states, and the assets and properties of such lodges were sold and the proceeds divided among the members of such lodges. From the date of the entry of the final order of May 4, 1937, the Royal Highlanders became, and thereafter continued to be, a mutual legal reserve life insurance company; for no appeal to the district court was taken therefrom within 20 days from the date of this order as limited by law, and the controlling statutory provision is, "The decision of the department of trade and commerce (insurance) shall remain in full force until reversed by final judgment of the (district) court." Comp. St. 1929, sec. 44-1116. See, also, *Leininger v. North American Nat. Life Ins. Co.*, 115 Neb. 801, 215 N. W. 167.

Notwithstanding the failure to appeal from this order, appellant and certain cross-appellants insist on lack of legal organization of the appellee as a mutual legal reserve life insurance company, seek to deny it the full exercise of corporate powers which, if lawfully organized, it would possess, and insist on claimed rights against it based on that contention.

That section 44-415, Comp. St. 1929, as amended, provides for the creation of a corporation with the powers here assumed must be admitted. That there was a *bona fide* attempt by the corporate authorities under such law with a colorable compliance with its requirements cannot be gainsaid. It also appears that the proceedings of the Royal Highlanders in accomplishing the proposed transformation has been submitted to the director of insurance, examined by

him, and in all respects approved, and a proper certificate of incorporation as a mutual legal reserve life insurance company has by him been duly issued to the appellee, and since the issuance of said certificate it has openly and continuously exercised the corporate powers evidenced thereby. In view of the situation thus created, it appears that the regularity and lawfulness of appellee's corporate organization affords no ground for challenge or basis of relief against it in this proceeding. *Parks v. James J. Parks Co.*, 128 Neb. 600, 259 N. W. 509.

The general rule appears to be that a court or officer may revoke or qualify a certificate, license or charter (of incorporation) after issuing or granting the same only to the extent and under the conditions that he is authorized by statute. The director of insurance, under the facts in this record, is not empowered by statute to revoke the certificate of incorporation, neither has he attempted so to do. It remains, therefore, in full force and effect, and has been annually renewed.

Then too, this corporation's legal existence as a mutual legal reserve life insurance company is not subject to collateral attack by private individuals or by the state; nor can it be questioned on direct attack by private individuals, but only by the state. 18 C. J. S. 489, sec. 94. See, also, *Interstate Airlines, Inc., v. Arnold,* 127 Neb. 665, 256 N. W. 513; *Thies v. Weible,* 126 Neb. 720, 254 N. W. 420.

It thus appears that the sole question rightfully presented for the determination of this court is the right of appellants to insist on the further distribution of the additional sum of $514,885.90 by the Royal Highlanders as a duly and legally organized mutual legal reserve life insurance company, a going concern, in view of the rights and contracts of its membership created by the policies issued by the Royal Highlanders as a fraternal insurance society prior to its assuming its present status.

It will be noted that by this mutualization the identity of the company was not changed. A new corporation is not created. The old corporation continued with new powers.

The title to the assets continues in the same company and it is not relieved of its liabilities. The obligations of its contracts are and must remain unimpaired.

Section 44-415, Comp. St. Supp. 1939, provides: "Such change shall in no way prejudice or impair any pending action or right previously acquired, or annul or change any existing contract of such company."

See *Jones v. Loaleen Mutual Benefit Ass'n*, 255 Ill. App. 170, affirmed in 337 Ill. 431, 169 N. E. 254; *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657, 24 S. Ct. 549; *Polk v. Mutual Reserve Fund Life Ass'n*, 207 U. S. 310, 28 S. Ct. 65.

All insurance contracts of the Royal Highlanders issued prior to May 4, 1937, were continued in full force, and were evidenced by the application for membership, the certificate of insurance, the edicts or by-laws of the society, and the fraternal laws under which such policies were issued. Comp. St. Supp. 1939, sec. 44-1239; *Pope v. Royal Highlanders*, 101 Neb. 774, 164 N. W. 1047; *Sharpe v. Grand Lodge, A. O. U. W.*, 108 Neb. 193, 201, 188 N. W. 100, 189 N. W. 176; 45 C. J. 24-30.

Fraternal certificates issued by the Royal Highlanders prior to May 4, 1937, still continue to be the same kind of contracts as before transformation and are evidenced and established by the same proof as was required prior to mutualization. *Yeoman Mutual Life Ins. Co. v. Murphy*, 223 Ia. 1315, 275 N. W. 127; *United Mutual Life Ins. Co. v. State*, 194 Ark. 371, 108 S. W. (2d) 484; Comp. St. Supp. 1939, sec. 44-415.

There were three classes of policyholders in this company before and at the mutualization, which are designated in the record as the participating Ideal Reserve policyholders, the nonparticipating Ideal Reserve policyholders, and the members holding fidelity certificates. Each of these policyholders had individual rights determined by his contract, but as a mutual member in the company he also had beneficial rights common with all the rest in contingent funds and general funds held for the benefit of the whole mem-

bership. But the nonparticipating policyholders were by the terms of their policies excluded from participation in the distributable surplus. Among the provisions of the by-laws relating to the "participating policies" are the following:

"The member named herein shall participate in any surplus accumulating in the Ideal Reserve Fund after two full years of membership. The *portion* of such surplus to which said member shall be entitled, and the *time* and *manner* of payment shall be determined by the Executive Committee in accordance with the Edicts of the Society."

Further, "Members holding Ideal Reserve Policies will be admitted from time to time to participate in the surplus. Such participation in the surplus shall be in accordance with the scale approved by the Executive Committee, which committee *shall have power to determine the amount and its prescribed methods of distribution.* The part of surplus which *may* be applied for apportionment shall consist of such amount of funds accumulated *from the monthly payments of such members* as may be left after the mean reserve and other liabilities are determined and any contingent reserve set aside."

Thus, by the terms of the by-laws, and of the contracts of insurance of which they constituted a part, the distribution to each member holding participating Ideal Reserve policies was limited to the accumulations on his own payments and reserves. The moneys on reserves accumulated from payments of Ideal Reserve policies which lapsed before the third year, the by-laws provided, were to be transferred to the general fund for general expense purposes. These by-laws also contained provisions for the creation and maintenance of certain other funds for the benefit of the membership without regard to the class to which they might belong. All of these provisions constituted essential elements of their membership contracts and the proper performance thereof was necessary to the proper observance of the obligations due to the membership.

Section 44-415, Comp. St. Supp. 1939, provides that in its

order of approval of the application of a fraternal society to change to a mutual legal reserve life insurance company the department of trade and commerce (insurance) shall also make such order with reference to the distribution of any existing or future surplus of such company as may be just and equitable. This language definable as concerning or pertaining to the disposition of existing or future surplus does not necessarily require or imply the making of an order of distribution. An order determining no distribution necessary on the change of form of corporate organization is equally an order in reference to "distribution." The terms of such an order are necessarily determined by the circumstances of the particular case.

Such section 44-415 further provides that there shall also be inclosed with such notice (of submission of proposed change) served on each member of the corporation, a copy of the approval of the department of insurance of the proceedings had, and also its order as to proposed disposition or distribution of the surplus assets of such company.

This determination as to the surplus was made by the department of insurance only as a prescribed condition to be accepted and performed by the corporation affected in accomplishing a valid change of "its articles of incorporation and methods of doing business" under the terms of the section referred to. As a prescribed condition to a transition it had no force and effect until and unless accepted by an affirmative vote of the persons in interest.

These questions at issue involved in the proposed change of form in the corporate organization are to be determined on the basis that the transition from the strictly fraternal form of this organization to the mutual legal reserve life insurance form was fully and effectively completed with the order of the department of insurance of May 4, 1937. The questions here presented do not rise out of or adhere to the making of that change. After that date, in its new capacity, this corporation was and is a going concern. Its several corporate officers are lawfully in charge of their several offices and engaged in the conduct of its business affairs.

It is in court now as an admittedly solvent company, well and conservatively managed. There is no evidence in the record to sustain any charge of fraudulent action, bad motives, or misconduct in the business transacted by its properly chosen officials. Its board of directors is its governing body, and lawfully vested with the management of its ordinary corporate affairs. Within the limits of their authority directors possess full discretionary powers, and in the honest and reasonable exercise of such powers are not subject to control by stockholders or by courts at the instance of stockholders. The accepted principle is that the wisdom and expediency of business policies and the methods of executing them are left to the discretion and decision of the board of directors. The established rule is that, in the absence of usurpation, or fraud, or of gross negligence, or transgression of statutory limitations, courts of equity will not interfere at the suit of dissatisfied stockholders merely to overrule and control the discretion of directors on questions of corporate management, policy or business. It would seem that this, as a general principle, would be equally applicable to the department of insurance.

The statutory provisions applicable were strictly complied with, and to each member of the Royal Highlanders the terms of this order as to continuance of "funds" and disposition of surplus formed the basis of his affirmative vote accepting the proposed change of form in corporate organization. In reliance on this condition, so approved by the department of insurance, the change in corporate form was actually effected by the Royal Highlanders. The membership of this organization has never approved any change in this condition.

Nevertheless, the department of insurance, on May 6, 1938, entered its order for final disposition of surplus, directing distribution to policyholders of the sum of $1,325,610.87. This order was properly subject to review by the district court. Comp. St. 1929, sec. 44-1116.

The controlling principle in determining the rightfulness and legality of this action by the department is that here

the right of policyholders to participate in the distribution of surplus in the insurance company depends entirely upon the existing contract between the policyholder and the company. In this case the respective beneficial rights of the members of the Royal Highlanders whose membership antedated May 4, 1937, are unchanged. Article VII of the amended articles of incorporation, as duly approved and adopted, relating to existing contracts, policies and funds, recites:

"All contracts and policies of insurance now in force and outstanding shall remain in force and be binding to all intents and purposes and to the same extent as is now provided by such contracts, and the Edicts of the Royal Highlanders in relation thereto and all funds of the society shall be maintained and devoted to the same purposes as now provided, and the Edicts governing such contracts and policies shall remain in force as the By-Laws pertaining to such matters until duly amended by the Board of Directors; and the Board of Directors shall have the same power to make reasonable amendments in the By-Laws as has existed in the Executive Castle."

The powers and duties of the board of directors of the Royal Highlanders with regard to divisible surplus, and the rights of the fraternal policyholders to an apportionment or payment, are all specifically provided for in the edicts, policies and fraternal statutes, as well as in the amended articles referred to. These powers result from contracts as agreed to and legislative enactments and by-laws which limit and control the rights of participation here involved. It appears that subsequent to mutualization the officers of the company proceeded to determine the question as to whether the society's surplus on May 4, 1937, was sufficient to make a distribution to policyholders in addition to regular dividends. To this end a competent actuary, with a staff of assistants, was employed, who made a careful and thorough examination. The board of directors, upon due consideration of his report, the surrounding circumstances, the business situation then existing, and not forgetting in these

troublesome times that ample reserves and contingency reserves must be set aside to fully guarantee the present existing obligation to the policyholders and their contract rights, in the proper exercise of their discretion, and in good faith, determined that there was $810,724.97 surplus available for distribution to policyholders in accordance with the terms of all policies then in force. The clear preponderance of evidence in the record fully justifies this action so taken. The actual situation at present is that the department of insurance believes that there should be $514,885.90 distribution made over and above the $810,724.97 distribution as made by the board of directors of the Royal Highlanders. Also, it entered an express order so directing on May 6, 1938. This was not an order of distribution provided for in such section 44-415; for the requirements of that section and the directions of the department of insurance thereunder had been fully complied with by the Royal Highlanders who, long prior to the date of the order of distribution last referred to, had been a mutual legal reserve life insurance company duly organized and doing business as such. It follows, therefore, that this order of the department of insurance is not sustainable under section 44-415, as amended.

True, the insurance department has general powers conferred upon it by the statutes of its organization. The right of investigation and review is conferred upon it, and if it ascertains that the insurance company investigated "has failed to comply with any provisions of this act (Comp. St. 1929, ch. 44, as amended) or is exceeding its powers, or is not carrying out its contracts in good faith, or is transacting business fraudulently," corrective measures are authorized. As to the proper exercise of their powers and the proper performance of the duties enjoined thereby, this court has adopted the general principle that the powers and duties of the insurance commissioner or superintendent are limited to those defined by statute. *Grand Lodge, A. O. U. W., v. Insurance Board,* 103 Neb. 99, 170 N. W. 617. However, in determining the validity of the departmental action, due

consideration must be given in this connection to the principle that, where the board of directors is vested with the power, either generally or by specific provision, to determine the time, amount, and method of distributing surplus, the courts will not ordinarily interfere, in the absence of a showing of fraud or bad faith, or a clear transgression of a legislative mandate. See *Greeff v. Equitable Life Assurance Society*, 160 N. Y. 19, 54 N. E. 712; *Bain v. Aetna Life Ins. Co.*, 21 Ont. Rep. 233; *Gadd v. Equitable Life Assurance Society*, 97 Fed. 834; *Wright v. Minnesota Mutual Life Ins. Co.*, 193 U. S. 657, 24 S. Ct. 549; *Midland Savings & Loan Co. v. Dunmire*, 68 Fed. (2d) 249; *City Bank Farmers Trust Co. v. Hewitt Realty Co.*, 257 N. Y. 62, 177 N. E. 309; *Gesell v. Tomahawk Land Co.*, 184 Wis. 537, 200 N. W. 550; *McNab v. McNab & Harlin Mfg. Co.*, 62 Hun, 18, 16 N. Y. Supp. 448; *Flynn v. Brooklyn C. R. Co.*, 158 N. Y. 493, 53 N. E. 520; *Hopkins v. Union Canvas Goods Co.*, 104 Pa. Super. 264, 158 Atl. 301; *NY PA NJ Utilities Co. v. Public Service Commission*, 23 Fed. Supp. 313; *Jones v. Van Heusen Charles Co.*, 230 App. Div. 694, 246 N. Y. Supp. 204; *Morehead Mfg. Co. v. Washtenaw Circuit Judge*, 254 *Mich.* 697, 236 N. W. 911; *Black v. Pacific Mutual Life Ins. Co.*, 31 Fed. Supp. 805; *Barrows v. J. N. Fauver Co., Inc.*, 280 Mich. 553, 274 N. W. 325; *Shonnard v. Elevator Supplies Co., Inc.*, 111 N. J. Eq. 94, 161 Atl. 684.

It would seem that principles which determine the action of our judicial department would be equally potent as requirements to be observed by administrative officials.

Then too, it appears from the record that the determination of the amount of distributable surplus in the instant case was made by the department of insurance on the basis of "book values" of the company's assets directed to be distributed. It is to be remembered that, where a divisible surplus is determined and ordered distributed, it, like a dividend, becomes a liability which eventually must be paid. In order to determine what distribution to policyholders should be made, it is incorrect to include ought but actual value of assets. It follows that actual value of assets alone

may be considered. *Cannon v. Wiscassett Mills Co.*, 195 N. Car. 119, 141 S. E. 344. Indeed, a careful consideration of the evidence in the record as an entirety wholly fails to sustain the reasonableness of the "amount of distributable surplus" as fixed by the department of insurance, but clearly establishes that the same is excessive and violated the duties enjoined on the company by the terms of its policies outstanding. Even certain cross-appellants in their brief admit that this distribution (made by the board of directors and approved by the trial court) "is the amount the policyholders believe is proper to be distributed at this time." And again, "By recognizing present conditions, the policyholders agree that it is very necessary to withhold a much larger surplus than that permitted by the department in order to protect against the dangers threatening this heavily unbalanced portfolio." It is obvious that the power and duty to make this determination as to the amount and method of the distributable surplus are vested primarily in the board of directors. It is implied in the statutes of such board's creation. No legislation purports to deny or limit the due exercise of this power by this corporate agency; neither under the circumstances here existing can it be said to be conferred upon the department of insurance. The express terms of the contracts here involved manifest a clear purpose that they shall be carried out and performed by the parties thereto. So the board of directors are the express recipients of this responsibility, not the courts, and not the department of insurance. While judicial review by court or administrative agency is of course conceded, when these duties so imposed on the board of directors are lawfully and properly performed, and the reasonableness of the action taken is supported by the proof adduced, their reasonable discretion will not be interfered with, and their determination of the questions involved is controlling and will be sustained, as to both amount and method of distribution.

Section 44-1116, Comp. St. 1929, provides for an appeal from a decision by the department of insurance to the district court, and this case is now presented to us to review

the determination of the district court made in an appeal brought to it pursuant to this statute. So considered, as an appeal in equity for consideration *de novo,* from all the evidence, we find that in limiting the distribution of surplus funds to $810,724.97 the board of directors has violated no provisions of statute (Comp. St. 1929, ch. 44, art. 12), has not exceeded its statutory powers, is in all respects carrying out its contracts in good faith, and is not transacting business fraudulently. Furthermore, we find that the action taken by such board of directors, both as to amount and method of distribution, is reasonable and in all respects justified by the facts disclosed and established by the evidence, as clearly within their legitimate discretion.

It follows that the judgment of the district court sustaining the action of the board of directors of the Royal Highlanders, and reversing the order of the department of insurance, is in all respects correct, and it is

AFFIRMED.

CHARLES G. MAY, APPELLANT, V. AMERICAN RED CROSS ET AL., APPELLEES.

299 N. W. 272

FILED JULY 11, 1941. No. 31109.

Conversion. "As a general rule, where a testator directs the sale of a specific tract of land for the purpose of paying certain bequests from the proceeds, a court of equity will consider that the conversion of the land into personalty has taken place. The fact that the time of the sale is postponed for a definite term is not material, and the conversion will be held to have been made at the time of the testator's death." *Coyne v. Davis,* 98 Neb. 763, 154 N. W. 547.

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

Neil France and *Lyman M. Stuckey,* for appellant.

Cook & Cook, contra.

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

EBERLY, J.

This is an action to quiet title to 480 acres of land in Dawson county, Nebraska. Joseph E. May, who died testate on September 25, 1938, a resident of Dawson county, was the owner of this land at the time of his death. The action is prosecuted by Charles G. May, plaintiff and appellant, who was the brother, and is the sole and only heir at law, of the deceased. In his last will, which has been duly admitted to probate and his estate settled as therein directed, Joseph E. May, now deceased, after providing for his funeral expenses, the costs of administering his estate, and payment of his just debts, incorporated as the second provision of his last will the following:

"Second: Subject only to the provisions of the first paragraph hereof, I give, devise and bequeath all of the remainder of my property, whether real, personal or mixed, and wheresoever situated, including after acquired property, to Edward A. Cook, Jr., Trustee, of Lexington, Nebraska, in trust for the uses and purposes hereinafter set forth; namely, to be held, managed and invested, and from time to time reinvested by said trustee and his successors in trust, and the income from said trust estate, less the expense of administering said trust and the compensation of said trustee, to be paid annually to my beloved brother, Charles G. May, during his natural life, and without being subject in any manner to any order, intervention or control of any other person or of any creditor of my said brother; and upon the death of my said brother, the principal sum remaining in the hands of said trustee, or his successor in trust, is to be paid to the American Red Cross, less any expense or compensation then due to said trustee.

"I hereby authorize and empower said trustee, or his successors in trust, to sell and dispose of any property, either real or personal, disposed of by this my said will, and to make good and valid instruments transferring the title to

the same, and no purchaser shall be bound to see to the application of the purchase money or consideration paid therefor; and said trustee is authorized to change investments from time to time as he deems advisable. In the event of the death or resignation of Edward A. Cook, Jr., Trustee above named, then and in that event, I hereby appoint W. M. Cook, of Lexington, Nebraska, as his successor in trust; and in the event of the death or resignation of both said trustee and said successor in trust, I hereby authorize and empower the County Judge of Dawson county, Nebraska, to appoint a successor who shall have the same rights, powers and duties as the trustee appointed by the terms of this instrument."

It is the theory of the plaintiff in this action that the foregoing provision of the last will of Joseph E. May, deceased, is not effective as a legal devise of real estate except to the trustee for the life estate of Charles G. May; that this instrument is ineffective as an equitable conversion of the real estate of the deceased, does not create a charity; that the American Red Cross, a corporation, not incorporated under the laws of the state of Nebraska, being disqualified and prohibited from acquiring title to or holding any land, or real estate, etc., in this state, by virtue of section 76-502, Comp. St. 1929, the real estate in suit, being not lawfully devised, descends under the laws of inheritance to plaintiff as decedent's sole heir.

To plaintiff's petition setting forth his contentions, general demurrers were interposed by the American Red Cross, a corporation, and by Edward A. Cook, Jr., executor of the estate of Joseph E. May, deceased, and also as trustee for the life estate of Charles G. May. These the trial court sustained, and plaintiff electing to stand on his petition, the district court entered its order of dismissal, from which plaintiff now prosecutes this appeal.

Appellant's contentions now made may be summarized as follows: "It is not disputed that the American Red Cross cannot hold or take title to real estate being prohibited therefrom by section 76-502, Comp. St. 1929. Therefore the ques-

tion presented here is whether or not by the terms of the Last Will and Testament of Joseph E. May, deceased, there is created an equitable conversion of real estate into personal which may pass to the American Red Cross."

In view of the inherent nature of the American Red Cross, we are not inclined to accept plaintiff's contention that it is within the prohibition prescribed by section 76-502, Comp. St. 1929. However, a decision of that question is not necessary to the determination of this case, and it will not be decided.

As determinative of a question similar to that here presented, this court has approved the following language: "The rule is that where there is a positive direction in a will to convert the real property into personalty, or where there is a power of sale in a will and bequests of such a character as to plainly indicate a testamentary intent that such power shall be executed to provide the means of satisfying them, or where the provisions of a will cannot be carried out without converting the realty into personalty, and the conditions are such that the testator must have contemplated that such conversion would take place to that end, courts of equity deal with the estate as personal property from the time the will takes effect—from the death of the testator." *Stalder v. Stalder,* 105 Neb. 367, 180 N. W. 566. See, also, *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345; *In re Estate of Willits,* 88 Neb. 805, 130 N. W. 757.

In *Coyne v. Davis,* 98 Neb. 763, 154 N. W. 547, the rule was announced in the following terms: "As a general rule, where a testator directs the sale of a specific tract of land for the purpose of paying certain bequests from the proceeds, a court of equity will consider that the conversion of the land into personalty has taken place. The fact that the time of the sale is postponed for a definite term is not material, and the conversion will be held to have been made at the time of the testator's death." See, also, *In re Estate of Kulp,* 122 Neb. 157, 239 N. W. 636; *In re Estate of Secrest,* 109 Neb. 431, 191 N. W. 663.

By the terms of this will the real estate is devised to the trustee with explicit direction that it be sold and the pro-

ceeds distributed. Ordinarily such direction alone operates as an equitable conversion of realty into personalty. Here we have no distribution of this estate contemplated by the testator, except in form, such as (we quote from the will) "to be paid annually to my beloved brother, Charles G. May, during his natural life," etc., and again, "the principal sum * * * is to be paid to the American Red Cross."

Apropos of the use of language similar to that just quoted, Barnes, C., in *Chick v. Ives*, 2 Neb. (Unof.) 879, 90 N. W. 751, makes the following observations: "The provision that the portion of the testator's estate bequeathed to his children was to be invested in unincumbered real estate securities, and at the time designated in the will the share of each of them should be paid over to him or her, makes it impossible to carry out the terms of the will, unless the real estate be converted into money. Personal property, money, can be paid over, but no such term can be applied to the conveyance of real estate. It cannot be paid over. That it was the intention of the testator that the estate should be converted into money, and that the respective shares of the children were to be paid to them as such, is thus put beyond question." See *Delafield v. Barlow*, 107 N. Y. 535, 14 N. E. 498; *Cherry v. Greene*, 115 Ill. 591, 4 N. E. 257; *Dodge v. Williams*, 46 Wis. 70, 50 N. W. 1103.

The instant case is thus clearly within the rule that, where a will contains a power of sale even though not mandatory in terms, but it is apparent from the general scope and terms of the will that the testator intended all his realty to be sold, the power of sale will be deemed imperative, and the doctrine of equitable conversion will be applied. 18 C. J. S. 55, sec. 16; 18 C. J. S. 58, sec. 17; 6 R. C. L. 1073, sec. 8; *Chick v. Ives*, 2 Neb. (Unof.) 879, 90 N. W. 751; *Stalder v. Stalder*, 105 Neb. 367, 180 N. W. 566; *In re Estate of Willits*, 88 Neb. 805, 130 N. W. 757; *Coyne v. Davis*, 98 Neb. 763, 154 N. W. 547.

It follows that the district court properly construed the provision of the will quoted herein, and dismissed plaintiff's action. Its judgment is correct, and is

AFFIRMED.

CHANCE WILBUR, APPELLANT, V. ADAMS LUMBER COMPANY, APPELLEE.

299 N. W. 268

FILED JULY 11, 1941. No. 31213.

1. **Workmen's Compensation.** In a compensation case, it is *held* that, when one employs an uninsured contractor, he becomes, by virtue of section 48-116, Comp. St. 1929, a statutory contractor, and is entitled to the protection of every statutory provision as to what acts are covered and what are not.
2. ———. In such a case, the defendant can only be held liable if the accident occurs while the plaintiff is actually rendering service to it at the time of the accident.
3. ———. Where plaintiff was employed with his team in unloading lumber from a car, for which defendant lumber company was to pay 50 cents per thousand feet, and after the work for the day was done, and plaintiff was going home on a public highway and was struck and injured by an automobile, plaintiff was not entitled to compensation, as the injury did not arise in the course of the employment.

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

Beatty, Maupin, Murphy & Davis, for appellant.

Shuman & Overcash, contra.

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

PAINE, J.

This is a workmen's compensation case. It was tried before Judge Welch, of the Nebraska workmen's compensation court, at North Platte, and the claim was denied and the petition dismissed. Upon appeal to the district court for Perkins county, it was tried at length, and after argument to the court a judgment was entered that the evidence is insufficient to establish that the accident arose out of or in the course of any employment of plaintiff, and plaintiff's petition was dismissed, from which judgment the plaintiff appealed.

The facts may be briefly stated as follows: Chance Wilbur lived at Grainton, Perkins county, and owned a team of horses and two wagons, and did hauling of various kinds. The Adams Lumber Company, defendant, has several lumber yards, one of which is located at Grainton. It employed as its regular drayman Pat Gartrell, who used a small pick-up truck in doing its work, but it was not large enough to handle this job. Gartrell was employed to unload this car of lumber at 50 cents per thousand feet, and he employed Wilbur to haul the lumber from the freight car to the lumber-yard, for which he agreed to pay Wilbur the going wages, i. e., whatever was right. Gartrell told Wilbur to be ready to start unloading the car on Monday morning.

Wilbur lived in town, but kept his team and wagons about half a mile north of town at the barn of his brother-in-law. He reported to Gartrell with his team and the running-gears of his two wagons. The plan followed in this work was about as follows: Gartrell pushed the lumber out of the car, and Wilbur loaded it on one of the running-gears of his two wagons, and would then drive the running-gears loaded with lumber to the yard of the Adams Lumber Company, where employees of the lumber company would unload the running-gears, during which time Gartrell and Wilbur would be loading the other set of running-gears at the car. In hauling lumber from the track, Wilbur used a public road for a short distance which was the same road as led to the barn where he kept his horses.

Proceeding in this manner, they worked until it was growing dusk in the evening, and after they had hauled their last load and quit work for the night, the plaintiff went out on the highway with his team, and talked for a moment to a man he met there about getting a job of shucking corn, and then proceeded in another direction, and when he reached an intersection of two highways an automobile driven by a farmer named Baker crashed into him, hurling Wilbur through the air, and resulting in injuries of a compound fracture of the right femur, a fracture of the left tibia, a brain concussion or fracture, five teeth were knocked

out, an ear partly torn off, and numerous other cuts and abrasions. As a result of these injuries, he remained in a hospital at North Platte for six months, then spent several months in a wheel-chair, is unable to do any manual labor, suffers constant pain, and has been crippled ever since the accident.

This accident happened within about a block of the lumber-yard, and was on a direct route from the lumber-yard to where he kept his team in the barn north of town, but was different from that used in unloading lumber. He had not completed his employment, but was to return the next day with the same team and complete the job.

It appears that Pat Gartrell had no compensation insurance, and the lumber company did carry such insurance.

The question to be decided is, did this unfortunate accident arise out of plaintiff's employment with the Adams Lumber Company? It is argued by the plaintiff that, when a man is employed with his own team and wagon, and while he is on his way to his barn to put away his team, if he is injured, the accident arises out of his employment, and this is particularly true because the compensation law specifically provides that it must be given a liberal construction.

Plaintiff argues at length that this case is on all fours with the case of *Speas v. Boone County*, 119 Neb. 58, 227 N. W. 87. An examination of this case shows that it was tried by Judges Lightner and Spear in the district court, and the opinion in this court was written by Chief Justice Goss in 1929, and after two arguments in the supreme court the award of compensation was affirmed as arising out of the course of his employment, and, in addition, attorney's fees were allowed in both courts. Speas was employed by Boone county to use his teams in dragging the highway. At 11:30 in the morning he ceased dragging because he was then directly in front of his own home, and drove the four horses into his own barn, and in going past one of them to tie it the horse kicked him, causing severe injury. This accident was reported at once to the county foreman under whom he worked. He had not completed his work, but would continue

it in the afternoon. He was paid for the use of the team, and it was his duty to feed them at noon to be ready for the afternoon's work. This court rejected the argument that his employment ceased when the horses had reached their stalls, and also that his employment ceased during the noon hour. These claims were rejected because the compensation law is to be liberally construed in favor of the workman.

Other cases cited by the appellant as being closely in point are: *Perry v. Johnson Fruit Co.*, 123 Neb. 558, 243 N. W. 655; *Miller v. Reisch Co.*, 132 Neb. 338, 271 N. W. 853; *Struve v. City of Fremont*, 125 Neb. 463, 250 N. W. 663; *Kirkpatrick v. Chocolate Sales Corporation*, 127 Neb. 604, 256 N. W. 89.

The defendant calls our attention to an amendment of the workmen's compensation law, made in 1935, found in section 48-174, Comp. St. Supp. 1939, which provides: "Provided, that a judgment, order, or award of the district court may be modified or set aside only upon the following grounds: * * * (3) That the findings of fact are not conclusively supported by the evidence as disclosed by the record, and if so found, the cause shall be considered *de novo* upon the record."

The defendant argues that, under this provision, if the findings of fact *are* conclusively supported by the evidence, this court need not try the case *de novo*. *Schirmer v. Cedar County Farmers Telephone Co.*, 139 Neb. 182, 296 N. W. 875.

The finding of the district court is to the effect "that the evidence is insufficient to establish that the accident complained of by plaintiff arose out of or in the course of any employment of plaintiff."

The evidence discloses that in a conversation between manager Brittain and Gartrell, with no one else present, the job was given to Gartrell, and at another time and place Gartrell asked plaintiff if he would help him unload the lumber at "going wages." After the accident Gartrell paid plaintiff's family $5 for the day's work.

Plaintiff brought suit against the Adams Lumber Company on the theory that the plaintiff was an employee of

Gartrell, an independent contractor, who carried no liability insurance.

When one employs an uninsured contractor in Nebraska, he becomes, by virtue of section 48-116, Comp. St. 1929, a statutory contractor, and is entitled to the protection of every statutory provision as to what acts are covered and what are not.

The defendant having agreed to pay a flat price of 50 cents per thousand feet for bringing the lumber into its yard, its employees did the rest. Gartrell and Wilbur had quit working for the night on this piece job. Gartrell left the job in one direction, and plaintiff left in another. He engaged in business of his own in trying to get a job shucking corn; then he starts in another direction on a public highway, and the accident occurs.

The defendant argues that plaintiff and Gartrell went into the job on shares, and were to divide what they got, and were partners in a joint adventure. In any event, the defendant lumber company could only be held liable if the accident occurred while plaintiff was actually rendering service to it at the time of the accident.

A recent discussion of this point occurs in *Burlage v. Lefebure Corporation,* 137 Neb. 671, 291 N. W. 100, as follows:

"Liberal construction of the workmen's compensation law to give effect to its purpose is a rule too well settled to admit of controversy, but the statute cannot be liberalized by judicial interpretation to allow noncompensable claims. By a long line of decisions the law on the burden of proof has been held to be as follows:

" 'Burden of proof rests upon plaintiff, in cases arising under workmen's compensation law, to prove with reasonable certainty that the employee met with an injury or death in an accident arising out of and in the course of his employment.' *Porter v. Brinn-Jensen Co.,* 131 Neb. 611, 269 N. W. 96, and cases cited in opinion. Comp. St. 1929, sec. 48-101."

The *Speas* decision is one of those cases described as a "noon-hour" case, in which injuries were sustained during

a temporary cessation of work. *Miller v. Reisch Co., supra; Tragas v. Cudahy Packing Co.,* 110 Neb. 329, 193 N. W. 742; 71 C. J. 738.

"To be compensable under the workmen's compensation law, an injury to an employee must arise out of and in the course of employment." *DePorte v. State Furniture Co.,* 129 Neb. 282, 261 N. W. 419.

In the above opinion, written by Judge Goss, compensation was refused for a noon-hour accident, and the *Speas* case was distinguished by the one who wrote it.

However, this court has held that, when a man has left his work, he cannot ordinarily recover for injuries. *Siedlik v. Swift & Co.,* 122 Neb. 99, 239 N. W. 466; *Sheets v. Glenwood Telephone Co.,* 135 Neb. 56, 280 N. W. 238.

"Where an employee leaves the place where his duties are to be performed or where his service requires his presence to engage in a personal objective, not incidental to his employment, the relation of employer and employee does not exist until he returns to a place where by the terms of his employment he is required to perform service." *McNaught v. Standard Oil Co.,* 128 Neb. 517, 259 N. W. 517. See, also, *Bell v. Denton,* 136 Neb. 23, 284 N. W. 751; *Morey v. City of Battle Creek,* 229 Mich. 650, 202 N. W. 925; *Jarman v. Trucking, Inc.,* 286 Mich. 492, 282 N. W. 218.

In a somewhat similar case, where plaintiff was employed by the county in improving a highway, and furnished his own labor and horses, after his work had ceased, and at some distance therefrom, he was injured while en route home on the public highway. It was held that plaintiff was not entitled to compensation from defendant for such injury, as the injury did not arise "in the course of employment." *Kary v. North Dakota Workmen's Compensation Bureau,* 67 N. Dak. 334, 272 N. W. 340.

Although we have reviewed much of the evidence in this case because of the close questions involved, we have reached the decision that the holding of both the compensation court and of the district court in rejecting the claim was the only conclusion which can be reached in the case.

There is no dispute as to any material fact in the case, and under our decisions we cannot see how the defendant can be legally held for this accident, which occurred after plaintiff had left his employment for the night and was on his way home.

AFFIRMED.

HOWARD E. BROWN ET AL., APPELLANTS, V. ROYAL HIGHLANDERS ET AL., APPELLEES.
299 N. W. 467

FILED JULY 11, 1941. No. 31010.

1. **Pleading.** A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom.
2. ———. A party moving for judgment on the pleadings necessarily admits, for the purpose of the motion, the untruth of his own allegations in so far as they have been controverted.
3. **Insurance.** Under the provisions of section 44-415, Comp. St. Supp. 1939, the department of insurance is authorized to direct the distribution of any existing or future surplus of an insurance company as a condition precedent to approval of a change of its articles of incorporation and methods of doing business. Such order of distribution must be approved by the members of the company in order to become effective.
4. ———. The decision of the department of insurance directing a distribution of surplus under the provisions of section 44-415, Comp. St. Supp. 1939, remains in full force until reversed by a final judgment of the district court or by final judgment on an appeal.
5. ———. In the absence of fraud, gross negligence or transgression of statutory limitations, courts of equity will not interfere at the suit of dissatisfied policyholders with the judgment and discretion of a board of directors on questions of corporate management, policy or business.
6. ———. The right of policyholders to participate in the distribution of surplus depends entirely upon the contract between the policyholder and the company, and where it appears that the board of directors is clothed with power to determine the time, amount and method of distribution of surplus to participat-

ing policyholders, the courts will not interfere, in the absence of fraud, gross negligence or violation of statutory restraints.

7. ———. When accretions to a fund are derived from suspensions and lapsed or surrendered policies, and the contract of the parties provides that such accretions shall be transferred to the general fund to be used for the best interests of the company and the general expenses of operation, the provisions of the contract control and such accretions cannot be treated as the accumulated surplus of any other fund.

8. ———. After the approval of amended articles of incorporation by the board of directors of the company and the department of insurance of the state, and their subsequent adoption by the policyholders of the company, the board of directors alone, in the absence of fraud, gross negligence and a violation of statutory restraints, may, in the exercise of sound judgment and business acumen, direct the distribution of divisible surplus in accordance with the participating provisions of the contract of insurance.

9. **Pleading.** Where the plaintiffs, by moving for a judgment on the pleadings, in effect admit that the divisible surplus allocated by the board of directors for distribution is the result of sound business judgment and is in accord with the wording of the contract after a valid change of its articles had been completed, the motion for a judgment on the pleadings should be overruled.

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

Perry, Van Pelt & Marti and *Lewis E. Laflin,* for appellants.

Flansburg & Flansburg, contra.

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

CARTER, J.

Plaintiffs commenced this suit on behalf of themselves and all others similarly situated as holders of certain life insurance policies, designated as Ideal Reserve policies, to compel the defendant insurance company to distribute an alleged accumulated surplus existing in the Ideal Reserve Fund of the defendant company to the holders of Ideal Reserve participating policies. The Ideal Reserve policies

issued to plaintiffs were participating insurance contracts entitling their holders to participate in any surplus existing in the Ideal Reserve Fund of the company. Plaintiffs allege in their petition that a surplus of between $1,500,000 and $2,000,000 exists in such Ideal Reserve Fund in excess of all reserves, liabilities and obligations, which is available for distribution. Plaintiffs allege that the moneys in the Ideal Reserve Fund are trust funds created and dedicated by the statutes of this state and the articles of incorporation and by-laws of the company for the exclusive purpose of paying valid claims of holders of Ideal Reserve policies, for the maintenance of the legal reserves and for the payment of accumulated dividends on Ideal Reserve policies having participation provisions. Plaintiffs further allege that defendants have failed to cause an annual accounting to be made and the amount of surplus determined, apportioned and distributed to Ideal Reserve policyholders having participating contracts, as required by the edicts, by-laws and contracts of the defendant insurance company, and have arbitrarily accumulated such surplus in violation of their duties as trustees of said funds. A more detailed version of the existing situation will be found in the case of *Royal Highlanders v. Wiseman, ante,* p. 28, 299 N. W. 459, released herewith. Plaintiffs pray for an accounting of the funds, that a determination be made of the amount of distributive surplus, that the reserves released by the termination of policies of Ideal Reserve policyholders be determined to be accretions to the reserves, mortuary or disability funds, that upon said funds exceeding the amounts required by law for said purposes, the excess be ordered distributed to the holders of Ideal Reserve participating policies in accordance with the beneficial interest of such policyholders therein, that defendants be enjoined from using the funds for any other purpose, and that it be determined that the order and judgment entered by the district court for Lancaster county in Royal Highlanders v. Wiseman, Docket 139, No. 66, were made without jurisdiction and are therefore null and void.

The Royal Highlanders and its board of directors, the defendants herein, allege in their answer that the defendant insurance company was organized in 1896 as a fraternal benefit society and continued as such until May 4, 1937, when it was transformed into a mutual legal reserve life insurance company. Defendants allege that prior to May 4, 1937, the company had issued Ideal Reserve policies on the legal reserve basis, some of which policies contained provisions for participation in the surplus accumulating in the Ideal Reserve Fund after two full years of membership. In transforming the fraternal benefit society to a mutual legal reserve life insurance company, the articles of incorporation were amended and approved by the department of insurance of the state of Nebraska. The amended articles provided that the rights of policyholders under their insurance contracts should not be altered and that the funds of the society should be devoted to the same purposes as heretofore and not be diverted therefrom. In addition thereto, the amended articles provided that no distribution of assets should be made and that all present funds should be maintained and devoted to the same purposes as heretofore existed in the company. Defendants allege that reports of these funds, their allocations, designations and amounts were made annually to the director of insurance of the state of Nebraska and the insurance departments of other states where the society was doing business, and in each case approved. The society likewise, through its monthly publication, kept the members advised as to the total assets, liabilities, reserves and funds. The Ideal Reserve Fund was set up for the payment of valid claims, for the maintenance of reserves and for the accumulation of funds to pay dividends on Ideal Reserve participating policies, such participation being limited by the contract to the accumulation in such fund other than from revenues of policyholders who had become suspended, lapsed their policies or surrendered the same. The funds accumulating from lapsed or surrendered policies were required to be transferred to the general fund to be used for the best interest, growth and welfare of the society

and the general expenses of operation. The portion of the surplus to which a member was entitled, and the time and manner of payment, were to be determined by the executive committee in accordance with the edicts of the society. The approval of the amended articles of incorporation by the department of insurance was not appealed from and became final. The defendants further allege that in May, 1937, the director of insurance instituted an examination and audit of the funds of the company for the purpose of determining if a distribution of divisible surplus of the funds of the company should be made. This examination and audit was completed as of May 4, 1937. It was contended by the director of insurance that this action was a continuation of the mutualization proceeding. The defendants urged that the department had no authority to order a distribution of surplus and that the authority to so do was vested by the contracts, edicts and laws in the board of directors of the company. On February 14, 1938, the board of directors, after setting aside proper reserves and other funds as required by the edicts and by-laws of the company, determined the amount of divisible surplus that could safely be distributed to be the sum of $810,724.97, which was actually distributed among the Ideal Reserve participating policyholders by the issuance and delivery of cash annuity certificates to them. This distribution was also approved by the policyholders of the company at the annual meeting on February 14, 1938, and the same reported to the department of insurance immediately thereafter. Defendants plead that, in the judgment of the board of directors, any distribution in excess of that made by the company, even though permissible under contract provisions, would be highly inadvisable and against the best interests of the policyholders as a whole, in view of the existing economic depression, the extremely unsettled conditions and the uncertainty of the times in general and the necessity and importance of maintaining the company in a sound condition through the years to come. On May 6, 1938, after the department of insurance completed its examination and audit of the funds of

the company, the department entered an order directing the company to distribute the sum of $1,325,610.87, and on May 10, 1938, another order was entered, approving the distribution of $810,724.97, which had already been distributed by the company. The defendant Royal Highlanders appealed to the district court for Lancaster county from the order of the department directing the distribution of $1,325,610.87, and affirmatively prayed for the approval of the distribution of $810,724.97 as made by the board of directors of the company as the only distribution to be made under the conditions existing as of May 4, 1937. On appeal, the district court for Lancaster county upheld the contentions of the company by setting aside the order of the department of insurance directing the distribution of $1,325,610.87, and approving the distribution of $810,724.97 as made by the board of directors of the company. On appeal to this court from the judgment of the district court for Lancaster county, the district court was in all respects affirmed in *Royal Highlanders v. Wiseman, supra.* The applicable provisions of the insurance contracts, edicts and laws are quoted in the case of *Royal Highlanders v. Wiseman, supra,* and are attached to and made a part of the pleadings in the present case. For the sake of brevity and the avoidance of repetition, they will not be set out at length in this opinion.

Upon the filing of the defendants' amended answer, plaintiffs moved for a judgment on the pleadings, and after the overruling thereof elected to stand upon the motion. The trial court thereupon dismissed the petition and plaintiffs have appealed.

A motion for judgment on the pleadings, like a demurrer, admits the truth of all well-pleaded facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. The party moving for judgment on the pleadings necessarily admits, for the purposes of the motion, the untruth of his own allegations in so far as they have been controverted. 49 C. J. 668. The question raised by the motion for judgment on the pleadings is whether the answer, which contained a general denial of

plaintiffs' petition, admitted sufficient facts to be true to entitle plaintiffs to a judgment.

Many of the issues raised in this case were considered and determined in *Royal Highlanders v. Wiseman, supra.* While it is true that the parties in that case were not identical with those in the case at bar, yet the reasoning of that case and the holdings made by this court therein have particular application in arriving at a correct decision in the case at bar.

While it is true that section 44-415, Comp. St. Supp. 1939, provides that the department of insurance shall make such orders with reference to the distribution of any existing or future surplus of such company as may be just and equitable to the policyholders in connection with the approval of amended articles of incorporation and a change in the method of doing business, yet such an order is subject to review by the district court for Lancaster county. But, in the case at bar, it was determined by the department of insurance that no distribution was necessary on the change of form of corporate organization. This is clearly such an order as was contemplated by the statute. Plaintiffs therefore find themselves in this dilemma; either the order that no distribution of surplus was necessary was final, or the subsequent order, if lawfully made as a part of the mutualization of the company, was subject to review by the district court. In either event, under the circumstances of this case with the result of the appeal favorable to the contentions of the company, plaintiffs are in no position to successfully maintain their contentions. The determination of the divisible surplus by the department of insurance is only a prescribed condition to be accepted and performed by the corporation in accomplishing a valid change of "its articles of incorporation and methods of doing business," which has no force and effect until it is accepted by an affirmative vote of persons in interest. *Royal Highlanders v. Wiseman, supra.* In the instant case, the order of the department of insurance directing the distribution of $1,325,610.87 was neither submitted to nor approved by the policyholders of the company.

After the change from a fraternal benefit society to a mutual legal reserve life insurance company was completed, without a condition imposed by the department of insurance for a distribution of assets, the corporate officers of the company were lawfully in charge of its business affairs. There being no evidence of fraud, bad management or misconduct in handling the corporate business, the insurance department and the courts are without power to substitute their judgment for that of the board of directors as to the wisdom and expediency of business policies and methods in carrying on the business of the company. As we said in *Royal Highlanders v. Wiseman, supra*: "The established rule is that, in the absence of usurpation, or fraud, or of gross negligence, or transgression of statutory limitations, courts of equity will not interfere at the suit of dissatisfied stockholders merely to overrule and control the discretion of directors on questions of corporate management, policy or business."

The right of policyholders to participate in the distribution of surplus of this insurance company depends entirely upon the existing contract between the policyholder and the company. And where it appears that the board of directors is vested with the power, either generally or by specific provision, to determine the time, amount and method of distribution of surplus to policyholders entitled thereto, the court will not ordinarily interfere, in the absence of a showing of fraud, or bad faith, or at least a clear transgression of a legislative mandate. *Royal Highlanders v. Wiseman, supra.*

Plaintiffs allege that the reserves released by the termination of policies of Ideal Reserve policyholders are accretions to the reserves, mortuary or disability funds, and that any amount accruing in any of said funds in excess of legal requirements should be distributed to the holders of Ideal Reserve participating policies in accordance with their beneficial interest therein. The laws, edicts and contractual provisions pleaded, however, show that the accretions to the Ideal Reserve Fund were limited by the contract to accre-

tions other than those derived from revenue resulting from suspensions and lapsed or surrendered policies. The funds accumulated from suspensions and lapsed or surrendered policies were required by the very terms of the contract to be transferred to the general fund to be used for the best interest, growth and welfare of the company and the general expenses of operation. The board of directors were clearly right in refusing to distribute any of such funds as demanded by plaintiffs.

Plaintiffs contend that the judgment of the district court for Lancaster county, in the case of Royal Highlanders v. Wiseman, Docket 139, No. 66, was void for the reason that the court was without jurisdiction to hear it. In the decision of that case in this court, *Royal Highlanders v. Wiseman, supra,* this court held against the contentions of plaintiffs on that issue. The reasoning and logic of the opinion in that case are sufficient authority for our holding that the district court had jurisdiction in that case and was invested with the necessary powers to enter the judgment that was entered therein.

A consideration of the pleadings, and the facts pleaded which are admitted to be true by the filing of the motion for a judgment on the pleadings, convinces us that the trial court properly overruled the motion and dismissed the petition. The board of directors, in determining the amount of surplus which could safely be distributed, violated no provisions of statute, participated in no fraud and in no way exceeded its statutory powers. The answer alleges that the $810,724.97, which the board of directors authorized to be distributed as accumulated surplus, was the result of a careful analysis of the affairs of the company, an appraisal of the present economic condition of the country as it bears upon the insurance field, and an estimate of the future as it appears to those interested in the welfare of the company and its policyholders. The allocation of funds as determined by the directors appears to be reasonable and justified by the facts admitted by the pleadings. The plaintiffs, by moving for a judgment on the pleadings, in effect admit

that the divisible surplus allocated by the board of directors for distribution to Ideal Reserve participating policyholders is the result of the exercise of sound judgment and business acumen. It is therefore a matter within the legal discretion of the board of directors with which, in the absence of fraud, gross negligence, bad faith or violation of statutory limitations, the courts are powerless to interfere.

We think the trial court was in all respects correct, and the judgment entered is

AFFIRMED.

WILLIAM BASSINGER V. STATE OF NEBRASKA.
299 N. W. 293

FILED JULY 11, 1941. No. 31233.

Burglary. No presumption of guilt of burglary arises from mere possession of stolen personal property.

ERROR to the district court for Otoe county: WILMER W. WILSON, JUDGE. *Reversed.*

Andrew P. Moran, for plaintiff in error.

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

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

YEAGER, J.

This is a criminal action wherein, in Otoe county, Nebraska, William Bassinger, plaintiff in error and defendant, was prosecuted by and in the name of the state of Nebraska, defendant in error, on the charge of burglary of a dwelling-house.

The information charges that on or about the 30th day of November, 1940, the defendant, in Otoe county, Nebraska, did unlawfully, wilfully, forcibly, maliciously, feloniously and burglariously break and enter into a certain dwelling-

house owned and occupied by one Henry Stone, with intent to, and that he did, steal, take and carry away certain personal property of the said Henry Stone.

On this charge the defendant was tried to, and he was convicted by, a jury. Following the overruling of a motion for new trial, defendant was sentenced to a term of five years in the state penitentiary. To reverse this conviction and sentence, he has brought this case to this court on petition in error for review.

Numerous errors are assigned, but only one of them requires consideration here. Defendant contends that there is not sufficient competent evidence in the record to support the verdict of the jury.

The only evidence which was adduced to support the charge was that at some time between noon and 10 o'clock p. m. on November 30, 1940, the home of Henry Stone was entered, and certain articles of personal property of Henry Stone were taken, and that thereafter, on or about February 20, 1941, certain of the personal property taken was found in the home of the defendant. The defendant's statement, testified to by witnesses for the state, indicated that the property was brought to his place by one Milo Smith; and Milo Smith, testifying on behalf of the defendant, gave testimony to the same effect. This statement of the evidence fairly reflects all of the testimony in support of the charge contained in the information.

There being no other evidence and no other circumstance indicating guilt on the part of the defendant, to sustain the conviction in this case would require the adoption of a rule of law that mere possession of stolen property lately taken burglariously is sufficient evidence upon which to base a verdict of guilty against the person found in possession of the property. This is not the present rule, and the adoption of such a rule would be obviously unsound. The rule, as heretofore announced by this court, is that no presumption of guilt of burglary arises from mere possession of stolen property; the inference to be drawn from such fact is alone for the jury, when weighed in connection with all the evi-

denced adduced on the trial. *Metz v. State,* 46 Neb. 547, 65 N. W. 190; *Williams v. State,* 60 Neb. 526, 83 N. W. 681. The evidence here of possession, when weighed in connection with all the other evidence adduced on the trial, points toward innocence rather than toward guilt of burglary.

For the reasons herein set forth, the conviction of the defendant is

REVERSED.

KENNETH GOLDEN, APPELLEE, V. PHILIP H. BARTHOLOMEW ET AL., APPELLANTS.
299 N. W. 356

FILED JULY 18, 1941. No. 31112.

1. **Licenses.** A rule of an administrative agency which requires that a funeral director must carry any number of caskets in stock in his place of business is arbitrary and unreasonable and an unconstitutional exercise of the police power.
2. ———. Any interpretation of the statutory provisions, set out in the opinion, which would constitute a requirement that a funeral director must carry any number of caskets in stock in his place of business would likewise be arbitrary and an unreasonable and unconstitutional exercise of the police power.
3. **Injunction.** To authorize a court of equity to interfere by injunction, the facts averred in the petition and established by proof or admission must show that if the injunction be denied the complainant will suffer an irreparable injury for which he has no adequate remedy at law.

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

Milton C. Murphy, for appellants.

Harry Silverman and *Paul F. Good, contra.*

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

SIMMONS, C. J.

The legislature in 1937 passed "An act relating to funeral directors and undertakers; to provide for the regulation of

funeral directing and undertaking" (Laws 1937, ch. 154), which is now chapter 71, art. 32, Comp. St. Supp. 1939. A "funeral director" and "undertaker" is defined as "a person * * * engaged in or conducting the business of * * * (b) Providing for or maintaining a funeral establishment * * *." So far as material here the act defines a "funeral establishment" as "a place of business * * * devoted to the care and preparation for burial * * * of human dead bodies * * * containing * * * a display room containing a stock of funeral caskets and shipping cases." Comp. St. Supp. 1939, sec. 71-3209. "The business of a funeral director must be * * * engaged in at a fixed place or establishment and no person * * * shall * * * engage in * * * the business of a funeral director, unless first licensed so to do by the department of health." Section 71-3210. The applicant for a funeral director's license shall furnish "proof satisfactory to" the board of examiners for embalming that the establishment "in which he intends to conduct business * * * is or will be constructed, equipped and maintained in all respects as a funeral establishment as defined" in the act. Section 71-3211. The department shall grant a license if the board of examiners finds (among other things) "that the proposed funeral establishment is, or will be, constructed and equipped as required by" section 71-3209. Section 71-3212. The act further provides that the department shall, upon the recommendation and finding of the board of examiners, suspend or revoke licenses after hearing, upon such licensee being found guilty by said board of "(2) Unprofessional conduct which is hereby defined to include * * * (l) Violation of any of the provisions of this act." Section 71-3218.

The act further provides a procedure for the revocation or suspension of a license, including the filing of a petition with the board of examiners, a notice, hearing, finding, an order of revocation or suspension, and a denial of the right of the licensee to practice funeral direction after revocation of or during suspension of a license. Section 71-3219. An appeal and trial *de novo* in the district court for Lancaster county is also provided; however, "In the event the licensee

appeals, the decision of the board shall not be stayed by the proceedings on appeal and such appeal shall not operate to restore the right of the licensee to practice pending such appeal." Section 71-3220. The act further provides a penalty for any person who shall engage in the business of funeral directing or undertaking "without having complied with the provisions of this act and without being licensed so to do." Section 71-3227. The act further provides in the first section (Laws 1937, ch. 154, sec. 1) that "The board of examiners in embalming may adopt such rules as may be reasonable and proper for the purpose of carrying into effect the provisions of this act." Section 71-3209, *supra.* Also, "The department shall have power, upon the recommendations and approval of the board of examiners in embalming, to adopt and enforce reasonable rules and regulations relating to the business of a funeral director, to the sanitary condition of places where such business or practice is conducted, with particular regard to plumbing, sewage, ventilation and equipment, and generally to carry out the various provisions of this act in the protection of the peace, health, safety, welfare and morals of the public." Section 71-3218, *supra.*

The plaintiff was on February 23, 1938, licensed under the act as a funeral director by the department of health and engaged in that business in the city of Omaha. About April 1, 1940, a petition was filed with the board of examiners charging that the plaintiff for more than a year past has had a display room for caskets in his funeral establishment and that during that period he had wilfully failed, neglected and refused to keep any stock of funeral caskets and shipping cases whatsoever in said establishment, contrary to the provisions of the act; that Rule 5 of the rules adopted under said act by the board of examiners in embalming provides as follows:

"A suitable minimum stock of caskets shall be determined by the number of complete adult funerals sold per year and shall be on the following basis: 1 to 25 cases per year, inc., 6 adult caskets; 26 to 50 cases per year, inc., 9 adult caskets;

51 to 75 cases per year, inc., 12 adult caskets; 76 to 100 cases per year, inc., 15 adult caskets; all over 100 cases per year, inc., 20 adult caskets.

"The above schedule shall be construed to mean a minimum stock of adult caskets of different styles and does not prohibit the displaying of more caskets."

That the plaintiff had an average of about 50 adult funerals a year and that he had for more than a year neglected and refused to keep on hand and display in his funeral establishment "any stock of funeral caskets or shipping cases" and had neglected and refused to have on hand and display "a sufficient stock of adult caskets of different styles to suit the requirements of said rule;" and that on April 1, 1940, he had failed to have on display in said establishment any stock of funeral caskets and shipping cases, contrary to the provisions of the act and the rules and regulations of the board of examiners. The prayer was for a revocation or suspension of plaintiff's license after notice and hearing. Hearing was held April 11, 1940, and findings of fact made sustaining the allegations of the petition. The board on said date entered an order recommending to the department of health that plaintiff's license be suspended for 60 days and that he be prohibited from engaging in the practice of funeral directing during that time. May 9, 1940, plaintiff filed an amended petition in the district court for Lancaster county against the director of health and the governor wherein he alleged that he was a licensed funeral director; the official status of the defendants; the filing of the petition before the board of examiners and the order entered (described above herein); that the recommendation of the board was before the department, and that unless restrained the defendants in their official positions would enter the order suspending his license; that while an appeal is permitted under section 71-3220, *supra,* said appeal would not operate as a supersedeas and no supersedeas of the order is permitted pending an appeal; that the plaintiff has an established business in Omaha as a funeral director, with a large investment therein and a number of employees;

that a suspension of his license would cause great and irreparable injury, without an opportunity for redress, and that he has no adequate remedy at law; that he has complied with all the regulations of the board except that with reference to the stock of caskets; that there are three wholesale casket establishments in Omaha from which he can and does obtain caskets when and as needed; that it is unnecessary to have a display of caskets on the premises; that his customers have available at the wholesale house a larger assortment from which to make a selection than would be carried in an individual establishment; that the facilities of his establishment are ample to care for bodies until placed in caskets; that caskets are always available when needed; that he takes his customers to one of these wholesale establishments to select caskets and that his customers are entirely satisfied with this method of meeting their needs; that the regulation is wholly unauthorized by statute, unreasonable, and has no connection or reasonable basis in the protection of the peace, health, safety, welfare or morals of the public; that said board of examiners interpret the statute to require a funeral director to have a display room containing a stock of caskets and that such requirement is a condition to a license, and that as so interpreted said statute is unconstitutional; deprives the plaintiff of his property without due process and denies the plaintiff the equal protection of the laws, and violates the guaranty of equal privileges and immunities; that the statute, as interpreted by the board, constitutes an unconstitutional delegation of legislative power. The same charges are made against the regulation. Plaintiff prayed that the court enter its order finding the regulation to be void; the recommendation that his license be suspended be void; enjoining the defendants from enforcing the recommendations of the board; that a temporary restraining order and a temporary injunction be granted pending the determination of the issues; and for equitable relief.

Defendants for answer set out that plaintiff has violated the statute and the regulations as charged in the petition

before the board; that Rule 5 had been adopted by the department; that it is the duty of these defendants to enforce the law and to suspend plaintiff's license; that plaintiff has an adequate remedy at law by appeal; and that the court is without jurisdiction to enter an injunction order.

Trial was had and findings made generally for the plaintiff, and specific findings made: (1) That the regulation is an arbitrary and unreasonable rule and an improper exercise of delegated powers; (2) that any interpretation of section 71-3209, *supra,* which would constitute a requirement that a funeral director must carry any number of caskets in stock in his place of business would likewise be arbitrary and an unreasonable and unconstitutional exercise of the police power; (3) that the regulation is void; (4) that the recommendation of the board of examiners that plaintiff's license be suspended is void; (5) and that plaintiff has no adequate remedy at law. Defendants were enjoined from enforcing the order of the board. From that decree defendants appeal.

Plaintiff's evidence established that, for reasons of economy and to better serve his patrons, his present practice was not to carry a stock of caskets but to buy as occasion arose. A casket company operated its factory and showrooms in the wholesale district in Omaha, some two miles from plaintiff's place of business. There the company maintained a neat, clean and satisfactory showroom where an extensive line of caskets was exhibited. The company was in a position to make delivery of caskets on hand within an hour, and of special orders within a day. Plaintiff's practice was to take a customer by private automobile to the showroom at the factory and let him select the casket desired. The casket was then, or later, ordered and delivered to the plaintiff's place of business in time for the funeral services. There is evidence that on one or two occasions delivery was not made until a short time before the funeral. However, the parties involved testified that they were entirely satisfied with the service. There is no evidence by any patron that plaintiff ever failed to properly perform his obliga-

tions in the manner of handling a funeral. The board of examiners make no complaint other than that he did not carry the required number of caskets in stock. There is evidence that, while funeral directors generally carry a stock of adult caskets on display, it is quite customary for them, on occasion, to take patrons to the wholesale house in Omaha or elsewhere to personally select a casket, and that directors outside of Omaha quite often resorted to mail, telephone or telegraph to secure special caskets. These occasions arose when patrons were not satisfied with caskets on display, or the deceased's body required a special size or make of casket; or children's caskets were needed; or the patron desired a casket of a style or material not ordinarily carried in stock. The evidence further indicates that the rule here involved could have been complied with by the plaintiff by the purchase and display of a line of cheap caskets, such as are not ordinarily used and that would not have met the desire of plaintiff's patrons, and that in such event he would have followed the same practice that he now follows of making selections at the wholesale house without violating the rule or incurring the displeasure of the board. The evidence further indicates that if a director maintained on display the minimum number of caskets required by the rule, and used a casket for a funeral, until he replaced the casket, he would be a violator of the rule and his license would be subject to suspension or revocation. The evidence will be further discussed in considering defendants' assignments of error.

The pleadings make separate issues as to the statute and the regulations and present the questions as to whether or not the statute requires the director to maintain in his funeral establishment a display room containing a stock of caskets, and, if not, whether the legislature can delegate power to make such a requirement to an administrative board. A decision of those specific questions does not seem to be necessary. The question necessary for determination is whether or not the legislature has the power by statute, or an administrative agency by delegation from the legis-

lature, to require, as a condition for a license as a funeral director that the licensee must maintain a display room at his establishment containing a stock of funeral caskets and shipping cases. If the legislature does not possess the power to make such a requirement, then it is patent that it cannot delegate that power to an administrative body.

We consider then the question, has the legislature the constitutional power to make such a requirement? Defendants contend that "the requirement that a stock of caskets be displayed in the establishment is a valid and constitutional exercise of the police power by the legislature." It is fundamental that if the power exists the courts cannot pass upon the wisdom of the requirement. This court has long followed the rule that "The legislature cannot, under the guise of police regulation, arbitrarily invade private property or personal rights. The test when such regulations are called in question is whether they have some relation to the public health or public welfare, and whether such is, in fact, the end sought to be attained." *Smiley v. MacDonald,* 42 Neb. 5, 60 N. W. 355. The legislature recognized this principle, in the act in question, when it provided in section 71-3218, *supra,* that the department shall have the power to adopt rules and regulations in certain specified matters "and generally to carry out the various provisions of this act *in the protection of the peace, health, safety, welfare and morals of the public.*" This court has also said: "Due process of law, as a limitation upon the police power, requires that it be exercised in such a manner that it is not arbitrary and unreasonable." *Hubbell Bank v. Bryan,* 124 Neb. 51, 245 N. W. 20. This court has also said: "In order that a statute may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals or general welfare; that there is some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof; and that the latter do in some plain, appreciable and appropriate manner tend toward the

accomplishment of the object for which the power is exercised. * * * Measures adopted by the legislature to protect the public health and secure the public safety and welfare must have some relation to those proposed ends. If it is apparent that the statute, under the guise of a police regulation, does not tend to preserve the public health, safety or welfare, it is unconstitutional, as an invasion of the property rights of the individual." *Carolene Products Co. v. Banning,* 131 Neb. 429, 268 N. W. 313. This court has also said: "The legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly." *Nelsen v. Tilley,* 137 Neb. 327, 289 N. W. 388.

For a retailer of merchandise to take his customer to a wholesale house, in order that a better and more satisfactory selection of desired goods may be made, is a common business practice. It is somewhat in between the method of doing business by selling merchandise from a stock on hand and the method of doing business by the use of a catalog or descriptive matter. No objection to the method as such is seen, nor is there any detriment to the public health, safety, morals or welfare apparent from the following of this business method generally. The effect of the requirement here involved is to fasten upon those engaged in the funeral directing business the mandatory requirement of following one business method to the exclusion of other methods common to the business transactions of the country. Its effect is also to exclude from the funeral directing business those directors, otherwise qualified, who are financially unable to purchase and keep in stock the required number of caskets, to eliminate competition of those directors who can reduce costs by not being required to carry an investment in caskets and to those extents is destructive of competition, otherwise lawful, and creates trade restraints tending to establish a monopoly. Clearly the requirement of the rule or the statute cannot be sustained as applicable to business generally.

Is there anything, then, within the particular field of the funeral directing business which causes this requirement to either promote or preserve the public health or welfare? What relation does this requirement of the board and department have to those ends? What reasonable connection or relation is there between the number of caskets in a funeral establishment and the public health or welfare? Wherein does the number of caskets on hand tend to promote the public purposes claimed?

The reasons advanced by the defendants are many.

(1) Those concerned with death of friend or relative are emotionally not normal. The relation of the funeral director and those whom he serves is one of personal trust and confidence, and a casket manufacturer should not come between the funeral director and those who call for his confidential and personal service. Is that not a matter within the control of the person seeking the service? This record establishes the existence in every community of funeral directors who have the required caskets on display in their establishments, and that that was the situation before this law was passed or the requirement made. Indeed this record would cause us to believe that plaintiff is the only funeral director in the state whose establishment is not stocked as required by the rule. Do not the parents of a child or the loved one seeking a special casket also come in contact with the manufacturer if they are required to go to the wholesaler to make a selection? Obviously that is not the reason for the requirement.

(2) Defendants stress that the showroom of the wholesaler, with whom plaintiff deals, is located in a factory building, in the business area where there is noise of trains and vehicles, odors and the confusion incident to business, and that for people to go there from plaintiff's place of business requires that they pass through the congested business area. But do not the residents of every city do that every day in going to and from their places of business or to or from places where business is transacted? The record shows that it may be more convenient for some customers

to make their selection of caskets at a funeral home, rather than at the wholesale house, but the record is entirely devoid of any evidence that those who choose to go to the wholesale house are in any wise injured in their peace, health, safety, welfare or morals by so doing, nor is there any evidence that the public generally is affected thereby.

(3) The next argument is that "the general practice of displaying a stock of caskets in the funeral home was for the benefit of the public * * * tended to reduce grief, mental suffering and distress, emotional and physical strain." We see no merit to that contention, and the evidence does not support it.

(4) The next contention is that a stock of caskets should be available in every funeral home for use in emergencies of fire, wrecks, storms, and epidemics, and for that reason the requirement is a proper exercise of the police power for the public health and welfare. Here the record shows that, prior to the adoption of the requirement, no situation, such as this argument contemplates, arose in Nebraska that was not properly met by the funeral directors of the community. There is ample evidence that, should such catastrophies occur, such a situation can be adequately handled by the industry. But assuming that a condition might arise in some community where there would be a delay in getting caskets, can that justify a requirement that all the directors be prepared at all times to furnish caskets for such emergency needs? We do not think so. If so, then dealers in all other necessaries of life, such as food, clothing, fuel, drugs, etc., could be required to carry stocks to meet emergencies, on penalty of being denied the right to engage in business, and subjected to criminal penalties. That argument advanced does not support the contention that this requirement is a proper exercise of the police power.

(5) Defendants next argue that persons from a home where death is caused by a contagious disease often desire to select the casket; that the contacts of the possible carrier of contagion can be controlled if taken to a funeral establishment better than if taken to a public display room at the

wholesale house; that the funeral establishment may be disinfected, and that the wholesale house apparently would not be. The prevention of the spread of contagious disease is of vital public concern. The obvious answer to this argument is that the possible bearer of a contagious disease should be disinfected before being permitted to be at large either on the way to or in a funeral establishment or a casket manufacturer's showroom. Apparently, from the record, the health department permits the practice of a member of a family from a quarantined home being taken to a funeral establishment under the condition that he will contact no one else. The difference in the two situations is one of degree. But it is obvious that this reason does not prompt the requirement here being considered, because children, adults requiring extra size caskets, and people whose relatives desire unusual designs of caskets die of contagious diseases, and funeral directors purchase in those instances from the wholesaler either with or without the assistance of the interested parties. If contagious disease cases can be handled in the latter event, consistent with the public health and welfare, then they can be likewise so handled in adult cases generally.

(6) The next argument is that "if all funeral directors used factory showrooms" (and the evidence clearly shows they do not and have not) the purchase of a casket would be "just shopping." "The whites, the blacks and the yellows, the Jews and the Gentiles, the high and the low, would mingle together in the sorrowful task of proceeding to neighborhoods such as 12th and Capitol in Omaha, with its noises and odors and dirt and its street and rail traffic, where in the din of pounding trucks and puffing switch engines, they would wander among the coffins trying to select a receptacle for the final repose of their dead." Such an argument might find ready listeners and acclaim in certain parts of the world today. It has no place here. It should not be advanced to, much less considered by, a court of justice in the United States.

It appears that the end sought to be attained by this rule

and the interpretation of the statute advanced in this proceeding is not the promotion or preservation of the public health or welfare.

We concur in the finding of the trial court that the rule involved is arbitrary and unreasonable and an improper exercise of delegated powers, and that any interpretation of the act which construes it to require that a funeral director must carry any number of caskets in stock in his place of business is likewise arbitrary and an unreasonable and unconstitutional exercise of the police power.

Defendants next contend that plaintiff has an adequate remedy at law by appeal under the provisions of the act. Plaintiff contends that the order of suspension cannot be superseded during the appeal which the act provides; that his business is one requiring service available at all times; that the expense of maintaining his establishment during the period of supension or appeal would be heavy; and that the effect of determining the questions here presented by appeal, during which he would be denied the right to engage in the business of a funeral director, would be the closing of his business. Defendants argue that so long as a right of appeal exists an injunction cannot issue.

This court has said: "An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Standard Oil Co. v. O'Hare*, 122 Neb. 89, 239 N. W. 467. "A legal remedy which will oust the equity court of jurisdiction must * * * be capable of being asserted without rendering the litigant liable to the imposition of a penalty or forfeiture. A litigant, instead of resorting to an equitable remedy, is not obliged to take the risk of prosecution, fine, imprisonment, and loss of property in order to test the constitutionality of a statute." 19 Am. Jur. 119, sec. 115. To authorize a court of equity to interfere by injunction, the facts averred in the petition and established by proof or admission must show that if the injunction be denied the complainant will suffer an irreparable injury for which he has no adequate remedy at law.

State Bank of Nebraska v. Rohren, 55 Neb. 223, 75 N. W. 543; *Omaha Grain Exchange v. Spillman,* 118 Neb. 729, 226 N. W. 452. It may be that the plaintiff here could determine the legal questions presented by appeal as provided by statute. It appears certain, however, that he would suffer an injury and damage to his business that would be irreparable and for which no remedy at law is provided.

The judgment of the district court is affirmed.

AFFIRMED.

FRANK M. JOHNSON, APPELLEE, V. ANDERS E. ANDERSON, APPELLANT.

299 N. W. 343

FILED JULY 18, 1941. No. 31077.

Statute of Frauds. Every special promise to answer for the debt of another person shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith.

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

Jeffrey & Padley, for appellant.

Cook & Cook, contra.

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

EBERLY, J.

This is an action at law to recover a balance alleged to be due the plaintiff from the defendant for services rendered by the plaintiff as attorney at law for one Griffith, defendant in a case entitled, State of Nebraska v. Griffith, at the trial thereof in the district court for Dawson county.

There was a trial to the court, a jury being waived, resulting in a finding and judgment for plaintiff. From the order of the trial court overruling his motion for a new trial, the defendant appeals.

The question here litigated by the parties, and presented by their briefs, is the applicability of our statute of frauds to the oral contract in suit.

Plaintiff's petition alleges the employment of plaintiff by Anders E. Anderson on or about the 1st day of March, 1935, to defend Donald Griffith in the case of State v. Griffith; further, that the services were performed pursuant to contract and that on April 3, 1935, it was agreed between Anderson and plaintiff that $500 was the fair and reasonable value for the services which plaintiff had performed; that plaintiff had received the sum of $300 thereon and the defendant then and there agreed to pay the remaining sum of $200 as soon as he, defendant Anderson, had disposed of some crops.

Defendant Anderson, in effect, denied the making of the contract with plaintiff, and alleged that he was in no way indebted to the plaintiff.

According to plaintiff's testimony there was no definite arrangement between himself and Anderson for payment prior to the completion of the trial of State v. Griffith in the district court. The trial of this case was commenced on the 19th day of March, 1935, and terminated on the 23d day of the same month, and resulted in the acquittal of the defendant. Plaintiff Johnson's services for which recovery is sought had been fully performed prior to the oral agreement of Anderson on which plaintiff relies.

On cross-examination the plaintiff, Johnson, testified as follows: "Q. Now, for the purpose of the record, you are relying on your claim of $200 on the promises made by—according to your testimony, on the promises made by Anders Anderson on the 3d day of April (1935) to pay this fee, is that correct? A. That is correct."

The evidence in the record shows without dispute that prior to the 3d day of April, referred to in the testimony quoted above, there had been no definite contract of employment between Johnson, the plaintiff, and Anderson, the defendant. On such 3d day of April, after all services of attorney Johnson in the case of State v. Griffith had been com-

pleted, Johnson testifies an oral conversation was had and an oral agreement as to fees was entered into between himself and defendant, Anderson. The following excerpt from Johnson's testimony discloses his claims as to the nature of this oral agreement and the terms thereof: "Mr. Anderson asked me how much or how large a fee I thought I should have for the services rendered, and I told Mr. Anderson that if it were people who had any amount of funds, that for the services I had rendered and the results accomplished, I could very reasonably charge a fee of $1,000, but under the circumstances, I thought that was too much; and he said, 'Well, if I could make some arrangement on my own part to help out, what do you think you ought to have to fairly reimburse you?' I told him if he had any idea of doing that, I wouldn't have to call upon Dawson county for an additional contribution in the case, that it had had to pay all the court costs, the witness fees, and that was quite an item, that I would take $600 if he would pay the difference between what he had collected by subscriptions, and $600, I would feel satisfied. He sat there and thought for quite a little bit, and said, 'Well, will you take $500 if I make up the difference myself?' And I said, 'Well, when would you want to pay it?' He said, 'Well, I will give you a check today to add enough to the contributions so that you will have $300, and I will pay you the additional $200 so you will get $500. That is, $500 in all.' "

This oral offer, Johnson testifies, was made by Anderson, and by plaintiff orally accepted, and was the agreement upon which he relies for recovery. This testimony was substantially denied by the defendant, but the district court determined this issue of fact against the defendant. The latter on appeal contends that the oral engagement or contract relied upon is void under our statute of frauds. This contention we find must be sustained. There is no definite contract of employment for Johnson's services as attorney in the case of State v. Griffith established by the evidence in the record prior to April 3, 1935. No definite obligation existed between these parties on that subject prior to that

date. The amount due for these attorney fees was not the debt of Anderson and such services were fully performed and completed at the close of the trial in the district court on the 23d day of March, 1935. It affirmatively appears that this oral agreement was not reduced to writing, nor was such agreement or some note or memorandum thereof signed by the party to be charged therewith.

This claimed oral contract is strictly within the following provision of our statute of frauds: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith. * * * Second. Every special promise to answer for the debt, default or misdoings of another person." Comp. St. 1929, sec. 36-202.

In the present case the oral promise as claimed was, in effect, to pay a primary debt of another antecedently contracted, and no new consideration moved to the promisor. Under these circumstances, "It is said that a consideration to support a promise, not in writing, to pay the debt of another must be of a peculiar character, and must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt." 25 R. C. L. 495, sec. 79. See, also, 27 C. J. 134; *Morrissey v. Kinsey*, 16 Neb. 17, 19 N. W. 454; *Union Loan & Savings Ass'n v. Johnson*, 118 Neb. 17, 223 N. W. 467; *Rose v. O'Linn*, 10 Neb. 364, 6 N. W. 430.

In the instant case, it is obvious that the oral obligation relied on is clearly within the inhibition of our statute of frauds, and that no recovery can be sustained thereon over the objection of the party sought to be charged.

In the entry of its finding and judgment the district court erred. The judgment is, therefore, reversed and the action dismissed.

REVERSED AND DISMISSED.

HIRSCHEL B. STURGEON, APPELLEE, V. CROSBY MORTUARY, INC., APPELLANT.

299 N. W. 378

FILED JULY 18, 1941. No. 31098.

1. **Coroners.** Jurisdiction to hold an inquest is conferred upon a county attorney by the finding and custody in his county of the body of a person who has apparently come to his death by violent, mysterious or unknown means.
2. ———. In view of the statutory provisions involved, and the public purpose of the entire proceeding, an autopsy is required and justified when necessary to determine that the cause of death of a human being who had departed this life did not involve unlawful means, and when necessary to secure information that will enable the county attorney to fully perform the duties of his office in reference to such occurrence.
3. ———. When the above conditions exist, the county attorney may legally order an autopsy to be made, when, in his judgment, that is the appropriate means of ascertaining the cause of death, and this may be done without consent of the family, or any of the members thereof, as incident to the county attorney's official duty.
4. ———. The evidence in the record is ample to sustain these conclusions: That the county attorney of Douglas county had jurisdiction to hold an inquest in the present case without the intervention or assistance of a jury; that the action taken under his authority in this case constituted a reasonable exercise of the powers of his office; that the acts of his statutory assistants in connection therewith were legally performed and required by the public policy of the state.
5. **Dead Bodies.** It affirmatively appears that the coroner's physician performed the autopsy in the instant case lawfully, by the authority of the county attorney, and in proper performance of his statutory duties. Further, the defendant in this case in no manner transgressed the legal duties it owed to its employer, plaintiff herein, and the evidence in the record is wholly insufficient to establish a cause of action against it.

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

Joseph D. Houston and *James T. English,* for appellant.

Leon, White & Lipp and *Boyle & Boyle, contra.*

Young & Williams, amici curiæ.

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

EBERLY, J.

This was an action at law brought by Mrs. Hirschel B. Sturgeon, plaintiff, against Crosby Mortuary, Inc., a corporation, doing business under the name of Crosby-Carlson-Meyer Mortuary, defendant. By this action plaintiff sought to obtain damages sustained by her resulting from the alleged unauthorized dissection and mutilation of the body of her deceased husband, made by the coroner's physician of Douglas county in the making of an autopsy in the performance of his official duties, because this autopsy thus performed was consented to and permitted by the defendant within the confines of its mortuary while in custody and possession of the body for the purpose of preservation and sepulture, and without notice to or consent of the plaintiff. At the close of all the evidence the defendant moved for a directed verdict, which was overruled. Whereupon the trial court determined that plaintiff's cause of action was established by the proof as a matter of law, and, by the court's instructions, the only question submitted to the jury was the determination of the amount of damages sustained by the plaintiff. The jury returned a verdict against the defendant for the sum of $3,000. Defendant filed a motion for a new trial. The court ordered a remittitur in the sum of $1,500 to be filed, or the motion for a new trial would be sustained. The required remittitur was filed, and the motion for a new trial was overruled. The defendant appeals.

The facts involved and surrounding the transaction under consideration include the following: Hirschel B. Sturgeon, the plaintiff's husband, on the morning of October 11, 1937, about 8 o'clock a. m., took the plaintiff from their home at No. 2502 North Forty-eighth avenue, in Omaha, Nebraska, to the Tudor Arms Apartment at 131 South Thirty-ninth street, Omaha. She there conducted a beauty parlor. Her husband was engaged in the selling of typewriters and

office supplies at a down-town establishment. There is no evidence that anybody saw him alive after the completion of this morning trip. Plaintiff testifies that she talked with him over the telephone at his place of business about 11:30 a. m. About noon the same day a violent explosion occurred at the plaintiff's home. A policeman heard the noise and rushed to the scene of the explosion. Finding the door locked, he broke through and found the body of Mr. Sturgeon in the kitchen on the floor face down. There were no other occupants in the home at this time. He carried the body outside and, finding no pulse in the body, he put in a call for the "inhalator squad," who with the fire department came to the scene, but the man was dead. Upon the scene came firemen, policemen, the county attorney's special investigator, a physician, the defendant undertaker, neighbors and others. A great deal of damage had resulted from the catastrophe. The explosion had raised the ceiling, blown out the windows, a closet in a bedroom blown up, entrance to a hall blown out, roof raised, and a fire within the house ignited and some damage had been occasioned thereby. No physician was attending Sturgeon when he died, no one saw him die, no one knew how or when he died, or the cause of the explosion, or what exploded. There was a cut on the dead man's head and blood was coming from his ear. There was an odor of gas in the building in which he died. The official investigator, after a discussion with the police and others present at the scene of the death, found it impossible to ascertain whether gas jets on the stove were found open immediately after the explosion, and, if open, who had closed them. At Mrs. Sturgeon's direction the body was taken by the defendant, Crosby Mortuary, to its undertaking establishment to be prepared for burial. The county attorney's special investigator, as instructed by the county attorney, communicated with the coroner's physician, Dr. Earl A. Connolly. The latter went to this funeral home, examined the body, and found it necessary to perform an autopsy to determine the cause of death, and told the persons in charge of the mortuary he would return

later. He communicated with Mr. Jaap, the special investigator, one of the men from whom he had received his instructions in the past, and returned to the mortuary and performed the autopsy at 5 o'clock p. m. He found the cause of death to be inhalation of carbon monoxide gas, and made the necessary death certificate. It is stipulated that no coroner's jury was impaneled in connection with the case; that Mr. Jaap was the special investigator of the county attorney, *ex officio* county coroner; and that his (Jaap's) duties were to make full investigation in coroner's cases. It is fairly established by the evidence that the autopsy was performed by the coroner's physician, acting in his official capacity, and that the same was done in a decent and scientific manner.

The contentions of the prevailing party are, briefly: That the widow of the deceased has the right to the possession of the dead body of her husband in the same condition it was in when death intervened; that an autopsy unauthorized by his widow, or by some other person having authority to so direct by law, is an invasion of the right of the widow; and that a coroner may not order an autopsy except under the circumstances prescribed by statute and only after an inquest.

And, as epitomized by the trial court in its instructions to the jury in this case, we find the following: "The statutes of the state of Nebraska provide that when the circumstances show it possible that death was caused by negligence, violence, or any unlawful means, the case shall be referred to the county attorney for investigation and certification and he shall state the cause of death as ascertained, giving as far as possible the means or instrument which produced the death, but the statutes do not give any right to hold an autopsy without an inquest. * * * When such inquest is held and a *post mortem* examination is deemed necessary the coroner is then authorized to cause an autopsy to be held. The coroner has no legal right to conduct an inquest or to cause an autopsy to be held in the course of an inquest unless he has reason to believe that it is possible that the person

died by unlawful means, or unless he has been requested to do so by the widow. * * * Since the autopsy (in the present case) was wholly unauthorized and illegal, all persons who assisted, advised, aided, abetted, incited, commanded, countenanced, or cooperated in conducting the autopsy are liable jointly and severally to the plaintiff. * * * Since the coroner's physician's acts were wrongful and without lawful justification, the defendant who permitted the unlawful act is equally liable for the consequences."

The correctness of these conclusions is challenged by the appellant herein as unsupported by the controlling statutory enactments and the reasons evidenced by the same.

The office of coroner, an ancient officer at common law, we have inherited or adopted from the common law of England. The powers of a coroner at common law were "in great measure ascertained by statute 4 Edw. I, *de officio coronatoris;* and consist, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be '*super visum corporis;*' for, if the body be not found, the coroner cannot sit. He must also sit at the very place where the death happened; and his inquiry is made by a jury from four, five or six, of the neighboring towns, over whom he is to preside. If any be found guilty by this inquest, of murder or other homicide, he is to commit them to prison for further trial, * * * and (he) must certify the whole of this inquisition (under his own seal and the seals of his jurors * * *) to the court of king's bench." 1 Cooley's Blackstone (3d ed.) *348.

The first territorial legislature of Nebraska adopted "An Act to put into force in this territory the common law of England," approved March 16, 1855, which provided: "That so much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this territory, or with any law passed or to be passed by the legislature of this territory, be and the same is adopted and declared to be law within said territory." 1 Complete Session Laws of Nebraska, 1855 to 1865, p. 144. After admission of the territory of Nebraska

as a state, this act was amended by substituting the words "this state" for "this territory" and "within the state of Nebraska" for "within said territory," and as thus amended it still continues in force.

Later the territorial legislature adopted "An Act to provide for the election, and define the duties of coroner," approved January 13, 1860. Sections 5-11 of this act provide, in substance, that the coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means, found or being in his county; require him to issue his warrant to a constable to summon a jury, and prescribe the holding of an inquest by the coroner and such jury, and the return by such jury of their inquisition in writing setting forth, with reference to the deceased, "when, how, by what person, means, weapon, or accident he came to his death, and whether feloniously." 1 Complete Session Laws of Nebraska, 1855 to 1865, pp. 646, 647. This was substantially the reenactment of the common law without material change except as necessitated by the difference in governmental institutions.

It will be noted that section 18, chapter VIII of the laws of 1866 (2 Complete Session Laws of Nebraska, 1866 to 1877, p. 13), added the following provision: "If the coroner or jury deem it necessary, for the purposes of an inquisition, to summon a surgeon, the coroner shall issue his subpœna for the one preferred, the same as for any other witness."

Certain amendments and additions have been made to the foregoing enactments for the evident purpose of increasing their effectiveness as law enforcement agencies. Thus, in 1907 the legislature of that year adopted an act providing for the appointment of a coroner's physician in counties having more than 125,000 inhabitants, and further providing that such coroner's physician should be appointed by the coroner and be removable by him; that such coroner's physician "shall make *post mortem* examinations of dead bodies and give testimony as to the same without witness fee in all inquisitions and state and county cases when called by the coroner, county or state, and shall perform such

other services in aid of the coroner as shall by him be requested." Laws 1907, ch. 35, sec. 1.

The legislature of 1915 introduced two changes to the law under consideration. By section 1, ch. 101, approved April 15, 1915, it amended section 5663, Rev. St. 1913, to read: "The coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means. When he has notice of the dead body of a person, supposed to have died by unlawful means, found or being in his county, he may in his discretion issue his warrant to a constable of his county requiring him to summon forthwith six lawful men of the county to appear before the coroner at a time and place named in the warrant."

This same legislature of 1915 enacted chapter 224 of the session laws of that year, approved March 16, 1915, providing: "On and after the first Thursday after the first Tuesday in January, 1917, the county attorney shall perform all of the duties enjoined by law upon the county coroner and the county attorney shall be the *ex officio* county coroner. * * * The county attorney may delegate to the county sheriff that part of the coroner's duties as now prescribed by statute which relate to viewing dead bodies," etc. Laws 1915, ch. 224, sec. 1.

In addition, section 71-2405, Comp. St. 1929, originally enacted in 1919 (Laws 1919, ch. 190) and thereafter amended in 1921 (Laws 1921, ch. 253) and again in 1927 (Laws 1927, ch. 166) provides, in part: "The undertaker or person in charge of the funeral of any person dying in the state of Nebraska, shall cause a certificate of death to be filled out with all the particulars contained in the standard blank adopted by the department of public welfare, and conforming to all of the requirements of the United States census bureau, including a statement of the cause of death, made by a person holding a valid license as a physician, and who was last in attendance upon the deceased; such physician is hereby made responsible for, and it shall be his duty to complete and sign in his own handwriting that part of the certificate of death entitled 'medical certificate

of death' or in cases of death where no person licensed as a physician was in attendance, the undertaker shall refer the case to the health officer for a death certificate, but if the circumstances show it possible that death was caused by neglect, violence or any unlawful means, the case shall be referred to the county attorney for investigation and certification, and he shall state the cause of death as ascertained, giving as far as possible the means or instrument which produced the death."

In 1919, by the adoption of chapter 64 of the session laws of that year, it was provided: "In counties having a population exceeding one hundred and fifty thousand people, there may be spent under the direction and control of the county attorney a sum of money not exceeding fifteen hundred dollars in any one year, to be paid out of the general fund of the county, for the employment of a detective or detectives, the same to be appointed by the county attorney at such rates of compensation per day as may be fixed by said officer, and said appointment may be revoked by him at any time."

The effect of the act (Laws 1915, ch. 224) providing that "the county attorney shall perform all of the duties enjoined by law upon the county coroner and the county attorney shall be the *ex officio* county coroner," is to incorporate in the new law the existing law defining the duties of the coroner. This act is complete within itself and the powers and duties vested in county attorneys are not judicial within the meaning of our constitutional provision but rather administrative in character. *State v. Moorhead,* 100 Neb. 298, 159 N. W. 412. The principle, "legislation by reference," has been accorded unquestioned recognition by our precedents. *Richardson v. Kildow,* 116 Neb. 648, 218 N. W. 429; *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273.

Whatever the source of their official powers, whether by direct authorization by statute or by reference to enactments already in being, they are vested in and exercisable by county attorneys as such solely by virtue of the office of which they are lawful incumbents, and without any other

warrant or appointment than that resulting from the holding of that particular office. The office of county coroner has ceased to exist, and the lawful powers, rights and duties of county attorneys are determinable, so far as the instant case is concerned, by a proper construction of all the statutory sources from which derived, certain of which we have already set out herein.

The above provisions fairly construed evidence a clear legislative intent to strengthen and reinforce the law enforcement agencies of the state by adjusting their methods to modern conditions and to the requirements of an increasing congested urban population. Thus, the county attorneys, the chief law enforcing officers of their respective counties, in turn supplant the historical coroners, to the end that more efficient service may be rendered at less cost. In addition, there is provided for the county attorney of Douglas county two official assistants, to aid him in the proper performance of his duties, a "coroner's physician" and also a "special investigator for the county attorney's office." When the importance, extent, nature and scope of the duties imposed on the office of county attorney of Douglas county are considered, the absolute necessity of this needed assistance is obvious.

Then too, in 1915 (Laws 1915, ch. 101) the same legislature which enacted the provision that the county attorney shall perform all of the duties of the county coroner amended what is now carried as section 26-1502, Comp. St. 1929, so as to make the issuance of the warrant for a jury for an official inquest a matter of discretion. The effect of this amended provision was to continue in full force the legislative mandate that upon the dead body of a person supposed to have died by unlawful means an inquest should be held by the county attorney, but that in each case the issuance of the warrant for a jury of "six lawful men" was a matter within his discretion. This change in the statutory language employed establishes by necessary implication that, the calling of the jury not being mandatory, an investigation made and inquest held by the county attorney, without the assist-

ance of a jury, is not necessarily illegal as in contravention of law. In such a case the law by fair inference contemplates an inquest and investigation by the official alone. The statutes of this state do not differentiate between inquisitions made by county attorneys with assistance of a jury and those made by him without. Neither is there any difference in the methods of investigation indicated in the two proceedings. The same circumstances that would justify an autopsy upon a dead body in one case would equally support it in the other. In certain legislative acts hereinbefore referred to, the duty of the county attorney to prosecute investigations in cases wherein the circumstances show it possible that death was caused by "neglect, violence or any unlawful means," exists, in which event he is required in his determination to state the cause of death as ascertained, giving as far as possible the means or instrument by which it was produced. It is obvious that there is but little substantial difference between the meaning of the phrase "neglect, violence or any unlawful means," as employed in the legislation last referred to, and the term "unlawful means," as used in section 26-1502, Comp. St. 1929. There is no inconsistency. It is apparent that an inquisition by a county attorney in his official capacity is entitled to the same consideration as that of a county attorney when aided by a statutory jury of "six lawful men."

We have no statute in this state which in express terms defines a lawful autopsy or the circumstances which might be said to be a condition precedent thereto. Inquests are justified when under the circumstances then existing it is necessary to determine whether a death resulted from "unlawful means." The lexicographers define the word "unlawful" as, "acting contrary to, or in defiance of, the law; disobeying or disregarding the law; of persons." Webster's New International Dictionary (2d ed.) p. 2783. While necessarily not implying the element of criminality, it is broad enough to include it.

Considering the statutory provisions involved and the public purpose of the entire proceeding, an autopsy is re-

quired and justified when necessary to determine that the cause of death of a human being who had departed this life did not involve unlawful means, and when necessary to secure the information that will enable the county attorney to fully perform the duties enjoined upon his office in reference thereto. It is in all respects a matter of public interest in which public safety is necessarily involved.

Under these conditions, the county attorney may legally order an autopsy to be made, when, in his judgment, that is the appropriate means of ascertaining the cause of death, and he may do so without consent of the family, for such power is incident to the county attorney's official duty. 13 C. J. 1250.

Jurisdiction to hold an inquest is conferred upon a county attorney by the finding and custody in his county of the body of a person who has apparently come to his death by violent, mysterious or unknown means. *Moore v. Box Butte County,* 78 Neb. 561, 111 N. W. 469.

From a careful examination of the facts disclosed by all the testimony, we conclude: That the county attorney of Douglas county had jurisdiction to hold an inquest in the present case without the intervention or assistance of a jury; that this decision as made by him was sustained by the facts within his knowledge at the time it was ordered, and constituted a reasonable exercise of the powers of his office; that the acts of his statutory assistants in connection therewith were legally performed and required by the public policy of the state.

Upon the general question of the right of public authorities to hold an inquest, and as an incident thereto to have autopsies performed, the following cases are cited: *Kingsley v. Forsyth,* 192 Minn. 468, 257 N. W. 95; *Cook v. Walley & Rollins,* 1 Colo. App. 163, 27 Pac. 950; *Rushing v. Medical College,* 4 Ga. App. 823, 62 S. E. 563; *Young v. College of Physicians and Surgeons,* 81 Md. 358, 32 Atl. 177; *Meyers v. Clarke,* 122 Ky. 866, 90 S. W. 1049, affirmed in 122 Ky. 873, 93 S. W. 43.

It appears that the coroner's physician performed the

autopsy in the instant case lawfully, by the authority of the county attorney, and in proper performance of his statutory duties. The defendant mortuary in no manner transgressed the legal duties it owed to its employer, the plaintiff herein, and the evidence in the record is wholly insufficient to establish a cause of action against it.

It follows that the judgment entered in the district court is erroneous, and it is, therefore, reversed and the cause dismissed.

REVERSED AND DISMISSED.

ISABELLE ANNABLE, APPELLEE, V. BURR C. RICEDORFF ET AL., APPELLANTS.

299 N. W. 373

FILED JULY 18, 1941. No. 31131.

1. **Wills.** "The construction of the will in such a case (in probate court) is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby." *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700.
2. **Partition.** "The district court has jurisdiction in an action of partition to construe a clause in a will determining the rights of the parties to the land under the will." *Fisher v. Fisher*, 80 Neb. 145, 113 N. W. 1004.
3. **Wills.** The second paragraph of the will of John W. Ricedorff construed, and *held* that thereunder Elizabeth Ricedorff, widow of deceased, was entitled to a life estate only in the property devised to her thereby, with power to dispose of and use the principal thereof only so far as the same might reasonably be necessary for her support, comfort and enjoyment, and that all of said property so devised remaining at the time of her death should go to and vest in Isabelle Annable and Burr C. Ricedorff, share and share alike, as tenants in common.
4. ———. The transfers by deeds of conveyance made by the widow were not necessary and proper for her support, comfort and enjoyment, and such conveyances were effective to convey her life estate only.

5. **Life Estates.** As between a life tenant and the owner of the fee, it is the duty of the former ordinarily to pay all taxes charged against the land.
6. **Partition.** In a partition action, the district court has authority to take an account of the rents and profits arising out of the premises partitioned therein.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

G. T. H. Babcock and *Charles A. Fisher,* for appellants.

R. O. Reddish, contra.

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

EBERLY, J.

This is an action in the district court for Dawes county to partition certain real estate described in the petition, and for an accounting of the rents and profits of this real estate for definite periods set up in this pleading. Isabelle Annable was plaintiff; Burr C. Ricedorff and Eileen Ricedorff, husband and wife, were defendants. It was commenced on June 28, 1939, after the death of Elizabeth Ricedorff. There was a finding and judgment in favor of the plaintiff, and from the order of the district court overruling their motion for a new trial, the defendants appeal.

It appears that John W. Ricedorff died testate on July 19, 1933, a resident of Dawes county, Nebraska, leaving surviving him, as his only heirs at law, his widow, Elizabeth Ricedorff, the plaintiff, Isabelle Annable, a daughter, and the defendant, Burr C. Ricedorff, a son. His last will is dated May 9, 1928, and was admitted to probate in the county court of Dawes county on August 12, 1933. Letters testamentary were issued to his widow, Elizabeth Ricedorff, and his son, Burr C. Ricedorff, who qualified as executrix and executor. The record presents, as the basic question, the proper construction of the second clause of the last will of John W. Ricedorff, deceased, which reads as follows: "Second. I give, devise and bequeath to my beloved wife Elizabeth Ricedorff, all my estate, real, personal and mixed

wherever located, to her own use and benefit forever; and it is my desire and wish that after her death, that all the property remaining, shall be divided equally between my son Burr and my daughter Belle."

Under the terms of the paragraph thus quoted, five separate tracts of real estate or city property, to be hereinafter described, were devised to the widow. The administration of the estate of John W. Ricedorff was in due time completed. It appears that no petition was ever filed in these probate proceedings for a construction of the will and no notice of hearing for a construction of the will in the probate court was ever given.

On December 12, 1933, Burr C. Ricedorff, one of the executors, filed a petition for distribution in this estate, in usual form, substantially alleging that the estate had been completely administered and prayed that a decree be entered assigning the residue of the estate; that notice thereof be given, and that upon such hearing on such final report the same be approved by the county court and the executors be discharged. Notice thereof was, by order of the county court, published in a legal newspaper which set forth, in substance, that the executors had filed their final account, that the petition for final settlement and discharge therein was set for hearing and would be heard on December 30, 1933, at 10 o'clock a. m., "when you may appear and contest the same." In the decree of the county court entered on such final report and petition, and after hearing, the county court determined that the final report was correct and approved the same; found that due notice was given to creditors and that no claims were filed; that there are no inheritance taxes, and that all debts of the decedent have been fully paid and satisfied; that the decedent died seised of the following described real estate: (Tract One) lot 197, Kenwood addition to Chadron; (Tract Two) lot 296 and south half of lot 295, Kenwood addition to Chadron; (Tract Three) lot 68, Kenwood addition to Chadron; (Tract Four) lot 3, block 2, North Chadron addition to Chadron; (Tract Five) lots 87 and 88, Kenwood addition to Chadron, all

situated in Dawes county, Nebraska; "that, under the last will and testament, all of the estate of the decedent, including real, personal and mixed wherever located, was bequeathed to his wife, Elizabeth Ricedorff, to her own use and benefit forever; it is the order of the court that all of said real estate as above described and any other property that may be hereafter found be assigned to the said Elizabeth Ricedorff to her own use and benefit."

It also appears that at the time John W. Ricedorff made his will, Elizabeth Ricedorff, his widow, owned and continued to own until her death testate on March 17, 1939, lot 82, Kenwood addition to Chadron. This lot 82 and the dwelling-house situated thereon constituted the homestead of John W. Ricedorff and wife, Elizabeth Ricedorff, and was so occupied by them at the time of the death of John W. Ricedorff, and thereafter his wife, Elizabeth Ricedorff, continued in the occupancy thereof until her death. She was also the owner in her own right of lot 221, Kenwood addition to Chadron, together with the dwelling thereon situated, which at the time of the trial in the district court was rented for $10 a month. In addition to the real estate last described, Elizabeth Ricedorff, at the time of her husband's death, owned $2,200 in personal property, of which there remained approximately $1,420 at the time of her death. No attempted conveyance of any of the real estate left by John W. Ricedorff had been made since the date of his death, except the following: (1) On March 21, 1934, Elizabeth Ricedorff, the widow, as grantor, executed a deed of conveyance which recited a consideration of $1 and which was duly recorded, and purported to convey "Tract One" to Burr C. Ricedorff; (2) on December 30, 1933, Elizabeth Ricedorff, as grantor, in consideration of $1, executed a deed of conveyance which purported to convey to Burr C. Ricedorff "Tract Five." Thereafter the defendant Burr C. Ricedorff sold and conveyed the property last described to one Emma V. Cooksey for $450. It also appears that the taxes on lot 197, Kenwood addition to Chadron (Tract One), occupied by a "store building," are unpaid for the years 1935-1938, in-

clusive, and at the time of the trial in the district court amounted to $239.58.

In this partition action plaintiff, as the basis of her right of action, pleaded the will of John W. Ricedorff bearing date of May 9, 1928, alleging that, "under the provisions of which he did give, devise and bequeath, all of his property, real and personal, remaining after the payment of his debts, funeral and administration expenses, to his son, the defendant Burr C. Ricedorff, and his daughter, the plaintiff Isabelle Annable, subject to the use and benefit of said property by his widow, the said Elizabeth Ricedorff, during her lifetime." Further, that by reason of the facts alleged the plaintiff, Isabelle Annable, and defendant Burr C. Ricedorff are the sole and exclusive owners in fee simple of the five tracts of land hereinbefore described, and ever since March 17, 1939, the plaintiff and said defendant have been, and now are, entitled to the use, rents, issues and profits of said property and to an accounting thereof (excepting as to Tract Five), and a partition of said estate as provided by law.

To this pleading the defendants answered, in effect, admitting the death of John W. Ricedorff and the ownership of the property at the date of death, as alleged in plaintiff's petition, and the existence and due probate of his last will are also admitted. Further, defendants allege, in effect, that the final decree entered in the John W. Ricedorff estate was in truth a valid construction of the will therein, as the county court was of competent jurisdiction to determine the nature of the title vested by the terms of such last will in the wife, Elizabeth Ricedorff, to be in the nature of a fee simple title and binding upon the plaintiff herein. This answer also set out the death of Elizabeth Ricedorff, the execution and terms of her last will, and the due admission thereof to probate.

To this answer, plaintiff filed a reply.

The district court adjudged and determined that, under the terms of the will of John W. Ricedorff, his widow, Elizabeth Ricedorff, was entitled to a life estate only in the real estate hereinbefore described, with power to dispose

of and use the principal so far as the same might be necessary and reasonable for her support, comfort and enjoyment, and that so much of said property, above described, remaining at the death of Elizabeth Ricedorff should vest in plaintiff, Isabelle Annable, and in defendant Burr C. Ricedorff, in equal shares; that Elizabeth Ricedorff, the widow, died March 17, 1939; that title to (Tract Five) lots 87 and 88, Kenwood addition to Chadron, Dawes county, Nebraska, had, through mesne conveyance, vested in an innocent purchaser, and was not subject to partition in this action.

The court further determined that it was not necessary or proper for Elizabeth Ricedorff to sell and convey any of the real estate above described for her support, comfort and enjoyment, and the conveyances made by her were effective to convey only her life estate. Upon the basis of its findings, the court determined the amounts due from the defendant Burr C. Ricedorff to the plaintiff as her undivided share because of rents and profits arising out of said estate, received and enjoyed by the defendant after the 17th day of March, 1939, and because of his failure as life tenant to pay certain taxes assessed on certain of the real estate herein involved. It was further adjudged that plaintiff was entitled to a partition and sale of said premises.

The first contention of defendants as to the force and effect of the decree of the county court entered in the matter of the estate of John W. Ricedorff, approving the final report of the executors therein, as being a decree construing the terms of the will therein and determining the nature and extent of the title devised thereby, cannot be sustained. So far as the executors are concerned, the terms of the will are clear. There is no possible question as to the property conveyed thereby. The devisee is certain. Whether the title devised is a life estate or amounts to a fee is a matter in which the executors as such in the instant case can have no interest, for it in no manner affects their actions and duties as executors. This jurisdiction was long ago committed to the doctrine: "The construction of the will in such a case (in probate court) is for the information and benefit of such

executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby." *Youngson v. Bond,* 69 Neb. 356, 95 N. W. 700. See, also, *Andersen v. Andersen,* 69 Neb. 565, 96 N. W. 276; *Fisher v. Fisher,* 80 Neb. 145, 113 N. W. 1004; *Klug v. Seegabarth,* 98 Neb. 272, 152 N. W. 385.

The matter here presented was determined in the following language in *Merrill v. Pardun,* 125 Neb. 701, 251 N. W. 834: "A county court has jurisdiction to construe wills when necessary for the benefit of the executor in carrying out the terms of the will, but has no jurisdiction to construe wills to determine rights of devisees or legatees as between themselves, and where under the terms of the will an executor can assign the property without a construction of the will and does not request such construction, the court has no authority to bind the heirs or legatees by any construction."

The conclusion is inescapable that the decree in the county court approving the final report of the executors and directing distribution is not a determination of the respective rights of the devisees under the terms of the will.

We are, on the contrary, committed to the view that the district court has jurisdiction in an action of partition to construe a clause in a will determining the rights of the parties. *Fisher v. Fisher,* 80 Neb. 145, 113 N. W. 1004; *Mohr v. Harder,* 103 Neb. 545, 172 N. W. 753; *Krause v. Krause,* 113 Neb. 22, 201 N. W. 670.

We now recur to the question of the proper construction of the second paragraph of the will of John W. Ricedorff. The part of this paragraph which is determinative of the matter here in suit is the last clause thereof, which is as follows: "And it is my desire and wish that after her (Elizabeth Ricedorff's) death, that all the property remaining, shall be divided equally between my son Burr (Burr C.

Ricedorff) and my daughter Belle (Isabelle Annable)." In this state, under the facts here presented, the following statutory provision is applicable and controlling: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties, so far as such intent can be collected, from the whole instrument, and so far as such intent is consistent with the rules of law." Comp. St. 1929, sec. 76-109.

It is to be observed that the term "forever," as used in paragraph 2 of this will, is not a technical term, and its influence and intendment are determined by its context. *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299; *Den ex dem. Ewan v. Cox*, 4 Halst. (N. J. Law) 10.

Construing the controlling words of paragraph 2 of the will under consideration, above quoted, in view of everything expressed within the four corners of this instrument, the relations between the parties and their respective financial situations so far as reflected by the evidence, and in the light of all the facts and circumstances disclosed by the proof, we find and hold that it was the intent of the testator that the words "and it is my desire and wish that after her death, that all the property remaining, shall be divided," etc., should be and they are effective to create a precatory trust, and that, under the terms of the will, Elizabeth Ricedorff, the widow of deceased, was entitled to a life estate only in the property devised to her thereby, with power to dispose of and use the principal thereof only so far as the same might be reasonably necessary for her support, comfort and enjoyment, and that all of said property so devised to Elizabeth Ricedorff remaining at the time of her death should go to and vest in Isabelle Annable, plaintiff herein, and Burr C. Ricedorff, defendant, share and share alike, as tenants in common, and that a trust will be enforced in said remainder in favor of the devisees last named.

It further appears that the provisions of the will of John W. Ricedorff do not authorize Elizabeth Ricedorff, his widow,

to make a gift of his realty, and such transfers made by her are void. *Graff v. Graff*, 136 Neb. 543, 286 N. W. 788.

The transfers by deeds of conveyance hereinbefore made by the widow to the defendant (Burr C. Ricedorff) herein were not necessary and proper for her support, comfort and enjoyment, and such conveyances were effective to convey her life estate only. It also appears that, as between the life tenant and the owner of the fee, it is the duty of the former to pay all taxes charged against the land. *Spiech v. Tierney*, 56 Neb. 514, 76 N. W. 1090; *Disher v. Disher*, 45 Neb. 100, 63 N. W. 368; *Saffer v. Saffer*, 133 Neb. 528, 274 N. W. 479.

We are also committed to the view that in a partition action the district court has authority to take an account of rents and profits. 20 R. C. L. 734, sec. 16.

It also appears that in this partition action the life tenant, Burr C. Ricedorff, is not entitled, as against the other legatees, to compensation for repairs and betterment upon the land made by him during the life of Elizabeth Ricedorff, and while he was in possession of the premises pursuant to a conveyance by Elizabeth Ricedorff as owner of the life estate therein.

A careful examination of the final decree of the district court appealed from herein, and the proof in the record, discloses that such decree was entered in harmony with the principles of law approved in this opinion, and is amply supported by the evidence presented to the trial court.

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

AFFIRMED.

MABEL A. YORKE, APPELLEE, V. ELDRED SEDDON ET AL., APPELLANTS.

299 N. W. 333

FILED JULY 18, 1941. No. 31049.

Appeal. It is prejudicial error for the trial court to fail to instruct on the issue of contributory negligence when raised by the pleadings and supported by the evidence.

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

Baylor, Tou Velle & Healey and *Kirkpatrick & Dougherty,* for appellants.

Sterling F. Mutz, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

PAINE, J.

This is an action brought for personal injuries suffered in a collision between a Dodge coupé and a gasoline transport. The jury returned a verdict for $750.28. Motion for new trial was overruled. Defendants appeal.

The plaintiff, Mabel A. Yorke, a minor, by Calvin Yorke, her father and next friend, brought suit against Eldred Seddon and Egan Kastrup, alleging in the amended petition that Egan Kastrup was the owner of the gasoline transport, and that Eldred Seddon was his employee, and the driver of the transport at the time of the accident. Plaintiff alleged that she was a passenger in a 1939 Dodge coupé being driven by Raymond I. Pierson, Jr., north on highway No. 76, at a point nine and one-half miles north of Exeter in York county on the afternoon of March 5, 1939, and that suddenly and without warning the gasoline transport turned to the east half of said graveled highway and collided with the Dodge coupé, inflicting serious injuries upon the plaintiff.

Plaintiff charges as acts of negligence that Eldred Seddon was negligently operating his transport on the left side of the highway, being in the line of traffic of the Dodge coupé; that he did not sound his horn or signal with his hand before turning sharply to the left in their line of traffic; that he attempted to turn across the highway in a place other than at an intersection; that he had operated the transport in violation of the laws of Nebraska in driving it upon the left side of the highway.

It is further alleged that, as a result of the collision, plain-

tiff was thrown more than 30 feet from the Dodge coupé, and sustained a twisted back, injuries to neck and limbs, internal injuries to kidney, liver and diaphragm, and suffered intense pain and agony.

The defendants for answer to the petition allege that Raymond I. Pierson, Jr., driver of the car, and plaintiff were guilty of contributory negligence which contributed to the collision; that the careless and negligent acts of Raymond I. Pierson, Jr., were that he was under the influence of intoxicating liquor, that he did not maintain a lookout for the approach of automobiles, that he drove the Dodge coupé on the wrong side of the highway, that he failed to yield the right of way, and failed to stop the Dodge coupé before colliding with the transport; that the plaintiff rode in the Dodge coupé when she knew, or should have known, that said Pierson had drunk liquor and was incapable of managing and controlling the car; that plaintiff failed to see the gasoline transport, or, if she did see it, she failed to warn Pierson of it.

In brief, the evidence discloses that the accident in question happened on Sunday, March 5, 1939, at about 6 o'clock p. m., on a clear, cold day; that plaintiff started from Lincoln with Pierson to go to Harvard to visit a friend and bring her back to Lincoln; that Pierson drove his Dodge coupé to Exeter, at which point he left highway No. 6, and turned off to highway No. 76; that he went into a farmer's house and inquired the way to Seward; that the accident occurred five or six miles beyond this farmer's home; that the graveled road was 24 feet wide at the place of the accident.

There was a slight ridge of gravel along the side of the graveled portion of the road, and there was a light fall of snow on the ground. The evidence disclosed that the gasoline transport was going south at about 35 miles an hour and the coupé was going north at about 30 to 35 miles an hour. It was also testified that as the coupé came over the top of a little hill it was traveling about in the center of the road; that the driver took his eyes from the road for a

moment and looked down into the interior of the car, swerving slightly to the left-hand side of the road, but immediately afterwards turned back on the right, or east, side of the road, and the plaintiff testified that he never again drove over the center line, but she said that the transport just before the collision suddenly turned over to the east side of the center line and struck the left front end of the coupé head-on.

The testimony further shows that at the time of the collision the coupé was at least two feet over on the east side of the center line of the road at the place it should be; that after the collision both vehicles stopped with their wheels in the ditch on the east side of the road; that the marks in the road showed that the brakes were applied on the transport before it started to turn off to the east side of the road; that the place where the coupé momentarily went over the middle line to the west side of the road, as it came over the hill, was distant about 110 feet from the transport. As the result of the collision, Pierson was thrown under the wheels of the transport and instantly killed.

Eldred Seddon, a young man 25 years of age, who was driving the transport, differs with this statement of facts, and testifies that he first saw the coupé about a quarter of a mile away; that just as it came over the hill it made the slight swing to the west, as plaintiff says, and then gradually swung back to its side of the road, and so continued until it was about 120 feet from the transport, when it headed directly for the transport; that he immediately headed the transport toward the east, or wrong, side of the road, when the coupé suddenly turned back toward the east, and he admits that the vehicles came together on the east side of the center line of the road.

The defendants' main defense was that Pierson was intoxicated, and they produced several witnesses on that issue. Chester Collins testified that before leaving town Pierson came into the hamburger stand where Collins was working; that he fell off the stool at the counter; that he ordered five sandwiches, took a bite out of one, left them

there on the counter, had difficulty picking up his change from the floor, started the wrong way when he went out the door, and then turned and went back the other way to his car; that he had difficulty in walking, was weak on his feet, that his eyes were bloodshot and face flushed, and in the opinion of the witness he was intoxicated. On cross-examination it was brought out that they had an argument in the hamburger stand, and Collins refused to cash a check for Pierson, and that Pierson got rough and used strong language; that Collins did not see any liquor, and Pierson did not drink any liquor when he was in the hamburger stand.

Robert VanBoskirk, of Lincoln, a certified public accountant, 45 years old, testified that he was driving toward Fairmont on highway No. 6 with his family, and followed the tan-colored Dodge coupé driven by Raymond I. Pierson, Jr., for a mile or two; that it was between 5:00 and 5:30 p. m. on March 5, 1939; that the coupé wobbled from one side of the road to the other, and went off both shoulders, and as it went off on the sides the mud splashed up.

Mrs. Leo R. Koehn testified that she lived on a farm two and one-quarter miles north of Exeter on highway No. 76; that on the Sunday evening in question she was in the kitchen getting supper, and Pierson frightened her by walking into the kitchen without knocking, and asked her the road to Seward. She testified that he did not seem to have control of his feet; that he could hardly walk; that he kept shuffling around; that he talked thick; that in her opinion Pierson was intoxicated.

Leo R. Koehn, her husband, was standing on the north side of the house, talking with Edgar W. James, at the time, and he testified that Pierson did not walk very well, and was not capable of driving a car.

Edgar W. James testified that he lived five miles north of Exeter; that between 5 and 6 o'clock he was at the farm home of Mr. Koehn; that he saw a man staggering toward the car and get into it and drive off fast, and he followed him for a way, but he got behind because the

driver of the coupé ran it between 45 and 50 miles an hour.

The plaintiff, in opposition to this testimony, called Mrs. J. M. Taylor, who resides with her husband and three small children in Lincoln. She testified that she had known Raymond I. Pierson, Jr., and Mabel Yorke since October, 1938; that they had stayed at her home the Saturday night before the accident; that Pierson slept on the studio couch in the living-room; that about 8:30 Sunday morning Pierson took Mabel Yorke to her home and came back for breakfast and stayed to lunch; that Pierson left her home between 1:30 and 2:15 that afternoon; that he had played out in the snow with the children, making a snow man; that Saturday night all of them had a little beer, rye bread and cheese for a lunch; that that was all that she saw Pierson drink; that he did not have any intoxicating liquor Sunday morning, did not drink any, and did not have any in his pocket that she saw; that he was normal and very happy when he left there Sunday after lunch, and he was going to pick up Mabel and go to Harvard.

Mrs. Taylor also testified that at some preceding time, she had understood, Pierson had had some personal injuries which caused him to walk in a shuffling manner. She said: "I would say it was a very peculiar walk, what one would call a drunken sailor walk." She said that he always walked that way except when he was dancing.

Plaintiff testified that she was 18 years of age at the time of the accident; that her home was near Clearwater, Antelope county, Nebraska, where her father was a farmer; that at the time of the accident she was taking home economics in the Nebraska College of Agriculture; that Pierson's nickname was "Bus;" that he was about five feet three inches tall; that she had kept company with him from September, 1938, and that they were engaged to be married; that he bought this tan-colored Dodge coupé in the fall of 1938, and that they went riding together frequently; that a student living at the same house, whose home was in Harvard, Nebraska, had gone home on Friday for the week-

end, and invited her out to spend Sunday evening at her home at Harvard, and Pierson offered to take her out.

On the day of the accident, she testified, Pierson called for her in the afternoon, then drove to a hamburger stand on North Twelfth street, got some hamburgers, and they were gone before they started out; that they then drove to a filling station at Sixteenth and N streets, where he bought gasoline, and then drove out on highway No. 6, without stopping until they reached Exeter, at a speed of 30 to 35 miles an hour. He stopped at a filling station at Exeter and got a little more gas, and then stopped at a café in Exeter to get some cigarettes, and then turned north on highway No. 76. He stopped at a farmhouse north of Exeter, and was going north on No. 76 when the collision occurred. Mabel Yorke was recalled on rebuttal, and testified that from the time he called for her Sunday afternoon until the accident occurred he did not drink; that she never saw any intoxicating liquor at all, either in the car or any place; that the last liquor that she saw him drink of any kind was a little beer with the lunch on Saturday night at Mrs. Taylor's.

Eldred Seddon, defendant and driver of the transport, testified he first saw the coupé when it was coming over a hill about a quarter of a mile away, and as it came over the hill the coupé made a slight swing to the west side of the road; gradually swinging back to the east side of the road, it continued on that side until it was about 120 or 130 feet away from the transport, when it headed right for the transport, and the speed of the coupé was not less than 40 and the speed of the transport was 30 to 35 miles an hour; that when the witness turned the transport toward the east the coupé was headed right toward him, but after the transport had turned, the coupé suddenly turned back toward the east, and the vehicles came together a little east of the middle of the road.

Sheriff Brock, of York county, also testified to the tracks made by the two vehicles, and furnished a chart as an exhibit.

Several answers of the plaintiff on cross-examination are as follows: "Q. Did you attempt to warn Mr. Pierson of the approach of the transport? A. No. * * * Q. Well then you don't know where it was that Mr. Pierson turned the car back toward the east side of the road, do you? A. Not definitely, no. * * * Q. The reason you can't state the distance is because you were not paying attention to the driving? A. I wasn't, no. Q. And, of course, you don't know whether Mr. Pierson was paying strict attention, do you? A. Not definitely. Q. Not definitely, is that your answer? A. Yes."

With this evidence the trial court gave instruction No. 16, reading as follows: "You are instructed that it is unlawful for a person to drive and operate an automobile upon the highways of this state while under the influence of intoxicating liquors, and if you find from a preponderance of the evidence that Raymond I. Pierson, Jr., while driving and operating his Dodge automobile, in which plaintiff was riding as a passenger, at and prior to the time of the collision between said motor vehicles, had been drinking intoxicating liquors, and was under the influence thereof to such an extent that it interfered with his operation of said automobile, then you will take the fact that he was so under the influence of intoxicating liquor in consideration in determining whether he was guilty of any of the act or acts of negligence as alleged in defendants' answer and set out in Instruction No. 2 hereof, and whether such negligent act or acts were the proximate cause of the collision between said motor vehicles, and if you find such act or acts of negligence were the proximate cause of said collision between said motor vehicles, then your finding and verdict should be for the defendants."

In this instruction it is clear that the trial judge instructed the jury that, if they found that Pierson was under the influence of intoxicating liquor, and found that this was the proximate cause of the collision, then their verdict should be for the defendant.

Defendants insist that the court failed to submit the

issue of plaintiff's contributory negligence, even though defendants did not request that one be given, and ask for a reversal because of that fact. It is insisted that plaintiff did not utter a protest, or warn the driver of her car, was not watching the road, and that this negligence on her part prevents a recovery, for the standard of duty of an invited guest is the same as the driver's.

The plaintiff insists that it is error to submit the issue of contributory negligence when the evidence is insufficient to show that plaintiff was guilty of such negligence. *Blank v. Omaha & C. B. Street R. Co.,* 137 Neb. 632, 290 N. W. 464.

In the answer it was positively alleged that the careless and negligent acts of the plaintiff were the proximate cause of said collision and damage. The evidence of the defendants tended to support this charge of contributory negligence on the part of the plaintiff, and in *Hackbart v. Rohrig,* 136 Neb. 825, 287 N. W. 665, this court said: "It is the duty of the court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested so to do or not." See, also, *McGrath v. Nugent,* 133 Neb. 237, 274 N. W. 549; *McCulley v. Anderson,* 119 Neb. 105, 227 N. W. 321.

In the opinion of the court, the trial court erred in failing to submit to the jury an instruction on the issue of contributory negligence of the plaintiff.

REVERSED.

TRAVELERS INSURANCE COMPANY, APPELLANT, V. SUSAN L. THOMPSON: IRWIN L. THOMPSON ET AL., APPELLEES.
299 N. W. 329

FILED JULY 18, 1941. No. 31127.

1. **Judicial Sales.** "A person by becoming a purchaser at a judicial sale, becomes a party thereto, and may both be compelled to complete his purchase, and is entitled of right to an order directing the sheriff to make the deed." *Phillips v. Dawley,* 1 Neb. 320.
2. **Mortgages.** By the acceptance of his bid, a bidder becomes sub-

ject to the jurisdiction of the court and concluded by its orders, and he may be required and compelled to perform his bid; and if a purchaser fails to comply with his bid, a resale may be ordered at his risk and he be held for a loss if the resale is for a less amount.

APPEAL from the district court for Cuming county: CHARLES H. STEWART, JUDGE. *Reversed, with directions.*

Chatt & Ellenberger, for appellant.

Spillman & Ptak, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

PAINE, J.

Farm property was bid in at a foreclosure sale for $26,000 by the defendants, who are appellees, and they thereupon paid the sheriff $200 as partial payment on said purchase. Upon failure to complete the purchase, a second sale was held, at which the plaintiff and appellant bid $15,200, which was confirmed and deed ordered. This amount was $962.04 less than the amount due on plaintiff's first mortgage, and the costs of the second sale were $22.70 in addition to the loss. Thereupon, plaintiff filed a motion asking judgment against defendants for the loss suffered by defendants' failure to go through with their bid at the first sale.

The trial court entered a judgment for plaintiff in the sum of $200 and costs, and directed the sheriff to pay to plaintiff the sum of $200, which defendants had paid in at the time they were the successful bidders at the first foreclosure sale. From this judgment, plaintiff appeals.

The pleadings and bill of exceptions show that the Travelers Insurance Company, as plaintiff, secured a decree on June 9, 1937, finding that the amount due upon its mortgage was $14,177.48, with interest at 10 per cent. from the date of the decree, and the plaintiff was given a first lien upon the northwest quarter of section 17, township 21, range 7, in Cuming county, Nebraska, and the decree provided that, if the defendants failed to pay the amount due

within 20 days, the sheriff should sell said real estate to pay the amount due.

A request for nine months' stay was filed by Susan L. Thompson, Kate High, Irwin L. Thompson, Thompson Cattle Company, a copartnership, Victor Thompson and Caleb Thompson on June 29, 1937.

On April 11, 1938, an additional decree was entered, showing that a $3,000 note had been given to I. Sibbernsen, secured by a second mortgage, which note and mortgage were sold and assigned to John J. Sullivan, who died February 17, 1926, and Kate L. Sullivan assigned the same to V. E. Thompson, and the court found there was due the sum of $4,833.33 thereon.

On April 11, 1938, a decree was also entered in favor of Irwin L. Thompson in the sum of $9,666, with interest at 10 per cent., the same being a third lien upon said real estate.

The first order of sale was issued on March 16, 1938, and the first sale was held on April 18, 1938. Attorney Ellenberger made a bid for the plaintiff, and just before the sale closed the sheriff testified that attorney Beckenhauer, acting for the defendants Irwin L. Thompson and Victor Thompson, bid $26,000, and they were the successful bidders. They paid $200 at that time into the hands of the sheriff of Cuming county as a part payment on their bid.

The successful bidders having failed to comply with their bid, plaintiff filed motion on May 11, 1938, the conclusion thereof reading as follows: "Wherefore, plaintiff moves the court to enter a conditional order of confirmation in this case, providing that said confirmation shall become absolute only upon satisfaction by defendants of their bid on or before a day certain, to be fixed by the court, not to exceed twenty days from the date of hearing upon this motion, and that if the defendants fail to comply with and satisfy their bid within the time fixed by the order of the court, that said real estate shall be again advertised and sold by the sheriff of Cuming county, Nebraska, at the cost, expense and risk of the defendants, Irwin L. Thompson and Victor Thompson, and that plaintiff have judgment against said defendants

for any deficiency which may result in case said real estate at a resale fail to bring a price sufficiently great to satisfy the amount of plaintiff's decree with interest and costs of this action."

Upon hearing this motion, the trial judge issued an order in pursuance thereof. On July 6, 1938, defendants asked for additional time to comply with their bid.

On July 12, 1938, an alias order of sale was issued, and the second sale held August 15, 1938, at which sale plaintiff was the successful bidder at $15,200, and sale was confirmed October 3, 1938, after objections thereto had been overruled.

Plaintiff thereupon filed motion, in which all of the pleadings and steps taken therein were reviewed, and judgment against defendants was prayed in the sum of $984.74.

Trial was had upon the issues, and the matter was taken under advisement for some time, and on September 3, 1940, the court entered judgment for plaintiff in the sum of $200 and costs, from which plaintiff appeals.

The general law covering the questions was stated very early by Chief Justice Mason: "A person by becoming a purchaser at a judicial sale, becomes a party thereto, and may both be compelled to complete his purchase, and is entitled of right to an order directing the sheriff to make the deed." *Phillips v. Dawley*, 1 Neb. 320.

Now, the question presented is: Did the court have the power to order a resale, and hold the bidder at the first sale for the loss and expense suffered by the resale?

A case very closely in point is that of *Rife v. Swanson*, 109 Neb. 814, 192 N. W. 498. Judge Letton wrote the opinion, and the syllabus reads as follows: "A sale under foreclosure was made on March 24, 1921. The sale was confirmed on June 3, 1921. The purchaser failed to pay the purchase price, and, on motion filed July 11, the court on July 12, the purchaser being in court by his attorneys, ordered that the confirmation and sale be set aside, and a resale ordered at the purchaser's risk and loss in case the real estate sold for less at the resale than the amount of the

bid. The purchaser appeals merely from that part of the order which directs the resale to be at his risk. *Held,* that the order of the district court was justified, and that under the circumstances it was unnecessary to issue an order to show cause before setting aside the sale."

This case appears to have been cited but once in the many years since it was released, and that was in a tax foreclosure case of *Dawson County v. Whaley,* 134 Neb. 509, 279 N. W. 164, and reaffirming the law to be as follows: "For, by the acceptance of his bid, the bidder becomes subject to the jurisdiction of the court and concluded by its orders, and he may be required and compelled to perform his bid; and it has been held that, if a purchaser fails to comply with his bid, a resale may be ordered at his risk and he be held for a loss if the resale is for a less amount." See, also, *Gregory v. Tingley,* 18 Neb. 318, 25 N. W. 88; *Penn Mutual Life Ins. Co. v. Creighton Theatre Bldg. Co.,* 51 Neb. 659, 71 N. W. 279.

"At a sale under order of court for the benefit of creditors, the sale to be for 'cash in hand,' C.'s bid was accepted, but, instead of paying cash, he offered a contract between himself and certain of the creditors, whereby he was to buy the land, apply their claims in payment of the price, and hold the land as trustee. The sale was reported, and the court offered to confirm it, provided C. would pay the amount of his bid in cash. This he refused to do, relying upon his contract with the creditors, whereupon the court ordered a resale, and subsequently entered a decree against C. for the deficiency between his bid and the proceeds of the resale, and for the extra costs. *Held,* that a formal confirmation of the sale to C. was not necessary in order to fix his liability for the deficiency." *Camden v. Mayhew,* 9 S. Ct. 246 (129 U. S. 73).

The approved procedure is concisely set out in 31 Am. Jur. 540, sec. 257, where it is said: "Where the resale has been lawfully ordered and duly conducted, the defaulting purchaser incurs a liability for any difference between the sum at which he had agreed to buy the property at the first sale

and the amount that it actually brings at the resale, together with the costs and expenses of the resale."

The question presented, of whether it was proper to proceed in the same foreclosure case by a motion, as was done in the case at bar, is answered by the part of the paragraph immediately following that quoted above, and which reads: "It is not necessary that such liability be ascertained and enforced by an original, independent action, but the purchaser may be proceeded against in the same suit by rule, or in any other mode devised by the court that will enable him to meet the issue as to his liability. In fact, such an action will not be maintained where relief can be obtained in the pending action, although it may be after the latter is closed by a final judgment."

We will now examine the contentions of the defendants which led the trial court to refuse to render a judgment for a greater sum than the $200 already paid into court by the defendants.

Defendants cite the case of *Shelby v. Platte Valley Public Power and Irrigation District*, 134 Neb. 354, 278 N. W. 568: "Equity will not aid one whose conduct connected with the controversy has been unconscientious or unfair." To support the application of this principle, the defendants urge that they endeavored, a few days before the first sale was held, to get the plaintiff to refinance the first mortgage in case they bid in the property, and just two days before the sale they received a letter on the stationery of the Travelers Insurance Company, showing the writer to be manager of the "Mortgage Loan Division," and this exhibit No. 20 reads as follows, omitting the printed letterhead:

"Omaha, Neb. April 16, 1938

(Copy of Ex. 20 WRE)
"Mr. Victor Thompson,
"West Point, Nebraska

"Re: 37941—Thompson—Cuming County

"Dear Mr. Thompson:

"I submitted to the Home Office your proposition, and this morning received a reply which, while not entirely

favorable, is not entirely unfavorable. I am again writing them and recommending that they accept the proposition as we discussed it and have requested that they wire approval or rejection so that we will receive it Monday. If I hear from them I will immediately contact you by telephone or wire.

"I am convinced in my own mind that the best thing for you to do is to let this property sell, as I feel sure that we can work out a proposition that will be mutually favorable for all parties concerned. The delinquencies are large, we are working at a long distance, and it does take a little time to put the matter over, for the reason that the loss the Company would agree to accept is considerable and we are all of the opinion that the property eventually will be worth the full amount of the loan and accumulations.

"Yours very truly,
"(Signed) E. P. Gaines, Manager."

Victor Thompson, defendant, testified that after the first sale he went to Omaha to make arrangements to renew the mortgage indebtedness and "finish up the deal as we had outlined it." When he saw Mr. Gaines, Mr. Gaines said: "There is just nothing we can do about that now. The ship's gone. * * * We have decided not to renew the mortgage and we are going to have to put the farm up and resell it."

Mr. Thompson further testified that he tried to borrow the full amount of the plaintiff's lien from the Federal Land Bank and two other loan agencies, but that he did not have time enough for the loan to be completed.

Defendants argued to the trial court and to this court that a bidder's liability for not complying with his bid is not an absolute liability, and they claim that the theme running through these cases is that the purchaser must be in good faith and must intend to comply with his bid. He is liable only when he unjustifiably refuses to complete his bid, and he will be excused from completing his contract for any cause that renders it unjust or unconscientious to insist upon its performance.

This court sees no promise in exhibit No. 20, received

before the bid was placed, to justify calling the business procedure of the plaintiff unfair and unconscientious. The trial court gave defendants 30 days in which to comply with their bid, or an alias order of sale would issue.

We fail to see any legal grounds for failing to enter a judgment for the plaintiff's loss of $984.74, and the judgment is reversed, with instructions to enter a judgment as prayed.

REVERSED.

WILLIAM G. POTARD V. STATE OF NEBRASKA.
299 N. W. 362

FILED JULY 18, 1941. No. 31133.

1. **False Pretenses.** One of the elements of the crime of obtaining money by false pretenses is that the false pretense must be a misrepresentation of a past event or existing fact which was relied upon by a party defrauded.
2. ———. When there is sufficient evidence adduced to sustain this necessary element of the crime, the issue is for the jury, even though false representations as to future transactions were made and relied on by the person alleged to have been defrauded.
3. **Criminal Law.** The giving of an instruction in the trial of a criminal case which in effect peremptorily directs the jury to return a verdict when a disagreement by the jury is imminent is a form of importunity and coercion which invades the province of the jury and constitutes an invasion of defendant's constitutional right to a speedy, public trial by an impartial jury.

ERROR to the district court for Johnson county: VIRGIL FALLOON, JUDGE. *Reversed.*

Harry K. Livingston, for plaintiff in error.

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

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

CARTER, J.

Plaintiff in error was convicted for having obtained the

sum of $1,250 from Harry Armknecht by false pretenses, and was sentenced to serve from one to two years in the state penitentiary. From this conviction and sentence plaintiff in error appeals.

The evidence shows that on June 10, 1939, William G. Potard, the plaintiff in error, called on Armknecht and told him that he had a house bought in Falls City for $1,250 and that he had a buyer who would pay $1,550 for it. He asked Armknecht to loan him the money so he could carry out the deal, and as an inducement agreed to divide the profits when the transaction was completed, which was to be within thirty days. The money was borrowed at a bank and delivered to Potard. The evidence is sufficient to sustain a finding that the facts represented to Armknecht were not true and that he relied upon them as true in making the loan. The defendant admits receiving the money. He says he lost it in the following manner: That he was riding in a car in Kansas City with one Burke, a stranger, that he turned the money over to Burke to procure a deed to a certain piece of property, and that Burke absconded with the money. The jury were, of course, the ones to pass upon the credibility of the witness and the reasonableness and likelihood of his story.

Plaintiff in error contends for the application of the rule that, to constitute the crime of obtaining money under false pretenses, the pretense or pretenses relied upon must relate to a past event or an existing fact and not upon any representation in relation to a future transaction, however false and fraudulent it may be. This is the correct rule to be applied to cases of this character. In the instant case there were representations made to Armknecht, relating to existing facts which were shown to be untrue, and relied upon by him. This is sufficient to meet the requirements of the statute. See Comp. St. 1929, sec. 28-1207. Plaintiff in error contends that the record shows that Armknecht relied only upon representations made as to future transactions. It is true that when Armknecht was asked why he turned this money over to Potard, he replied: "Well, he promised he

would split the commission with me, which amounted to one hundred and fifty dollars apiece."

When the necessary elements of the crime are sustained by evidence, the question of the intent with which the transaction was carried on is usually one for the jury to determine after a consideration of all the facts and circumstances. The fact that additional representations may have been made relating to future transactions are material only as circumstances to be considered by the jury in determining the question of intent. Every case of this character is usually accompanied by grandiose promises and assertions of great benefits to be derived in the future as an inducement to the completion of the fraud. Such promises and assertions cannot form the basis for a prosecution for obtaining money under false pretenses, but if there be evidence in the record of the misrepresentation of a past event or present fact, relied upon by the person alleged to have been defrauded, the issue is still one for the jury.

Plaintiff in error contends that the trial court committed reversible error in giving the following instruction after the jury had deliberated for more than 19 hours:

"This case has been submitted to you on instructions which I think are clear and point out the issue for you to determine. You have been given two forms of verdict, one of guilt and one of not guilty. It is your duty to return a verdict. The court does not intimate to you in the slightest degree what your verdict shall be. You should return one of these verdicts. Which one is for you to say.

"Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, yet in order to bring twelve minds to an unanimous result, you must examine the evidence guided by the instructions carefully, with candor and a proper regard and deference to the opinons of each other. You should consider that you are selected in the same manner and from the same source from which any further jury must be and there is no reason to suppose that the case will ever be submitted to 12 men more intelligent, more impartial or more competent to decide

the issue or that more or clearer evidence will be produced on one side or the other. And with this view, it is your duty to decide the case if you can conscientiously do so. You have taken an oath to try this case under the evidence and instructions of the court and you should see you do your full duty thereunder.

"Read the instructions carefully again, discuss the evidence among yourselves with open minds and see if some agreement cannot be reached. Will you not try and reach a verdict."

We are of the opinion that the giving of this instruction is prejudicial error. The only purpose that can be gleaned from it is that the trial court was peremptorily directing an agreement. In this the court invades and trespasses upon the province of the jury. The defendant in a criminal case is entitled to an acquittal unless each of the twelve men on the jury is convinced beyond a reasonable doubt of the guilt of the defendant without being importuned or coerced by the trial court. The defendant is entitled to the benefit of a disagreement by the jury. The very fact that each member of the jury must be convinced beyond a reasonable doubt of the guilt of the defendant before a conviction can be had evidences the fact that jurors who are not convinced beyond a reasonable doubt of the guilt of the defendant are obligated to sustain their convictions, even if a disagreement is the result. Of course, verdicts ought to be agreed upon if possible. On the other hand, a disagreement may result because of the very oath taken by a juror as it may be the only way that his reasonable doubt may be manifested. In such a case, disagreement of the jury is a protecting right to which a defendant is entitled.

The attempt of the court in this instruction to absolve himself from any intent to press or coerce a verdict is of no avail. The prestige of a trial court with the ordinary jury is well known. Any attempt by the court to encourage a verdict will be seized upon by the majority as a coercive argument against the minority, especially if the minority be small. Such a situation does not meet the constitutional

requirements of a speedy, public trial by an impartial jury. *Sharp v. State*, 115 Neb. 737, 214 N. W. 643; *State v. Clark*, 38 Nev. 304, 149 Pac. 185; *State v. Campbell*, 166 Mo. App. 589, 149 S. W. 1173.

As we have said, the only purpose of such an instruction is to encourage or coerce the jury into arriving at a verdict. If the instruction does not accomplish that purpose, there is utterly no reason for giving it. If it does accomplish that purpose, then it is clearly an invasion of the rights of the jury, and the defendant has been deprived of his right to a speedy, public and impartial trial. The law contemplates that, when the jury have heard the evidence and have been instructed by the court as to the law, they understand the character and nature of their duty.

We realize that cases exist which hold that, if there be no hint of rebuke or importunity on the part of the trial court, that such an instruction is not erroneous, but we think the better rule to be that it is error to give such an instruction, no matter how effectively its real purpose may be concealed by the method of expression used.

The verdict and judgment are reversed and the cause remanded for a new trial.

REVERSED.

HILMA M. WELSH, APPELLANT, V. CITY OF ST. PAUL, APPELLEE.

299 N. W. 336

FILED JULY 18, 1941. No. 31111.

1. **Appeal.** "Where an instruction is given upon an issue submitted to the jury at the request of a party to a suit, he will not be heard to say that there was no evidence upon which to base the instruction." *Wortman v. Zimmerman*, 119 Neb. 682, 230 N. W. 588.
2. ———. The court will not search the record to determine whether or not issues presented by certain instructions are proper questions for the jury, unless the instructions complained of are set forth in appellant's errors relied upon for reversal.

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

Dobry & Dobry, B. J. Cunningham and *W. P. Lauritsen,* for appellant.

R. A. Haggart, W. F. Spikes and *Harold A. Prince, contra.*

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

MESSMORE, J.

This is an action for damages for personal injuries sustained by plaintiff while riding with her husband, when the automobile which he was driving struck a manhole located in the center and protruding above the level of the street. The cause was submitted to a jury, resulting in a verdict for the defendant. Plaintiff appeals.

Plaintiff's petition sets out that the manhole was in the center of the street, protruding above the street level, and was not properly maintained, but negligently permitted to remain in a dangerous position, when the proper officials of the city (a city of the second class) did know, or should have known, of the dangerous and defective condition of the street. The answer contains a general denial, and an affirmative allegation that the negligent conduct of the plaintiff's husband in operating the automobile was the proximate cause of plaintiff's injuries. Other allegations of the answer need not be stated. The reply is a general denial. The record discloses:

Plaintiff and her husband, living two and one-half miles north of Dannebrog, Nebraska, on the night of May 6, 1939, were proceeding to Grand Island, accompanied by four friends, in a 1937 Oldsmobile, owned and driven by plaintiff's husband, to attend a dance. The night was dark and foggy. Between 10 and 10:15 o'clock, the car, with good headlights burning and brakes in perfect condition, and while being driven at 15 to 20 miles an hour down the center of a street in St. Paul, with no other cars approaching, struck the cover of a manhole, which protruded four or five

inches or more above the level of the street and which extended into the ground some 10 or 12 inches, with sufficient force to move it off its base. The car stopped suddenly, moving two or three feet; the manhole casting caught under the housing of the car, bending it underneath and breaking the housing. The frame was sprung and bent about one-third of the way back of the car. On each side of the manhole were traveled tracks, with the main-traveled track on the south side. The center of the road on which the car was being driven was a high crown, sloping down on each side. The driver was going down the center of the road and had straddled the manhole cover. Occupants of the car, residents of St. Paul, knew the manhole was there, but did not mention it to the driver.

There was some controversy about the amount of rainfall on the particular day. The weather bureau statistics placed the amount at .87 of an inch during the day and .24 of an inch at 9 o'clock in the evening. This testimony was elicited because plaintiff's witnesses testified as to clods of dirt immediately under the front part of the car when it was raised, and other witnesses testified about the tracks where the driver applied his brakes. This was denied by plaintiff. The manhole had been maintained by scraping about four inches of dirt around it once or twice during the summer, and one of the employees who had maintained it in this manner testified that he had talked to the city road commissioner about lowering it. It had been so maintained a week previously, and the blade of the maintainer was raised in order to get it over the manhole. The exhibits disclose a muddy condition of the road. The manhole stands near the summit of a slope; the street falls away to the east, and dirt is washed down on the pavement at the intersection to a depth of one to one and one-half inches. The foregoing constitutes the pertinent evidence upon which the case was submitted to the jury.

The plaintiff predicates error, in that the verdict and judgment are contrary to and not supported by the court's instructions to the jury.

The plaintiff requested the following instruction on her theory of the case: "You are instructed that the defendant city is required to exercise ordinary care and prudence in keeping its streets in repair. If you find that the city exercised such care and prudence, you will find for the defendant. If you find that the city failed to exercise ordinary care and prudence in the repair of its streets at the place of the alleged injury, you will then find for the plaintiff." Instructions 4 and 5 offered by plaintiff are on the same theory. The court gave instructions covering this subject-matter in more detail and clarity than in the requested instructions.

It will be observed that the plaintiff specifically requested the court to instruct the jury that, if they found the city exercised due care and prudence, they should find for the defendant. This request was complied with. In such situation the following authorities apply:

It is the rule in this state that, "Where an instruction is given upon an issue submitted to the jury at the request of a party to a suit, he will not be heard to say that there was no evidence upon which to base the instruction." *Wortman v. Zimmerman,* 119 Neb. 682, 230 N. W. 588. See, also, *Splittgerber Bros. v. Skinner Packing Co.,* 119 Neb. 259, 228 N. W. 531.

In view of plaintiff having received what she requested as to her theory of the case, a detailed analysis of the duties of a city to keep and maintain its streets in a reasonably safe condition for public use need not concern us. This stands admitted, and the jury received instructions covering this subject-matter.

Instructions 1 and 2 on the issues and instruction No. 6 on negligence and proximate cause are discussed in plaintiff's brief to some extent. Plaintiff did not except to such instructions or predicate error on the giving of them. Under the circumstances the following applies:

Section 20-1919, Comp. St. 1929, reads in part: "The brief of appellant shall set out particularly each error asserted and intended to be urged for the reversal * * * of the judgment, * * * alleged to be erroneous."

This court will not search the record to determine whether or not issues presented by certain instructions are proper questions for the jury, unless the instructions complained of are set forth in appellant's errors relied upon for reversal. *Labs v. Farmers State Bank,* 135 Neb. 130, 280 N. W. 452; *Federal Land Bank v. Elsemann,* 121 Neb. 397, 237 N. W. 288; Revised Rules, Supreme Court, Nebraska, rule 13.

Error is predicated on certain evidence admitted. We have examined this evidence and find the admissibility thereof error without prejudice.

AFFIRMED.

GUSTAVE A. GILGREN, APPELLEE, V. BLANCHE PRICE, APPELLANT.

DAVID CHRISTIAN GILGREN, APPELLEE, V. BLANCHE PRICE, APPELLANT.

299 N. W. 325

FILED JULY 18, 1941. NOS. 31146, 31147.

1. **Specific Performance.** Specific performance of an oral agreement to make a will will be enforced only where one party has wholly and the other party partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed.
2. ———. Specific performance of an oral agreement to make a will will not be enforced where there has been a substantial failure of performance by the party seeking enforcement of the agreement.
3. ———. Where there has been a substantial failure of consideration for an oral agreement to make a will, the agreement will not be enforced in an action by the party obligated to supply the consideration.

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

J. Howard Davis and *Paul L. Martin,* for appellant.

R. P. Kepler and *Martin W. Dimery, contra.*

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

YEAGER, J.

Presented here are two actions identical in all particulars except as to names of parties and description of real estate. They were consolidated for trial in the district court and have been presented here on one bill of exceptions and one set of briefs. They will be disposed of in one opinion. The actions were originally instituted in the district court for Cheyenne county, Nebraska, by plaintiffs and appellees, against Blanche Price, defendant and appellant, and others not parties to this appeal, the objects and purposes of which were to obtain specific performance of an alleged oral contract between plaintiffs and one August Burk, and to quiet title in Gustave A. Gilgren to the northwest quarter (NW ¼) of section twenty-eight (28), township seventeen (17) north, range forty-nine (49), west of the sixth P. M. in Cheyenne county, Nebraska; and to quiet title in David Christian Gilgren to the southwest quarter (SW¼) of this section of land.

The substance of the claims of plaintiffs, as set forth in their petitions, is that prior to her death on April 21, 1934, Anna Kristina Gilgren, mother of plaintiffs, was the owner of the northwest quarter (NW ¼) and the southwest quarter (SW ¼) of section twenty-eight (28), township seventeen (17) north, range forty-nine (49), Cheyenne county, Nebraska, and that at the time of her death Vera Josephine Andersen held a mortgage on the northwest quarter, and the Lincoln National Life Insurance Company held a mortgage on the southwest quarter. After the death of Anna Kristina Gilgren the mortgagees foreclosed the mortgages, and decrees of foreclosure were duly entered in March and September, 1935, respectively, and nine-month stays were taken in each case. Prior to the sales August Burk purchased and secured assignments of the judgments of the two mortgagees, whereupon the stays were withdrawn and sales made to August Burk, which sales were duly confirmed and deeds were issued.

August Burk was a brother of Anna Kristina Gilgren, an uncle of Gustave A. Gilgren and David Christian Gilgren,

and a brother of one Lottie Akeson. Lottie Akeson predeceased both Anna Kristina Gilgren and August Burk, and in her will bequeathed to each of them $1,000. After her death, and before receipt of the bequest, Anna Kristina Gilgren died, thus causing the bequest to become payable to the estate of Anna Kristina Gilgren. Gustave A. Gilgren and David Christian Gilgren, being the only heirs at law entitled to take, were entitled to share equally in the distribution of this bequest.

On October 27, 1939, August Burk died in Cass county, Nebraska, leaving a will in which he gave to Blanche Price, a niece, all of his estate after the payment of debts, funeral expenses and costs of administration. This will was duly probated in the county court of Cass county, Nebraska.

The plaintiffs contend that this will is in violation of an oral agreement which August Burk had with them, whereby Burk agreed to give Gustave A. Gilgren the northwest quarter, above described, and to give the southwest quarter to David Christian Gilgren.

They alleged that on May 16, 1936, and at many times prior thereto, August Burk orally promised that in consideration of the plaintiffs' withdrawal of their nine-month stays, and the transfer of the use and benefit of the real estate involved to August Burk, such use and benefit being rents and income during the life of Burk, and a further cash consideration of $1,000 to be received by plaintiffs out of the estate of Lottie Akeson through the estate of Anna Kristina Gilgren and paid over to August Burk to apply on the existing indebtedness upon the land in question here, at his death Gustave A. Gilgren would become the sole and absolute owner of the northwest quarter, and David Christian Gilgren would become the absolute owner of the southwest quarter. They say that the stays were withdrawn and that Burk received the $1,000 from the estate of Anna Kristina Gilgren.

It is this agreement that plaintiffs seek to have enforced in these actions, and they further seek to have titles quieted in them to the lands described as against the devise to Blanche Price.

On the question of the existence of the agreement, Gustave A. Gilgren, having been limited by the court to conversations relating to the David Christian Gilgren case, testified as follows: "Q. Did you ever have any conversation with him (August Burk) regarding what was to be done, or might be done, with the land that was given to your brother David by your mother? * * * A. Yes; we had conversations. Q. Will you just tell the court about when those conversations began, if you can recall? A. Yes, sir; those conversations began shortly after the will was probated, her will. Q. Do you know whether or not your uncle August Burk knew of the mortgage against that land? A. I do. Q. Now, just tell the court what he said to you about this quarter of land that was willed by your mother to your brother David? * * * Q. Subsequent to the death of your mother, as you have testified? A. Well, there were several conversations. I couldn't just exactly remember the whole thing. He said he would like to see the mortgage cleared up so we could get the benefit from the land, was mostly his idea. Q. Did you hear him make any proposition to your brother David regarding that matter of clearing up the mortgages on the land? * * * A. Yes. Q. What did he say? A. He said that if we can get the money and get together and try and clear it up. * * * Q. Did he make any suggestions to you as to how that could be done, or what he would do about it? Answer 'Yes,' or 'No.' A. Yes. Q. What did he say? A. He said he would try to get the money, and if he could clear it up and buy it out some way that he would see that we got some benefit out of it. * * * Q. Was there anything that your brother David was to do in connection with that? A. Yes, sir. Q. What was it? A. Well, he was supposed to take his share of the estate that was willed to my mother, and it was afterwards willed to him and I, and apply on the land. Q. What money or estate was that? A. That was the estate of my aunt Lottie Akeson. Q. Do you know where the money from that estate—where did the money from that Akeson estate go to, if you know, who was it paid to? A. According to my knowledge it was paid to my mother's

estate, and then it was paid to apply on those mortgages. * * * Q. Now, in return for what you have just testified to, to be done by your brother David in connection with this land and the proceeds of that estate, what, if anything, did Mr. Burk say he would do? * * * A. He said if they could get it cleared up and he could have the income from the land that he would will or deed us the land at his death. Q. Did you have any further conversation with him about the deeds, and if so what was it? A. Yes, sir; he said one time he would fix up two deeds and then at his death they were to be turned over to us. Q. Who do you mean by 'us'? A. My brother David and I."

Ellen Gilgren, wife of Gustave A. Gilgren, in relation to a conversation with August Burk testified to the following: "Q. What was your conversation with him? A. I told him I didn't want to sign that paper to give him control of the estate. Q. What did he say? A. He said if I would, he said at his death we would get it, he would either give us a quitclaim deed or turn it over to us in a will at his death. Q. Who did he say he meant, if he did at all, by 'we'? A. He meant my husband and I. Q. Did he tell you anything, or did you talk about the other piece of land that was willed to Dave? A. Yes, sir; he said that went to him and his wife."

David Christian Gilgren, having been limited by the court to conversations relating to the Gustave A. Gilgren case, testified as follows: "Q. Now, did you ever have any conversation with your uncle August Burk respecting the real estate that was owned by your mother at the time of her death? A. Yes; I did. Q. Did you have more than one conversation with him? A. Yes. Q. Over how long a period did those conversations take place? A. I would judge about three months. Q. And can you tell now how many you had during that three months period? A. Oh, I should say ten or twelve. * * * Q. Now, just tell the court what those conversations were between you and your uncle August Burk affecting the land that was in your mother's estate, that is, for instance the northwest quarter? * * * Q. I will ask you

another question, then what did he say to you regarding the northwest quarter of section 28-17-49 in those conversations you had with him? A. Well, it was mostly about this estate money from the Lottie Akeson estate. I said I didn't like to sign it over and he said, 'Well, if I give you the money you will just spend it, but if you have it in this place, why,' he said 'after my death you will have the place clear.' * * * Q. What was he going to do, what did he say, if anything, he would do? A. Well, he said he would put up the balance of the money so he could save the places for us. Q. And what was to be done then? A. Well, he was to receive all rent and all dividends off of it until after his death. Q. Then what was to happen to it? A. It was to be willed to my brother Gus. Q. Do you recall anything about his talking to you about withdrawing a stay against the foreclosure to that land? A. Yes, sir. * * * Q. Did you consent to that, or did you, do you know whether Gus consented to that withdrawal of the stay? A. Yes; I believe he did. Q. Did you consent to the withdrawal of the stay in connection with those same foreclosures? A. Yes. * * * Q. Why did you agree to withdraw that stay? A. I figured that if we didn't we would probably lose the place or lose our interest in the estate."

On behalf of the plaintiffs, A. J. Kinnersley gave the following testimony with reference to conversations with August Burk: "Q. I will ask you if you had any conversation or conversations with Mr. August Burk, during the, well, in the spring of 1936? A. I had a number of conversations with him during the time that there was these foreclosures on the Gilgren property, I don't remember the dates. Q. Was that prior to the time when he finally purchased the property? A. That was prior to, and I also talked with him about it afterwards. * * * Q. What, if anything, did you say to him at that time about that? * * * A. I told him he would have to purchase a judgment and get an assignment of it in order to clean it up. * * * Q. Did he tell you the reason he wanted that at that time? A. He did. Q. What was that? A. The reason was he wanted to save it

for the boys. * * * Q. What was the conversation between you and Mr. Burk at the time you five were in Mr. Foster's office, that is, Mr. Burk, Mr. Foster, Mr. Dave Gilgren, Mr. Gus Gilgren and yourself? A. Well, the thing they wanted to do was to save that property for the boys, that is what he wanted to do. Q. Mr. Kinnersley, I want you to just tell as near as you can, if you can, just what the conversation was—what did Mr. Burk say? A. He said 'If I had enough money I would buy those judgments up,' but he said he didn't have it at that time. That was fairly early after the foreclosure." Referring to incidents attendant upon the procurement of the assignments by Burk of the foreclosure judgments, the witness testified: "Q. Now, what transpired prior to the time you went down there in connection with that, in connection with this whole deal? A. Well, we went in Mr. Foster's office and discussed how we would save the property, and what it was for, and Mr. Burk said, told them that if they would put in that $1,000 that was willed to their mother that he would make up the balance. Q. What $1,000 was that? A. That was the $1,000 in the Akeson estate. * * * Q. Proceed. A. And if they permitted him to take the title in his own name and receive the revenues during his lifetime they could live in the properties, and that he would make a will as soon as the transaction was completed willing them, Gustave the northwest quarter and David the southwest quarter."

This quoted testimony is substantially all of the evidence in support of the contention that the plaintiffs entered into an oral agreement with August Burk, by the terms of which Burk agreed to give by deed or will the two quarter-sections of land to the plaintiffs, in consideration whereof they agreed to release two foreclosure stays, and to pay or cause to be paid to Burk a legacy of $1,000 which came to their mother from the estate of her sister and to them through the estate of their mother.

The evidence further showed the following: Burk took assignments of the two foreclosure judgments and paid for them a little more than $2,400, all his own money; that the

nine-month stays were withdrawn; that foreclosure sales were had and titles to the lands were confirmed in Burk; that after confirmations of sale and during the month of May, 1936, Burk made and executed a will in which it was provided that the plaintiffs were to each receive the quarter-section of land claimed by him in these actions; that thereafter, on January 17, 1938, Burk made a new will in which he gave all of his estate to Blanche Price, which will was, after his death which occurred on October 27, 1939, probated in the county court of Cass county, Nebraska; that in August, 1939, Gustave A. Gilgren attempted to negotiate with Burk for the purchase of the land now claimed by him, and in the same month David Christian Gilgren also attempted likewise to negotiate for the land that he claims; that Gustave A. Gilgren, while he occupied one quarter-section, paid no rent; that David Christian Gilgren occupied the other quarter-section but paid but a small amount of rent totaling approximately $200; that the taxes which were paid were paid by August Burk.

Further, it is shown conclusively by the evidence that Burk did not get the $1,000 which was a part of the consideration for the claimed agreement. All of the $1,000, except $224.81, was used in payment of the debts of the estate of Anna Kristina Gilgren, which amount was released to Burk. As against this amount the record shows by stipulation that Burk paid $423.35 in taxes upon these two quarter-sections of land, which became due before entry into the claimed oral agreement.

On this evidence the district court found that plaintiffs and August Burk had entered into the oral agreement pleaded in the petitions, and that there had been full performance on the part of the plaintiffs, and entered its decrees and judgments accordingly.

The substance of the assignments of error is that the court erroneously so found and decreed.

The rule is, in case an oral agreement to make a will is proved, that specific performance of the oral contract will be enforced, only, where one party has wholly and the other

party partly performed it, and its nonfulfillment on the one hand would amount to a fraud on the party who has fully performed. *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788; *Damkroeger v. James*, 95 Neb. 784, 146 N. W. 936; *Mercer v. Payne & Sons Co.*, 115 Neb. 420, 213 N. W. 813.

Assuming, but not deciding, that the oral agreement alleged by plaintiffs was proved, the evidence shows without doubt or contradiction that the part of the agreement which required the payment of $1,000 to August Burk was never performed. That this consideration was important can hardly be questioned, since the only others were the release of the foreclosure stays, and the use and benefit of the lands which Burk never got to any appreciable extent. One of the stays had but five days to run and the other about six months. The plaintiffs were never ousted from possession, and only one of them ever paid rent and he only a very small amount.

We conclude that performance of the alleged oral contract by the plaintiffs was not proved; in fact, the evidence of the plaintiffs specifically negatives performance by them. In the absence of such proof the plaintiffs were not entitled to any of the relief prayed.

In the light of this view, we find it unnecessary to discuss the question of whether or not an oral contract was, in point of fact or law, proved, or the further question of whether or not it was error to allow the attorney, A. J. Kinnersley, to testify to conversations had with August Burk, or any of the other questions raised by the appeal.

We find, for the reasons herein set forth, that the decrees and judgments in each of these cases should be, and they are,

REVERSED.

THERESA ANGLIM, APPELLEE, V. JAMES ANGLIM ET AL., APPELLANTS.
299 N. W. 346

FILED JULY 18, 1941. No. 31140.

1. **Divorce.** State courts are not bound, under the full faith and credit clause of the federal Constitution, to recognize, as against its own citizens, divorces obtained in other states by constructive service, where the matrimonial domicile of the innocent party remains here, and where our courts had determined the other spouse the wrong-doer, but such courts may determine for themselves what effect it will give such foreign decrees here.
2. **Courts.** A decision of the supreme court of the United States on a federal constitutional question is conclusive on the state courts.
3. **Divorce.** Where a wife secured a decree for separate maintenance, upon personal service, and the husband, subsequently in another jurisdiction on constructive service, without bringing the former decree to the attention of the latter court, secured a divorce, and never paid the maintenance decree, said separate maintenance decree will continue in full force and effect until directly modified, especially where the former court retained such right, and where the husband dies before such modification, all instalments, due and unpaid, and other rights thereunder, unless modified by the court, or prohibited by specific statute, may be enforced against the estate of the deceased husband in this state.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

R. B. Hasselquist and *Howard B. Redden*, for appellants.

Ziegler, Dunn & Becker and *D. L. Manoli, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

FALLOON, District Judge.

This case involves the modification or setting aside of a decree from bed and board on the ground that a decree of absolute divorce had been subsequently granted in the state of Nevada, and also that in probate proceedings in that state it had been held that the appellee was not the widow but had been legally divorced.

There is no dispute as to the facts. The appellee, Theresa Anglim, was married to James T. Anglim in Omaha, on

October 4, 1899, and thereafter this couple lived in Omaha as husband and wife. Eight children were the issue of this marriage. On March 9, 1923, Theresa Anglim filed in the district court for Douglas county, Nebraska, her petition for a divorce from bed and board, charging her husband with extreme cruelty. James T. Anglim cross-petitioned for an absolute divorce, and the matter was, on March 12, 1930, determined by the district court, which found the appellee was entitled to divorce from bed and board, and to separate maintenance, and also found against the appellant husband, James T. Anglim, on his cross-petition, and that the husband should pay $65 a month for support of herself and children. The court also in its decree reserved the right to modify the same as far as alimony and custody of children were concerned upon the application of either party. This decree was affirmed and mandate therein issued by the supreme court of this state in March, 1931. Subsequently, the husband sought unsuccessfully to obtain an absolute divorce because of extreme cruelty and the separation of parties since 1923, and the last time, in March, 1937, the district court again found against the husband upon these issues and dismissed his petition. Also, in March 1937, the amount of alimony and support money was reduced to $40 beginning March 1, 1937, instead of the $65 originally granted.

On August 7, 1937, the husband, James T. Anglim arrived in Reno, Nevada, where he has since resided, voted three times and transferred membership from the Omaha Camp to the Reno Camp of the United Spanish War Veterans. He stated that he came to Reno for his health and to make it his home. On November 12, 1937, in Nevada, James T. Anglim filed suit for absolute divorce from his wife, Theresa, on the grounds of extreme cruelty, desertion and because they had lived separate for more than five years. Personal service was had on the wife in Omaha on November 20, 1937, and on January 13, 1938, by default, the husband obtained an absolute divorce in Ormsby county, Nevada, on the grounds of extreme cruelty and having lived separate

for more than five years. The custody of the minor child, Robert Donald, was left with the wife, and the husband was ordered to pay $40 monthly for support thereafter until January 1, 1939, when it would be reduced to $20 monthly until March, 1941, at which time the child would become of age. The decree also provided that the support money was to run concurrently, but not in addition to the provision made for support by any other court. It also provided, as in the Douglas county decree, that the wife was to have the use of the residence property in Omaha. The husband died at Reno, Nevada, on July 12, 1939, and the wife has lived all the time in Omaha for over 29 years. The evidence shows that the wife made no appearance in the divorce proceedings in Nevada, that she never lived there, and the only notice she had was the personal summons served upon her in Douglas county. The evidence also shows probate proceedings were had in Nevada, where the will of James T. Anglim was admitted to probate. No appearance was ever made by the wife in the probate proceedings in Nevada except that she filed an election under the law of Nebraska provided for in estate matters, in which she stated she appeared solely and for that purpose only. No further action was taken nor was any appearance further made by the wife in these proceedings. On December 26, 1939, the Nevada district court in the probate proceedings found that Theresa Anglim was not his widow, by virtue of the Nevada divorce, and had no right to elect or inherit from him under the Nevada law or of any other state and decreed that her election was of no force and effect. The support money has all been paid under the decree as modified of the Douglas county district court to July 1, 1939, except for the six months prior thereto it was paid at rate of $20 a month, leaving $120 thereof unpaid and no payments have been made since. R. B. Hasselquist was appointed executor on December 29, 1939, in ancillary proceedings in this estate by the Douglas county court, and is so acting, and the interveners are the sisters of deceased, who were left the residue of the estate under the will.

On July 31, 1940, order of revivor was entered, after proper notice to all parties interested, by Judge Willis G. Sears, in the sum of $600, being an unpaid balance due and payable under the separate maintenance decree heretofore entered and as modified. Later, upon motion of the executor and petition by interveners to vacate this decree, another hearing was had, and on September 6, 1940, District Judge Herbert Rhoades overruled and dismissed said application and the case is properly here for review. There is not much dispute as to the facts in this case. Nor can there be any question that, in the various proceedings in Douglas county, Nebraska, had prior to the Reno divorce, the courts here found that the husband, now deceased, was the wrong-doer; also, under the evidence, there is no doubt but that it has been established that the husband was a *bona fide* resident of Nevada at the time the divorce there was granted.

The dispute comes over whether the Nebraska courts must accept, at full face, the decrees in the divorce and probate proceedings, under the full faith and credit clause of the federal Constitution or under the rule of comity between the states, or, briefly, whether Theresa Anglim is still the widow of the deceased in eyes of the courts of this state. That the parties were married in Omaha, which was the matrimonial domicile for nearly 30 years, and that the wife never lived in Nevada or made any appearance in the divorce proceedings there, and that the courts of this state had on several different occasions adjudged the husband to be the wrong-doer and the wife the innocent party, there likewise is no doubt.

Must Nebraska courts under such facts give full faith and credit to the Reno divorce? Has the Nevada court jurisdiction over the wife and her marital relationship, or do the proceedings there only operate over the status of the husband?

The supreme court of the United States in *Haddock v. Haddock*, 201 U. S. 562, 26 S. Ct. 525, has laid down the principles which will either compel one state to recognize a divorce decree of another state or will justify its refusal to do so.

"The mere domicile within the state of one party to the marriage does not give the courts of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the federal Constitution against a nonresident who did not appear and was only constructively served with notice of the pendency of the action." *Haddock v. Haddock*, 26 S. Ct. 525.

In the case above, the parties were married in New York. Subsequently, the husband went to Connecticut and there, upon constructive service, procured a divorce. Subsequently, the plaintiff wife brought suit against the defendant husband in New York for a decree of absolute divorce and personal service was had upon the defendant. The defendant interposed as a defense the Connecticut divorce decree, claiming that it was entitled to full faith and credit. The supreme court of the United States held that the decree having been procured by the wrong-doing spouse, in the state where the wife was not present, and which had not been the matrimonial domicile and to the jurisdiction of whose courts the plaintiff wife had not submitted, was not entitled to full faith and credit by the New York courts, and said: "Sixth. Where the domicile of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and, therefore, is not to be treated as the actual or constructive domicile of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicile until a new actual domicile be by her elsewhere acquired."

Justice White goes on to say in this opinion: "Coming to apply these settled propositions to the case before us three things are beyond dispute: a. In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the state of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the

courts of Connecticut, he being at the time when the decree was rendered domiciled in that state. b. As New York was the domicile of the wife and the domicile of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicile of the wife continued in New York. c. As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicile in that state, and was not there individually domiciled and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicile of the wife within the state or as the result of personal service upon her within its borders."

This *Haddock* decision has started numerous decisions which hold that a decree of divorce rendered by the court of the domicile of the wrong-doing spouse alone is not entitled to full faith and credit unless the spouse who is not domiciled there is either personally subject to the jurisdiction of the state which grants the divorce, or the state granting the divorce is the last state in which the spouses are domiciled together as husband and wife, or the absent spouse has consented to the decree being entered.

This decision has settled the proposition that no state is bound, under the full faith and credit clause of the federal Constitution, to recognize, as against its citizens, divorces obtained in other states upon constructive notice, at a place other than the matrimonial domicile. In other words, each state is left free to adopt such course respecting such foreign divorces as seems most likely to promote the happiness and welfare of its citizens, consistent with a due regard to comity and good morals. The marriage relation of the parties as such, under this decision, is divisible, and therefore the status of the wife remains in the state of the matrimonial domicile, and never came within the jurisdiction of the Nevada court.

In *Wagoner v. Wagoner*, 287 Mo. 567, 229 S. W. 1064, it is said: "Though ordinarily the matrimonial domicile is the domicile of the husband, the domicile does not follow him where a decree of separate maintenance has been rendered, or where the husband illegally deserts his wife, but in such cases the matrimonial domicile, so far as the wife is concerned, remains in the place of their former residence in which the wife continues to reside."

The Missouri court goes on to say, in *Wagoner v. Wagoner:*

"In this case the wife was residing in Missouri, under judicial decree obtained against her husband upon personal service. That decree fixed her matrimonial status separately from him.

"The question here is whether he can put this separate matrimonial status adjudged to his wife into his own pocket, and carry it to Nevada, and there use it to give jurisdiction to a court of that state to set aside the judgment of the Missouri court which fixes it. This absurd proposition is answered definitely by the court which is the final arbiter in the matter, and we see nothing in the cases cited by respondent to the contrary. They all proceed upon the well-established theory that ordinarily the matrimonial domicile of the wife follows that of the husband. This is true, for there can be but one such domicile while it is her duty to live with him. They are matrimonially one person, and, as such, can have but one abiding place. When that unity is destroyed by a decree of court founded upon the misconduct of the husband, or is wrongfully repudiated by him, the law permits her to get bread and the shelter of a home without surrendering her matrimonial right.

"This doctrine covers completely the facts of this case and if any court has inadvertently disregarded it we need not follow it into the error. It follows that the Nevada court having no jurisdiction of the *res*—the subject-matter of this suit—its decree, whatever may be its effect on the rights and duties of the respondent, is void in all things relating to the matrimonial status of the appellant, inclusive of the

judgment of the St. Louis circuit court which established her innocence of wrong in the matrimonial relation and her desertion by respondent together with her right to be his wife wherever she might lawfully be. This is for her the *situs matrimonii.*"

In *Parker v. Parker,* 222 Fed. 186, the court say: "It seems well settled by federal authority that, when the wife is deserted by the husband without justification, the matrimonial domicile stays with her, the innocent party, and that she may in consequence acquire a new domicile, which may become, indeed, the matrimonial domicile, as was held in *Barber v. Barber,* 21 How. 582, 16 L. Ed. 226, and *Haddock v. Haddock,* 201 U. S. 570, text."

The court in the case above further speak: "The decision impresses us with the belief that the reasoning of that decision gives the court of the domicile of the innocent party jurisdiction to render a judgment binding everywhere, and deprives the court of the domicile of the guilty party of jurisdiction to render a judgment binding save in the state where rendered."

The court further goes on to say in this *Parker* case: "The obligatory recognition of such a decree beyond the limits of the state depends, however, upon whether there was jurisdiction of the matrimonial relation of the parties. That relation may not follow the domicile of the offending husband. If the adopted residence is intended to perpetuate a fraud on the innocent wife, or if the wife is without fault, and was deserted, the matrimonial domicile remains in the state of her residence."

In *Dean v. Dean,* 241 N. Y. 240, 149 N. E. 844, the court, speaking through Justice Cardozo, said: "The wife domiciled in Canada and there abandoned by her husband, became by her marriage a party to a relation which the courts of Pennsylvania have attempted to destroy. They have done this, though there has been no submission to the jurisdiction by her, upon the basis of a domicile which the erring husband has wrongfully set up apart from her. We think the judgments of this court leave no escape from the con-

clusion that according to the standards of justice prevalent among us, injustice would be done if that attempt were to prevail."

In the case of *Miller v. Miller*, 200 Ia. 1193, 206 N. W. 262, the wife in Iowa obtained a decree for separate maintenance in 1912 on the grounds of cruelty and desertion as of 1911. The husband went into Missouri and in 1921 obtained a divorce. The wife sought to increase her alimony in the Iowa courts because the husband had inherited some property, while the husband sought to be relieved from further payments. The trial court recognized the Missouri divorce and treated the marriage as having been dissolved, but extended the alimony payments for a period of two years subsequent to the marriage dissolution by the Missouri court. The Iowa court in its opinion did not think the New York doctrine as laid down in the *Haddock* case very compelling and, though it stated the letter had released it, the spirit of the Constitution still bid them hold to the validity of foreign divorce decrees.

The Iowa court in *Miller v. Miller, supra,* say (206 N. W. 262): "Where separate maintenance was awarded to wife, and thereafter husband acquired domicile in Missouri and obtained divorce there, in wife's petition in nature of creditor's bill, husband's decree having been wholly *in rem,* trial court was not precluded from adjusting property rights of wife."

In *Smith v. Smith,* 19 Neb. 706, 28 N. W. 296, where it was sought to have a divorce procured in Utah territory recognized as valid, this court said: "In a divorce suit the court, in granting a decree, declares and fixes the status of the parties to the suit. If but one of the parties is a resident of the state, and the other a nonresident, the court in a proper case may adjudge the status of the resident towards the nonresident, but it has no such power over residents of another state."

In *Barber v. Barber,* 62 U. S. 582, the wife obtained a decree of divorce from bed and board in the state of New York where the parties had been married and had lived.

Later, the husband went to Wisconsin, where he obtained a decree of divorce. In a suit brought by the wife, in the federal court of Wisconsin, to recover the amount due her as alimony under the New York decree, the husband claimed, first, that he was not bound by the New York decree since he was divorced, and, second, that the federal court had no jurisdiction because the wife was, by reason of her husband's domicile in Wisconsin, a citizen of Wisconsin. The court held, first, that the wife was a citizen of the state of New York, saying: "So when parties are already living under a judicial separation, the domicile of the wife does not follow that of the husband." The court further said: "It also appears, from the record, that the defendant had made his application to the court in Wisconsin for a divorce *a vinculo* from Mrs. Barber, without having disclosed to that court any of the circumstances of the divorce in New York; and that, contrary to the truth, verified by that record, he asks for the divorce on account of his wife having wilfully abandoned him. It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the *vinculum* of the marriage between the defendant and Mrs. Barber. It certainly has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the state of New York, upon that decree being carried into judgment in a court of another state of this Union, or in a court of the United States, where the defendant may be found, or where he may have acquired a new domicile different from that which he had in New York where the decree was made there against him."

While the supreme court of Iowa, in *Miller v. Miller, supra,* said that the pronouncement of the *Haddock* case lifted from the various states the mandate of the federal Constitution, it would interpose no obstacle in the way of such state courts to recognize the validity of such foreign decrees as a matter of comity between states, and the reasoning in that opinion was very impressive.

This court believes, however, the better philosophy is to

follow the rule laid down by the highest court in our land. Theresa Anglim obtained a decree of separate maintenance which was in full force and effect by the Nebraska courts and was such that jurisdiction continued. The district court of Nebraska had on several occasions found the husband to be the wrong-doer. It was the matrimonial domicile, and the wife never did anything to lose that domicile, and never submitted herself to the jurisdiction of the Nevada court in the divorce proceeding there. State courts are not bound, under the full faith and credit clause of the federal Constitution, to recognize, as against its own citizens, divorces obtained in other states, by constructive service, where the matrimonial domicile of the innocent party remains here, and where our courts had determined the other spouse the wrong-doer, but such courts may determine for themselves what effect it will give such foreign decrees here. A decision of the federal supreme court on a federal constitutional question is conclusive on the state courts.

The only remaining question in regard to the Nevada divorce decree is whether, as a matter of comity or state courtesy, or, to put it differently, our own interpretation of the conflict of laws, should we declare a public policy and recognize such a decree that we may feel free to refuse. If such a policy is repugnant to our sense of justice, or prejudicial to the interests of our citizens, under our laws and administration of justice, we should not hesitate to make the proper decision and say it cannot apply. A state has the right to apply certain principles of justice, even though opposed to its conception elsewhere, as to exact justice, not only to the stranger, but to its own citizens. Comity gives a certain degree of latitude in recognizing foreign decrees in the absence of a positive obligation.

The district court of Washoe county, Nevada, in the probate proceedings, held that Theresa Anglim had ceased to be the wife of James T. Anglim since the divorce decree obtained in that state on January 13, 1938, is not now his widow, and had no rights as such to elect not to take under his will or to inherit from him as his widow, under the

law of descent and distribution of Nevada or of any other state. This decree may be binding in Nevada, but does it determine for Nebraska the same, absolute and binding conclusion under the full faith and credit clause, and under the rule of state comity? The court there did not have jurisdiction in the marital status of Theresa Anglim, but was only concerned with the estate proceedings, and had no jurisdiction over the wife unless she appeared and invoked its jurisdiction over her rights. No appearance was ever made by her, except that she filed an election, which she claimed was made solely to comply with the Nebraska statute in regard to rights of the widow. Did she so restrict herself or was such a filing a general appearance?

This court in *Mettler v. Warner*, 98 Neb. 111, 152 N. W. 327, held that it was proper for the widow to file her election in the sister state which was the domicile of her deceased husband, and that her election filing there, in effect, would operate on proceedings, later brought in this state, as affecting her status. The appellants contend that such a filing constituted a general appearance, and therefore the wife is bound thereby and must accept the decision of the Nevada court as binding on her rights here. We think not. The filing did not ask the Nevada court to pass on her rights here, nor is such decision binding under the record made. The Nevada court was not asked whether or not she could make such a decision. If she had not filed such election, she might have barred herself by the statute. She specifically objected to the jurisdiction of the Nevada court over her person or rights, and only filed and registered her election because required by the Nebraska statutes. Did this constitute a general appearance by the widow?

In the case of *Hammond v. District Court of Eighth Judicial District*, 30 N. M. 130, 228 Pac. 758, 39 A. L. R. 1490, where the question involved was whether the plaintiff had made a general appearance, the plaintiff had filed objections upon various legal grounds and it was contended that this constituted a general appearance and gave the court jurisdiction over the person of the defendant. The court said:

"The expression, 'which recognizes the case as in court,' as used in some if not all of these several cases, means that it recognizes the case as pending in court, with jurisdiction of the subject-matter and of the parties. In order to do this, the defendant must seek some affirmative relief at the hands of the court, or he must ask a favorable decision upon some matter of a substantive character, or endeavor to secure a continuance or postponement. The reason underlying the doctrine is that no such action can be taken without the court possesses jurisdiction over his person, and he is not entitled to any such affirmative relief or favorable ruling unless the court possesses jurisdiction over his person, and when he seeks such relief, he necessarily assumes the attitude that such jurisdiction has been acquired, and having taken that position, he is bound thereby, and will not be heard afterwards to say otherwise. No such relief was sought by the defendants in making the objection referred to. They merely presented legal objections to an action then being taken by the court without their request or solicitation. So it cannot be said that the defendants entered a general appearance, thereby cutting themselves off from the right to present this question here."

Even if the court of Nevada, in the probate proceedings, declares the wife is not the widow of the deceased, the courts of this state are not bound so to declare, especially if such is not a fact. The Nevada court does not have jurisdiction over the property here. Our courts and ours alone determine the procedure in probate matters affecting real property in this state. No matter what the Nevada court determined, under the evidence and record in this case, Nebraska courts have that right in regard to property here and to rights of its own citizens. The probate jurisdiction of the Nevada courts cannot determine this marital status when its divorce courts cannot.

The decree for separate maintenance was final so far as the Nebraska courts were concerned. The decree for maintenance or alimony under section 42-319, Comp. St. 1929, became a lien. It was proper to revive it against the repre-

sentatives of the deceased. An execution could be properly issued and levied thereupon when it had been revived.

In *Nygren v. Nygren,* 42 Neb. 408, 60 N. W. 885, it was held: "A decree for alimony is a lien upon real estate the same as a judgment at law, and is enforceable in the same manner."

"Such a judgment is for a definite amount and is a lien, not only for the amount of the matured instalments and interest thereon, but also as security for the payment of those instalments yet to become due during the minority of the younger child." *Wharton v. Jackson,* 107 Neb. 288, 185 N. W. 428.

This amount was to be paid to the wife as alimony and was not made contingent upon the age of the minor children, but only subject to modification by the decreeing court, which right the court retained at all times. The appellants contend that the support payments abated at the death of the husband and that, in any event, the judgment could only be revived for the difference between the Nebraska decree and the amount actually paid by the now deceased husband, or the sum of $120.

This court has indicated in *In re Estate of Rusch,* 89 Neb. 265, 131 N. W. 209, that support money payments do not abate upon death. The court there said: "As to maintenance the decree is subject to change. It may bind the father while he is living and his estate when he is dead. The obligation of a father to support his helpless offspring may survive both divorce and death. *Miller v. Miller,* 64 Me. 484; *Seibly v. Person,* 105 Mich. 584."

Where a wife secured a decree for separate maintenance, upon personal service, and the husband subsequently in another jurisdiction, on constructive service, without bringing the former decree to the attention of the latter court, secured a divorce, and never paid the maintenance decree, said separate maintenance decree will continue in full force and effect until directly modified, especially where the former court retained such right, and where the husband dies before such modification, all instalments, due and unpaid, and other

rights thereunder, unless modified by the court, or prohibited by specific statute, may be enforced against the estate of the deceased husband in this state.

We believe the judgment of the court below is right.

AFFIRMED.

THERESA ANGLIM, APPELLEE, V. CITY OF OMAHA, APPELLANT.
299 N. W. 353

FILED JULY 18, 1941. No. 31141.

1. **Courts.** Our courts need not recognize rights as valid because they are so declared by courts of another state, which rights our courts had already declared do not exist.
2. **Municipal Corporations.** An unmarried widow, recognized as such by our courts, is entitled to the same pension as was obtained, in his lifetime, by her deceased husband, a metropolitan fireman.

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

Harold C. Linahan, W. W. Wenstrand and *Edward Sklenicka,* for appellant.

Ziegler, Dunn & Becker and *D. L. Manoli, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

FALLOON, District Judge.

This is an action by Theresa Anglim, appellee, who claims to be the widow of James T. Anglim, deceased, a former city of Omaha fireman. She claims a widow's pension under section 35-201, Comp. St. 1929, which provided that a pension should "be paid to the widow of such deceased fireman during such time as she shall remain the widow of such deceased fireman." The appellee claimed she was the surviving widow, had not remarried since her husband's death, on July 12, 1939, and that she was entitled to $75 a month from the date of the death to the date of the judgment and

a like sum, monthly in the future, as long as she remained the widow.

The appellant, city of Omaha, in its answer, admitted that James T. Anglim was placed on the roll as a pensioned fireman during the year 1922 and remained there until the date of his death. For defense, appellant alleged that a divorce had been granted the deceased husband by the courts of Nevada, and that, under the full faith and credit clause of the federal Constitution, the marriage relation was dissolved and therefore appellee was not the wife of James T. Anglim at the time of his death. As a further defense, in the probate proceedings, the widow having filed her election, the Nevada court again declared she was not the widow and, under the full faith and credit clause, likewise it must be given effect here and therefore she was not the widow and thereby barred from obtaining any relief under the fireman's pension act affecting the city of Omaha.

The reply set up the separate maintenance decree obtained in the Douglas county district court, the various attempts to obtain an absolute divorce by the husband, and the denials thereof by the courts of Douglas county, and that the Nevada court decrees were not binding on appellee.

R. B. Hasselquist, as executor of the James T. Anglim estate, sought to intervene in this action, which was denied, and then the said executor sought to appear as a friend of the court, which likewise was not permitted by the trial court.

The trial court found generally for the appellee and against the appellant. It found specifically that the appellee and James T. Anglim were married on or about October 4, 1899, in Omaha, where they continued to live together as husband and wife until the year 1923; that at that time the appellee filed her petition for divorce from bed and board and separate maintenance against her husband in the Douglas county district court; that on March 12, 1930, that court entered a decree finding James T. Anglim guilty of cruelty and granted appellee a divorce from bed and board; that in that cause James T. Anglim filed cross-petition for absolute

divorce; that on appeal to this court said decree was affirmed and has since remained in full force and effect; that the said James T. Anglim on one or more occasions sought to have decree modified or set aside and an absolute divorce granted, and that on each occasion his application was denied, and the orders so entered have remained in full force and effect.

The trial court further specifically found that on October 3, 1935, James T. Anglim filed his petition in that court against the appellee, charging cruelty and praying for an absolute divorce, and that upon a trial of this cause on its merits the petition of James T. Anglim was dismissed, which judgment remains in full force and effect.

The trial court further found that said James T. Anglim, on August 7, 1937, went to the state of Nevada, and on November 12, 1937, filed his complaint against the appellee in the first judicial district court of the state of Nevada, praying for an absolute divorce on the grounds of extreme cruelty, desertion in 1929, and that he and the said appellee had lived apart for more than five years, that a copy of said complaint and summons issued thereon were served upon the appellee herein in Douglas county, Nebraska, and that on the 13th day of January, 1938, said Nevada district court entered its decree purporting to grant said James T. Anglim an absolute divorce from the appellee.

The trial court further found that at the time of the Nevada decree and for several years prior thereto the appellee had been living separate and apart from said James T. Anglim under and by virtue of the decree of divorce from bed and board granted by the district court for Douglas county, Nebraska. The trial court further found that the appellee had at no time ever resided in the state of Nevada, nor had she ever been personally present in said state, and that she entered no legal appearance in the Nevada divorce proceedings. The trial court further found that the first judicial district court of Nevada was without jurisdiction over the person of the appellee, and without jurisdiction to determine and adjudicate the marital relation of appellee to the said James T. Anglim, by reason of the fact that the

marital status of the appellee had been previously adjudicated by the courts of Nebraska. The trial court further found that the said pretended decree of divorce granted in Nevada was procured in bad faith and by fraud upon the courts of Nebraska and upon the appellee.

The trial court further found that the said James T. Anglim died July 12, 1939, while in Nevada, and that his estate was probated in the district court for Nevada, that in said probate proceedings the appellee filed her notice of election to take as his widow under and by virtue of the laws of Nebraska, and that said district court in Nevada purported to make a finding in said estate proceedings that the appellee was not the widow of said deceased. The trial court further found that said Nevada court in the estate matter was without jurisdiction to make said finding, and that said finding is not entitled to full faith, either as a matter of comity or under the Constitution of the United States of America, and is not binding upon the appellee herein, and does not affect her status as the widow of the deceased James T. Anglim.

The trial court further found that, while living, James T. Anglim was entitled to and received a pension of $75 a month from the city of Omaha as a fireman, that the appellee is his widow, now unmarried and entitled to said pension, commencing July 15, 1939, together with interest. Judgment was entered on findings that she is the surviving widow of said James T. Anglim and for the sum of $1,009.51.

Motion for new trial was filed, overruled, and matter is here for review.

There is no need to set out the evidence, for there is no dispute thereon, except perhaps as to its interpretation, and we will say it bears out conclusively the findings of the trial court as to the facts. The only difference is the matter of opinion as to those findings which follow as a matter of law. The judgment of the trial court does not violate either the rule of comity or of the full faith and credit of the Nevada decrees. These decrees, while perhaps not fraudulent, were obtained by concealing the action of the Ne-

braska courts relative to the marital status of these parties. Our courts need not recognize as valid rights, because they are so declared by courts of another state, which rights, our same courts had already declared, do not exist. See *Anglim v. Anglim, ante,* p. 133, 299 N. W. 346, released herewith.

The appellant was not a party to the Nevada proceedings, but that gives it no advantage in these proceedings, nor does it impose any greater burdens thereon. The real question is whether the appellee is still the widow of the deceased husband. If she is, under the interpretation of this court, then she is entitled to all rights that status gives her. An unmarried widow, recognized as such by our courts, is entitled to the same pension as was obtained, in his lifetime, by her deceased husband, a metropolitan fireman.

As to the denial of the executor to intervene, the trial court was absolutely right, as the executor had no interest whatever in the suit. He might have appeared as a friend of the court, but that is a matter of discretion with the trial court. Its decision, if reasonable, cannot be criticized here.

Under the record, the decision of the trial court is correct and it is affirmed.

AFFIRMED.

JOSEPH SOULEK, APPELLEE, V. CITY OF OMAHA ET AL., APPELLANTS.
299 N. W. 368

FILED JULY 18, 1941. No. 31002.

1. **Trial.** "It is proper practice for court to refuse to submit to jury defense not supported by evidence." *Sterns v. Hellerich,* 130 Neb. 251, 264 N. W. 677.
2. **Appeal.** In an action for personal injuries, unless the amount of the verdict appears to be clearly wrong or the result of passion, prejudice or mistake, it will not ordinarily be set aside on appeal as excessive or be reduced by remittitur.
3. **Joint Adventures.** A joint adventure is in the nature of a partnership, but may exist where persons embark on an undertaking without entering on the prosecution of a business as partners

strictly but engage in a common enterprise for their mutual benefit.

4. ———. To constitute joint adventure, there must be an agreement to enter into an undertaking in the objects of which the parties have a community of interest and common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control over the agencies used therein, though one party may entrust performance to another.

5. ———. Relationship of joint adventurers does not exist between city and Works Progress Administration in carrying out of city sponsored projects under record herein.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. *Affirmed in part and in part reversed and dismissed.*

Harold C. Linahan, W. W. Wenstrand, Edward Sklenicka and *Alfred A. Raneri,* for appellants.

Gordon Diesing, contra.

Heard before SIMMONS, C. J., ROSE, CARTER, MESSMORE and YEAGER, JJ., and MEYER and ELLIS, District Judges.

MEYER, District Judge.

This is an action for damages for personal injury. Plaintiff had judgment against each defendant in the amount of $4,000. Both appealed.

The petition alleges that the city of Omaha and the Works Progress Administration were engaged as joint adventurers in the construction of a fire barn for said city and in the extension and repair of the city garage; that on the morning of February 2, 1939, the defendant Dunn, a timekeeper of said administration, was negligently driving from one of said projects to the other in his employment on said works when he collided with an automobile driven west on Capitol avenue in the city of Omaha by one James H. Adams, causing the automobile of said Adams to strike and injure the plaintiff, who at that time was walking south on the west cross-walk of Thirteenth street at the intersection of Capitol avenue. Defendants allege that the plaintiff was guilty of contributory negligence and complain that the trial court did not instruct on that issue.

There is little dispute in the evidence. Dunn had written up the daily time sheets on one project and at the time of the accident was going to the other for the same purpose. Adams testified that before the collision he stopped his car at the east intersection of Capitol avenue with Thirteenth street and looked in both directions; that the Dunn car was approximately 200 feet north of the intersection; that he shifted gears and drove west on the right side of the street at 12 or 15 miles an hour; that when in the northwest corner of the intersection his car was struck by the Dunn car, causing it to strike the plaintiff who was on the cross-walk walking south. The testimony of three disinterested witnesses who viewed the collision from different nearby points is to the same effect. They also state that Dunn was driving 35 to 40 miles an hour and that without slackening his speed he smashed head-on into the right side of the Adams car. It was a clear day, the streets were dry and there were no stop or slow signs at the intersection. Dunn admitted before trial that he did not see the Adams car before the collision. We fail to find any evidence in the record that would warrant the trial court in giving an instruction on contributory negligence.

It is also urged that the court erred in failing to require a remittitur. The medical testimony is to the effect that plaintiff's back, shoulder and leg were badly bruised; that he sustained a comminuted fracture four inches below the knee of his left leg; that the large bone was broken in three places and the small bone broken across in a simple fracture; that he was in the hospital 23 days; that he wore a cast from the thigh to the toes for nine weeks, one from the knee to the toes for six weeks thereafter, and a small cast for a month or so later; that he still had a half inch atrophy of the calf and thigh muscles of said leg and only a 90 degree range of flexion in the knee and ankle; that his leg was shortened one-fourth inch; that there was a large tumor mass over the site of the fracture; that the alignment was good; that incoordination would partially disappear if plaintiff walked more, and that the reasonable charge for medical

services was $200. Plaintiff testified that he used crutches until July of 1939, and that his left leg, knee and back caused him great pain and that he was unable to sleep. He was 58 years of age at the time of the accident and was then earning $21 a week loading fruit and vegetable trucks and at other jobs, and at the time of trial was not capable or able to earn more than $3.50 a week. We are not disposed to disturb the judgment. Unless the amount of the verdict appears to be clearly wrong or the result of passion, prejudice or mistake, it will not ordinarily be set aside on appeal as excessive or be reduced by remittitur.

Defendants also complain about certain remarks made by the court during trial with reference to one of the exhibits. We have examined the record and find that same were not prejudicial.

The city contends that the trial court erred in refusing to direct a verdict in its favor, for the reason that the evidence was insufficient to establish a joint adventure between the W. P. A. and said defendant.

"A joint adventure as a legal concept is * * * purely the creature of our American courts." 33 C. J. 841. It is in the nature of a limited partnership. *Bank of Cedar Bluffs v. LeGrand,* 127 Neb. 183, 254 N. W. 892. It "can exist only by the voluntary agreement of the parties to it; * * * nor can it arise by mere operation of law." 33 C. J. 847. The contract need not be express, but may be implied in whole or in part from the apparent purposes, the acts and conduct of the parties. *O. K. Boiler & Welding Co. v. Minnetonka Lumber Co.,* 103 Okla. 226, 229 Pac. 1045. It is said to exist where persons embark on an undertaking without entering on the prosecution of a business as partners strictly, but engage in a common enterprise for their mutual benefit. *Bosteder v. Duling,* 117 Neb. 154, 219 N. W. 896; *Sander v. Newman,* 174 Wis. 321, 181 N. W. 822; *Chisholm v. Gilmer,* 81 Fed. (2d) 120; *O'Neil v. Stoll,* 218 Ia. 908, 255 N. W. 692; *Dexter & Carpenter v. Houston,* 20 Fed. (2d) 647; *Goss v. Lanin,* 170 Ia. 57, 152 N. W. 43. The mere pooling of property, money, assets, skill or knowledge does not create the

relationship. *Bank of Cedar Bluffs v. LeGrand, supra.* And the absence of mutual interest in the profits or benefits is conclusive that a partnership or joint adventure does not exist. 47 C. J. 668. The principal distinction between a partnership and a joint adventure is that the latter may relate to a single transaction. *Slater v. Clark & Co.,* 68 Ill. App. 433. "The fact that the contract provides for a sharing of the profits, while an important factor in determining the character of the contract, does not of itself make it one of joint adventure. There must be something more, some active participation in the enterprise; some control of the subject-matter thereof or property engaged therein." 33 C. J. 847. See *Griffiths v. Von Herberg,* 99 Wash. 235, 169 Pac. 587; and of the means employed to carry out the common purpose (*Troietto v. G. H. Hammond Co.,* 110 Fed. (2d) 135); some community of interest in the business (*Wallace v. Pacific Electric Ry. Co.,* 105 Cal. App. 664, 288 Pac. 834; *Holcomb v. Lorino,* 124 Tex. 446, 79 S. W. (2d) 307); each to have a voice in its control and management (*Gleichman v. Famous Players-Lasky Corporation,* 241 Mich. 266, 217 N. W. 43).

The law of partnership applies to the questions arising between the parties and among the parties in relation to third parties. Each member of a joint adventure has a dual status—that of principal for himself, and as an agent for the others. *Irvine v. Campbell,* 121 Minn. 192, 141 N. W. 108; 47 C. J. 666. And the negligence of one will be imputed to both. *Keiswetter v. Rubenstein,* 235 Mich. 36, 209 N. W. 154. In the absence of agreement otherwise, if one pays a joint liability of himself and associates or a debt incurred in the business, he is entitled to proportionate contribution from his associates. 33 C. J. 855.

The essentials of the relationship have been frequently stated in automobile accident cases when contributory negligence is alleged and it is sought to impute the negligence of the driver to the passenger, in which cases the courts have generally held that to constitute the relationship there must be an agreement to enter into an undertaking in the objects of which the parties have a community of in-

terest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other. *Jessup v. Davis,* 115 Neb. 1, 211 N. W. 190. In *Rosenstrom v. North Bend Stage Line,* 154 Wash. 57, 280 Pac. 932, two high school football players discovered they had left their locker keys at home. One offered to drive the other to procure the keys. The driver was negligent and his companion was injured. The court held there was no joint adventure, saying: "The one had no interest, as that term is understood in the law of joint adventure, in procuring the key of the other, and in going for them, their purpose was in no sense common or joint, but rather separate and independent." In *Carboneau v. Peterson,* 1 Wash. (2d) 347, 95 Pac. (2d) 1043, a similar case, the court said: "Two parties may be engaged in the performance of a purpose or object which may be for the sole interest or advantage of one and from which the other is to derive no benefit, or the interest of one may be different and distinct from that of the other, in which cases there would not be a joint adventure." Plaintiff claims that the tests applied in this class of cases is not applicable to the facts herein. However, we think the basic principles are the same. Certainly the essentials of the relationship to be established before it can be said that there is such privity between the parties that one is chargeable with the negligence of the other should be the minimum essentials to be established in order to create a relationship in which one can be held liable for the negligence of a party employed by the other.

In view of the foregoing and other authorities, it is apparent that the relationship depends largely upon the legal intent as manifest from the facts and circumstances involved in each particular case. It may be concluded, however, that in order to establish a joint adventure the parties must enter into a contract, express or implied, as joint owners or principals. It must be an arrangement for their mutual benefit in the pursuit of which each has equal voice,

control and authority, although performance may be entrusted to one. There must be a community of interest in the objects and purposes of the enterprise, without which there can be no joint adventure.

We do not think the evidence shows that any such relationship was intended or in fact created herein. The record discloses that the extent of the city's responsibility was to furnish such part of the entire cost of the projects as was not supplied from federal funds. Specifically it agreed that the funds set out in the project proposals to be furnished by the sponsor would be available. W. P. A. agreed to furnish superintendence, material, all labor and other items. The city had no right to hire or direct employees, no control over any business or the means or agencies used to further said projects. It did not pay Dunn, have any right to fire him, tell him what to do or where to go. It had no authority to supervise his work or to tell him how to travel from job to job, whether by automobile or otherwise, or in what condition to keep his car. The entire control of the expenditures, employees and the work on both projects was at all times under the absolute direction of the W. P. A. Furthermore, the sole purpose of the W. P. A. was to furnish work relief for those in need and it restricted its employment rolls in order to accomplish this purpose. The city was not free to require that the employees be secured in the open field upon the basis of efficiency and because of known qualities as careful workmen. Neither was there community of interest in any business or property or the ends to be accomplished. The buildings involved were city buildings. The W. P. A. acquired no interest in them by reason of the project. The purposes and objects sought by each were separate and distinct and it could hardly be said, we think, that the projects were conducted for their mutual benefit, an essential prerequisite to the establishment of a joint adventure. The Works Progress Administration is merely a bureau or agency of the national government created by statute to render public service—by furnishing employment —from which it derives no direct benefit. Nor did the gov-

ernment ever intend, we think, to enter into an arrangement whereby it would be liable to the city for contribution as a partner, nor for any financial obligations beyond those specified, nor was it obligated under its agreement to complete the ventures—circumstances to be considered in determining legal intent. The relationship here formed is not such as would likely exist between individuals. In the case of *Dabelstein v. City of Omaha,* 132 Neb. 710, 273 N. W. 43, we referred to C. W. A. as a contractor. So also W. P. A. might be likened herein to a labor contractor who, to promote projects for relief purposes, also contributed part of the material and the major portion of the funds. A contractor represents the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. To this extent at least the relationship outlined partakes of that of contractor and contractee, but whatever the characterization, we think the arrangement shown by the evidence will not stand the tests which determine joint adventure.

We have examined many cases in which it was sought to hold a municipal subdivision liable in compensation to a relief worker or for his negligence. These cases have uniformly held that there was no liability, for the reason that the relation of master and servant did not exist. See *Williams v. City of Wymore,* 138 Neb. 256, 292 N. W. 726; *Shapiro v. City of Winston-Salem,* 212 N. Car. 751, 194 S. E. 479; *City of Los Angeles v. Industrial Accident Commission,* 9 Cal. (2d) 705, 72 Pac. (2d) 540. In none of these cases was the theory of joint enterprise discussed, although the fact situation in all is very similar.

Plaintiff admits that he does not find any direct authority for his position, but cites *Johnson v. City of Billings,* 101 Mont. 462, 54 Pac. (2d) 579, in support thereof. In that case, the city of Billings and Yellowstone county entered into an agreement to construct a drainage ditch. Later, help was obtained from C. W. A. The court held the city and county jointly liable for the negligence of one of the employees acting under the direction of the county. With-

out dispute, however, the drainage ditch was constructed for the joint and mutual benefit and use of both sponsors. Nor did the court find that C. W. A. and either sponsor occupied the relationship of joint adventurers. Herein, except for the fact that the city of Omaha and W. P. A. each made contribution to city projects, the record fails to present any legal indicia of the joint adventurer relationship generally recognized by the courts, and in our view will not sustain a finding based on the claim that such relationship existed between them. The city's motion for a directed verdict should have been sustained.

The judgment is affirmed as to the defendant Arthur L. Dunn. It is reversed and the action dismissed as to the city of Omaha.

AFFIRMED IN PART AND IN PART REVERSED AND DISMISSED.

IN RE GUARDIANSHIP OF LILLIE M. LYON.
NORMA ABELL ET AL., APPELLANTS, V. CLIFTON W. LYON ET AL., APPELLEES.

299 N. W. 322

FILED JULY 18, 1941. No. 31096.

1. **Insane Persons.** Ordinarily, one who is indebted to a person for whose person or estate a guardian is sought, or who has interests adverse to such person, should not be selected as such guardian, even though such a status does not by statute constitute a legal bar to such an appointment.
2. ———. Subject to statutory restriction, the selection of a guardian is within the sound discretion of the county court, and its selection will not ordinarily be changed upon appeal except for abuse of discretion.
3. ———. In the selection of a guardian, the paramount consideration is the interest of the ward, both as to his mental happiness and the proper use of his estate.
4. **Appeal.** A failure of the trial court to state the conclusions of fact found separately from the conclusions of law, in the trial of questions of fact to the court, in compliance with section 20-1127, Comp. St. 1929, is not reversible error, even though such statute be mandatory, if the record affirmatively shows that such failure

could not adversely affect the party making request for such compliance.

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

Thomas E. Dunbar, for appellants.

Robert M. Armstrong, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

TEWELL, District Judge.

This action was begun in the county court of Nemaha county by Norma Abell and Dale Lyon, hereinafter called "petitioners," for the purpose of securing the appointment of a guardian of the person and estate of Lillie M. Lyon. The petitioners suggested the appointment of John P. McKnight as guardian. Prior to the completion of trial in the county court, Clifton W. Lyon, Edward Ray Lyon, and Charles Buerl Lyon, three sons of said Lillie M. Lyon, hereinafter called "objectors," filed objections to the appointment of said McKnight as guardian, but requested the appointment of said Charles Buerl Lyon as such guardian. Trial in the county court resulted in the appointment of Charles Buerl Lyon as such guardian. An appeal was taken to the district court by petitioners. In the district court Radford W. Lyon and Kenneth G. Lyon, hereinafter called "interveners," filed a petition of intervention, by which said interveners objected to the appointment of said Charles Buerl Lyon as guardian and requested the appointment of said John P. McKnight. Trial in the district court again resulted in the appointment of said Charles Buerl Lyon as guardian. Petitioners have perfected their appeal to this court.

The pleadings and the evidence disclose that Lillie M. Lyon and James W. Lyon, wife and husband, resided on a farm in Nemaha county for several years prior to the death of James W. Lyon, which occurred about March, 1938. Lillie M. and James W. Lyon were the parents of four sons, three

of whom are the objectors named above. The other son, Columbus Lyon, predeceased his father, and at his death he left surviving five children, two of whom are the petitioners above named, two of whom are the interveners above named, and the other of whom is one Ava Lyon. James W. Lyon died intestate when the owner of about 880 acres of land, which was then free of encumbrance. By some method, not shown by the record, the objectors acquired the interest in said real estate that the five children of their deceased brother, Columbus, inherited from their grandfather. In January, 1939, the three objectors herein, and their mother, Lillie M. Lyon, as sole parties plaintiff, began an action in the district court for Nemaha county against Nina M. Lyon, wife of objector Edward Ray Lyon, and Fairy I. Lyon, wife of objector Charles Buerl Lyon, as sole parties defendant. In this action it was alleged that the objectors and their mother were the sole owners of said real estate and had agreed upon a partition thereof in kind, and that said Nina M. Lyon, defendant in such action, was incompetent to sign any conveyance of any part of such real estate. The petition set forth the terms of the partition agreement. By these terms the three objectors took all of said real estate, each receiving a separate part of about one-third the value of the whole. A small payment in money by one or two of the objectors to the others, and a provision that the three objectors should pay their mother an annuity during her lifetime, payable semiannually in two equal instalments as follows, Edward Ray Lyon $505 a year, Clifton W. Lyon $552.50 a year, and Charles Buerl Lyon $496 a year, supposedly caused each of the objectors to receive a one-third of such land in value. For the purpose of this division the 880 acres of land were valued at $62,140. The annuities taken by the mother were her only compensation for her one-third interest in such real estate and a homestead interest of a life estate in one quarter-section. This partition action resulted in a decree approving a partition of the estate in kind in accordance with the agreement recited in such petition. By the decree payment of the annuity to be paid by

any one of the objectors herein was secured by a first lien on the real estate taken by such objector. About July 24, 1939, Lillie M. Lyon, then 76 years of age, suffered a slight cerebral hemorrhage, and about August 11, 1939, was placed in Green Gables Sanatorium, in Lancaster county, Nebraska, by objectors for care and treatment. On September 2, 1939, petitioners began this action for the appointment of a guardian, and about the same time made application to the district court for Lancaster county for a writ of habeas corpus to obtain the release of their grandmother from such sanatorium. On September 25, 1939, a consent decree was entered in the action for such writ by which Lillie M. Lyon was released to the custody of the objectors, and was then taken to the farm home of objector Clifton W. Lyon, where she had previously resided with such son and her husband, James W. Lyon, for many years. The estate of said Lillie M. Lyon, at the time of the appointment of a guardian, as shown by the inventory filed November 1, 1939, by objector Charles Buerl Lyon after his appointment by the county court as guardian in this action, consisted of a note for $1,000 dated January 10, 1939, due one year after date and made by her son Clifton, a one-third distributive share in the proceeds from the estate of her deceased husband, estimated as having a value of $400, cash on hand in the sum of $1,435.17, chattels of the value of $427 and $1,553.50 past due and owed by objectors upon the annuities above mentioned, a total of $4,815.67.

It will be noted that all of the parties to this action seek the appointment of a guardian. The evidence is ample to sustain a finding that a guardian should be appointed. The question here involved is not that of whether or not a guardian should have been appointed, but rather the question is whether or not Charles Buerl Lyon should have been appointed, under the circumstances above outlined.

No statute of Nebraska is cited that gives preference to any person, spouse, or next of kin of the ward, in the appointment of a guardian, as is the case in the appointment of an administrator of the estate of a person deceased.

No statute of Nebraska, aside from one relating to the appointment of a guardian for one receiving payment from the United States Veterans' Bureau (Comp. St. 1929, ch. 38, art. 4), seems to place any restriction upon what person shall act as a guardian of a minor or incompetent person, other than to provide that a "suitable person" shall be so appointed. Ordinarily one who is indebted to a person for whose person or estate a guardian is sought, or who has interests adverse to those of such person, should not be selected as such guardian, even though such a status does not by statute constitute a legal bar to such an appointment. 28 C. J. 1076. The only indebtedness of Charles Buerl Lyon to his mother is his obligation to pay her the annuity of $496 a year above mentioned. The payment of this is secured by a first lien upon real estate of the value of about $20,000. Subject to statutory restriction, the selection of a guardian is within the sound discretion of the county court, and its selection will not be changed except for abuse of discretion. 25 Am. Jur. 23, sec. 26; 32 C. J. 663. We are unable to say that the county court abused its discretion merely because of the indebtedness of the one appointed guardian, under the circumstances above outlined.

It is urged that it might be, or become, the duty of the guardian of Lillie M. Lyon to maintain proceedings to undo the purported effect of the partition action above mentioned. Such a probability presents a far more serious question than does the indebtedness above discussed. The value of the annuities received by Lillie M. Lyon, to be paid only during her life, when she was in poor health and 76 years of age, appears to be far less than was the value of the interest she held in the real estate affected by the partition action. If she was competent, she had a right to do with her property what she liked. If she was incompetent, the right to maintain such a proceeding will not, in all probability, be barred by lapse of time during her lifetime. The annuities are ample to support her in the manner to which she has been accustomed. The record does not show Charles Buerl Lyon to be a person of bad habits, but affirma-

tively shows him to be honest and industrious. No ill will, or lack of attachment common between a mother and her son, is shown to exist between Charles Buerl Lyon and his mother. He resides near to her residence. In the selection of a guardian, the paramount consideration is the interest of the ward, both as to mental happiness and proper use of his estate. 28 C. J. 1075. While the county court might well have selected as guardian some one to whom the objections urged against Charles Buerl Lyon did not apply, we are not able, from the record as a whole, to say that it abused its discretion.

During the trial in the district court, petitioners filed a written request, by which the trial court was requested to make separate findings of fact and of law. Section 20-1127, Comp. St. 1929, provides as follows:

"Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, * * * in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law."

A finding upon any specified question of fact or of law was not requested. The court did make a special finding of fact upon a sufficient number of questions of fact to support its decree. Furthermore, upon any material issue, the evidence is not in conflict. While this section of the statute is mandatory, when applicable, a failure by the trial court separately to state findings of fact or conclusions of law is not reversible error, when the record affirmatively shows that such failure worked no injury to appellant. 4 C. J. 1059, and cases cited in footnote. Under the condition of the record in this case, the appellants could not possibly be injured by any failure to make special findings of fact and conclusions of law separately, since the evidence is not in conflict upon any issue necessary to support the trial court's decree. The parties stipulated that John P. McKnight was a suitable person to act as guardian, all parties request and agree that a guardian should be appointed, and

the trial court made a specific finding to the effect that Charles Buerl Lyon was a suitable person to appoint.

For reasons above given, the decree of the trial court is affirmed.

AFFIRMED.

HARRY RICHARDS, APPELLEE, V. ESTATE OF ANNA GILMORE ET AL., APPELLANTS.
299 N. W. 365

FILED JULY 18, 1941. No. 31124.

1. **Garnishment.** In garnishment proceedings, when a third person, claimant of the fund, interpleads, it is proper for the court to hear and determine such person's right thereto.
2. ———. County court has jurisdiction in garnishment proceedings to determine the ownership between rival claimants of an undisputed amount owing on a real estate contract.
3. **Conversion.** When the owner of real estate enters into a valid contract for the sale thereof, equity regards the real estate as converted into personal property, and it is so treated if the vendor dies.
4. **Courts.** Objection to jurisdiction of the court over the person of the defendant is waived by filing a motion to strike part of the petition and to make parts of the petition more definite.
5. **Contracts.** A contract for the benefit of a third person made with his knowledge and assent cannot ordinarily be changed without his approval.
6. **Vendor and Purchaser.** Evidence examined and *held* testatrix' attempted change of beneficiary to part of fund to be paid by debtor after her demise was ineffectual and contrary to her original intent when contract with debtor was made.
7. ———. No actual or constructive fraud being shown and claimant's right to the proceeds of the real estate contract being established, the trial court was correct in assigning the funds in garnishment to claimant.

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

T. R. P. Stocker, for appellants.

Robert M. Armstrong, contra.

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

THOMSEN, District Judge.

On a garnishment issued out of the county court at request of the administratrix with will annexed, Harry Richards, entitled the plaintiff in this cause, intervened, claiming ownership of the fund. He filed his petition of intervention, the defendant administratrix filed her answer, followed by a reply, and the court heard and determined the respective claims in conformity with the rule: "Where the court obtains jurisdiction of a fund by garnishment proceedings, it necessarily follows that the claims of all persons claiming an interest in the fund should be heard and an order entered determining their respective rights thereto. While it is true that the court's jurisdiction over a fund in the hands of a garnishee is determinable from the answer of the garnishee, yet, if jurisdiction does attach, the determination of the interests of all the parties is for the court." *Orchard & Wilhelm Co. v. North*, 135 Neb. 39, 280 N. W. 272. The court found that the fund was the property of the plaintiff and ordered payment to him, and further required the administratrix to restore $75 previously collected from the garnishee on prior garnishments. The administratrix appeals.

The controversy arises over a real estate contract made by Anna Gilmore with Lee Kelligar, a lawyer of excellent repute at Auburn, Nebraska. The contract was made February 23, 1935. By it she sold her house for $5,000, $500 in cash and the remainder at the rate of $25 a month. Among the provisions, Kelligar should pay the taxes, keep property insured and repaired, and in the event of his failure promptly to pay a strict foreclosure would follow. The contract was drawn by Kelligar in consultation with Mrs. Gilmore and her brother, Harry Richards. Under its terms the seller deposited a warranty deed, properly executed, with the Carson National Bank of Auburn, Nebraska, "said deed to be delivered to second party (the buyer) when this contract has been fulfilled in all its terms and full payment

made." Kelligar paid regularly to Mrs. Gilmore until her death, October 23, 1938.

The contract also provided: "It is further agreed between the parties hereto that in the event of the death of party of the first part all payments remaining unpaid and any and all covenants of this agreement to be kept and performed by second party will, by second party be made, kept and performed to and in favor of Harry Richards of Mexico, Missouri, and in the event of his death before the completion of the terms of this contract, all payments and covenants hereof will be made and kept with the heirs at law of Harry Richards." After Mrs. Gilmore's death payments were made to Harry Richards of Mexico, Missouri, until garnishment by the administratrix.

Defendant contends that a determination of the litigants' rights involves the "title to land" and that this is "an action upon a contract for the sale of real estate," subjects forbidden by statute to the jurisdiction of the county court. Under familiar equitable principles, where the owner of real estate enters into a valid contract for the sale thereof, the real estate is regarded as converted into personalty and it is so treated when the vendor dies. *Davie v. Davie,* 47 Wash. 231, 91 Pac. 950; Annotation, Ann. Cas. 1914D, 419; 19 Am. Jur. 11, 15, secs. 11, 15. Thus, not the title to land but the right to personal property, the money to be paid by vendee, is here involved. Neither is this an action between the parties to a contract for the sale of real estate in which their rights or liabilities between themselves are involved. This is a contest between two rival claimants to a fund unquestioned in amount in which the vendee has no interest except as stakeholder. The county court is a proper forum for the hearing.

Notice of the filing of the petition of intervention was served on Nellie Bellas without her designation as administratrix of the estate with will annexed. Defendant filed a special appearance objecting to the jurisdiction of the court over her person. Assuming, without deciding, that service of such notice was necessary under all the conditions, the

defendant waived her objection by filing a motion to strike and to make parts of the petition more definite, and, moreover, by objecting to the jurisdiction of the court over the subject-matter. *Cropsey v. Wiggenhorn*, 3 Neb. 108; *Crowell v. Galloway*, 3 Neb. 215; *Healy v. Aultman & Co.*, 6 Neb. 349; *Hurlburt v. Palmer*, 39 Neb. 158, 57 N. W. 1019; *Burlington Voluntary Relief Department v. Moore*, 52 Neb. 719, 73 N. W. 15; *Kyd v. Exchange Bank of Cortland*, 56 Neb. 557, 76 N. W. 1058; *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801, 89 N. W. 269; *Stelling v. Peddicord*, 78 Neb. 779, 111 N. W. 793; *Williamson v. Williamson*, 120 Neb. 40, 231 N. W. 506; *Troyer Furniture Co. v. Orchard & Wilhelm Co.*, 121 Neb. 301, 237 N. W. 144.

The administratrix is the only beneficiary under the will of Anna Gilmore. The amount which she claims is $300 due to her on a note signed by the deceased's husband, who died before Anna Gilmore's demise. If her claim were paid, all the remainder of the estate would descend to Harry Richards, the brother. The claimed will is dated June 28, 1938, less than four months before the testatrix died and more than three years after the contract with Mr. Kelligar was signed. The whole of the will found in the bill of exceptions is as follows: "I feel I desire the principal of note given by W. A. Gilmore to Miss Nellie Bellas paid on my death. I, therefore, request Lee Kelligar to pay to Miss Nellie Bellas a total of $300. This is to be paid out of the $25.00/100 per month due me on the sale of my former home and being purchased by Lee Kelligar. This memo is to be the authority of Lee Kelligar to make such payment and on the payment of the $300 to Miss Bellas, Mrs. Cline is to turn this order over to Mr. Lee Kelligar." This document was admitted to probate as the will of the deceased, and no appeal having been taken therefrom, it must be considered as the will of the deceased.

It is contended by the defendant that "Anna Gilmore believed and understood that said contract provided for and left said property and the proceeds thereof subject to her use, benefit and control, and that she had a right to dispose

of the same as she saw fit, by will or otherwise, and that said contract was ambulatory, and at all times subject to her control and change as to the disposition of the proceeds of said property and the control thereof. That the provision with respect to the said monthly payments under said contract after her death to the said Harry Richards by Lee Kelligar was only intended to be made to him as her agent, and at all times subject to her right to change and control the same by will or otherwise." The only evidence offered to support this claim is in the testimony of the witness Mrs. Frank Cline who, after reciting that Mrs. Gilmore had stated at the hospital that she wanted Miss Nellie Bellas paid, said: "Q. Did she tell you from what source she wanted it paid? A. Yes, sir; she felt she had no money, she never could have the three hundred, that it had gone and could it be arranged to be paid out of the twenty-five dollars that was coming in from the house, Mr. Kelligar was paying each month. Q. Did she indicate to you that she thought the house belonged to her or somebody else? A. Yes, sir; she felt the house belonged to her." This conclusion of the witness Cline is far from establishing the claim made by the defendant. Moreover, the evidence and circumstances overwhelmingly establish that Mrs. Gilmore understood the full import of the contract when made, and that the provision for payment of any amount remaining after her death was at her request. No other attempt to change beneficiary is shown in the record. When the contract was made Mrs. Gilmore was well and strong, taking care of a ten-room house and a sick mother; when the attempted change was made she was in the hospital afflicted with cancer of which she died in a few months. A contract for the benefit and with knowledge and assent of a third person cannot ordinarily be changed without the consent of the beneficiary. *Fanning v. Murphy,* 126 Wis. 538, 105 N. W. 1056; and particularly true when the beneficiary had acted on the contract. 17 C. J. S. 857, sec. 373; Annotation, 53 A. L. R. 181; 4 Page, Contracts, sec. 2394; Restatement, Contracts, sec. 142. A familiar application of this rule is in old line life insurance

policies. The beneficiary has a vested interest the moment the contract is made. 2 Couch, Cyclopedia of Insurance Law, sec. 308; Annotation, 62 A. L. R. 940. In some respects the situation is similar to that of a gift delivered to a third person with instructions to deliver to donee on the donor's death, and if the donor parts with control over it and reserves no right to recall it, he thereby makes a final disposition of the property. Annotations, 3 A. L. R. 902, 933; *Novak v. Reeson,* 110 Neb. 229, 193 N. W. 348. Here the beneficiary knew of the existence of the contract and was consulted with respect to its formulation. Furthermore, he later paid to his sister the sum of $15 a month and during her stay in the hospital, except the first three weeks, the sum of $25 a week. Under all the facts and circumstances it seems adequately established that Mrs. Gilmore intended to and did part with control over the disposition of the proceeds of the sale, and that she lost the power to change, partially and wholly, the person who should be the beneficiary; and that the disposition made by her in the claimed will is entirely ineffectual.

Defendant contends that the price obtained for the house is inadequate and that the sale was procured by fraud on the part of Richards; that the latter stood in the position of confidential adviser, and that his action resulted in some detriment to Mrs. Gilmore. It must be remembered that this is solely a garnishment and a determination of the question to whom the money reached by such garnishment belongs; it is not a creditor's bill or a suit against Richards to recover money or property belonging to the estate. On the latter score it must, however, be remembered that the sole heir is Richards, and that after the payment to Nellie Bellas of her claim of $300 all the remainder would go to Richards. No evidence of inadequacy of price or of fraud in the sale of the property is offered in the record. No witness is called to dispute that the $5,000 to be paid by Kelligar is not fully adequate. On the other hand, it seems contrary to good sense that Richards should not want his sister to have the highest possible price, for, if she died, the unpaid balance

would be his. On the general contention that Mrs. Gilmore lost on the transaction the evidence is against the defendant. The sale seems to have been a sensible one; it brought her a definite income for a time, enabled her to go to smaller quarters, suitable for her needs, at less expense for maintenance and heating, and permitted her better to care for her invalid mother.

We have gone through the record and briefs of counsel carefully, with some independent investigation of the law, and we find nothing in the action of the district court contrary to established rules. The judgment of the district court is

AFFIRMED.

MARCE WITZENBURG, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

299 N. W. 533

FILED JULY 25, 1941. No. 31081.

1. **Insurance.** By the provisions of section 44-204, Comp. St. 1929, the state determines the source of the funds which may be used in the payment of compensation for services rendered and expenses incurred in the administration of the affairs of an insurance company by the department of trade and commerce (now insurance).
2. ———. The state does not underwrite those items of compensation and expenses and does not authorize its officials to contract to save employees harmless in the handling of those funds.
3. **Officers.** Every person must ascertain, at his peril, the extent of the power of a public officer in the performance of his ministerial duties.
4. ———. The authority of the officer is a matter of public law, of which every person interested is bound to take notice.
5. ———. In performing ministerial duties, the acts of a public officer which are beyond the powers authorized by law are void.
6. **Insurance.** The contract alleged in the petition herein is void and not binding upon the state.
7. **Evidence.** The general rule is that, while a court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case.

8. ———. However, where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
9. **Pleading.** Matters so judicially noticed are properly considered when determining the questions presented by a demurrer.

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

Albert S. Johnston, for appellant.

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

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

SIMMONS, C. J.

Plaintiff alleges that in July, 1932, he was employed by oral contract at $250 a month to render services to the defendant as an employee of the department of trade and commerce (later department of insurance) in connection with the affairs of the Lincoln Hail Insurance Company then in the hands of the department; that the statutes authorized the department to give its employees such powers and duties as it considered proper; and that the defendant agreed to hold harmless any person so engaged from liability for acts done pursuant to such orders and in reliance upon said orders and in the belief that such orders were authorized and lawful; that prior to July, 1934, the defendant incurred obligations of $20,543.61 in the administration of the trust and placed funds of said trust in the hands of plaintiff and one F. A. Wood and directed that they be disbursed in the payment of said obligations; that plaintiff and Wood were informed that said funds could be so used lawfully and that the court had so authorized their use; that plaintiff and Wood so disbursed the funds, exercising no discretion in so doing, under orders of the defendant, believing that their acts were authorized and legal and relying on the agreement

of the defendant to hold them harmless; that the amounts so paid were authorized and approved by the court in the action then pending involving said insurance company; that in July, 1934 (after the disbursement of said funds) policyholders intervened in the district court action claiming that the moneys used in the payment of said expenses were funds which could not be used for that purpose and that plaintiff was liable therefor; that the defendant and its attorney general were notified and agreed to defend said action and hold the plaintiff harmless; that the defendant abandoned the defense of said action and plaintiff employed his own counsel; that in said action it was adjudged that $12,633.56 was not lawfully disbursed and plaintiff and Wood were required to repay the same with interest, which they did, and that the judgment, costs and attorneys' fees so paid amounted to $15,145.72; that the plaintiff acted throughout in good faith and relying upon defendant's statement that it had the authority to so use the funds; that at all times during plaintiff's employment the defendant had ample assets of the trust to have paid the expenses of its administration, and to hold the plaintiff harmless, but it failed to do so; and that by reason thereof defendant is obligated to indemnify plaintiff for the amount spent in making restoration. The above constitutes a summary of the allegations of plaintiff's first cause of action.

For a second cause of action plaintiff alleges that he was paid his salary to December 31, 1933; that it was agreed that his salary subsequent thereto should be paid when the remaining assets of the trust were liquidated; that plaintiff continued said employment until January 28, 1935; that his unpaid salary amounts to $3,233.33; and that defendant disposed of the assets of the trust and did not pay him.

Plaintiff further alleged, as to both causes of action, that he presented a claim for the amounts due him to the department for approval, but that that department failed to approve the same; that he then presented the claim to the auditor of public accounts, who informed plaintiff that there were no funds appropriated or available for its payment and re-

ferred the same to the claims and deficiencies committee of the legislature; that that committee did not approve the same; that that committee was of the opinion that it presented a question of contract and that the liability of the defendant could be determined by the courts without further legislative action.

Plaintiff prayed judgment for the sum of $15,145.72 on his first cause of action and the sum of $3,233.33 on his second cause of action.

To the petition the defendant demurred generally for the reason that the facts stated in the petition "are insufficient to constitute a cause of action against this defendant."

The trial court sustained the demurrer, holding the petition deficient in the following particulars:

(1) The defendant was without power or authority, express or implied, to enter into the contract alleged; (2) the liability, if any, on the part of the state for alleged services or expenses rendered in the liquidation of the insurance company is a charge against the assets of the company and not of the state; (3) the action of the district court to which plaintiff refers in his petition was appealed to the supreme court of Nebraska and a decision rendered therein which is *res adjudicata* of any alleged cause of plaintiff.

Plaintiff elected to stand on his petition; his case was dismissed and he appeals.

A detailed summary of the facts surrounding this transaction may be found in *State v. Lincoln Hail Ins. Co.*, 133 Neb. 496, 276 N. W. 169, wherein this court affirmed a judgment in favor of the receiver of the insurance company against plaintiff and Wood in the sum of $12,633.56, for moneys unlawfully diverted and misappropriated and denied them a judgment for compensation.

The plaintiff in this action seeks to require the defendant (state) to reimburse him for the money which he alleges he paid in satisfaction of that judgment and to require the defendant to pay him the salary which he was denied in that action.

The theory is that the acts done by the plaintiff which

resulted in the judgment against him were in fact the acts of the defendant; that the defendant itself, acting through its officers, took the trust funds to pay these expenses which the defendant had incurred; that the plaintiff was required to restore these funds because they passed through his hands while he was acting pursuant to orders; that he unknowingly and unwittingly trespassed upon the rights of the beneficiaries of the trust relying upon the statements of officials of the defendant that the funds could be so used and that said use of the funds had been approved by court order; that the decision to so use the funds was not the decision of the plaintiff but of the defendant; and that the defendant agreed to hold the plaintiff harmless; and that the defendant is liable to the plaintiff for the loss which he sustained.

As to the claim for compensation for services, the contention is that the defendant undertook the operation of the business of the insurance company, employed the plaintiff, used his services, and agreed to pay plaintiff for the services so rendered.

To support his contention that he has a right to maintain this action and that he has alleged causes of action against the defendant, the plaintiff cites section 27-324, Comp. St. 1929, providing that "The state may be sued * * * in any matter founded upon or growing out of a contract, expressed or implied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state;" and upon the holding in *Peterson v. State,* 113 Neb. 546, 203 N. W. 1002, to the effect that a contract with the department of public works, previously authorized by the legislature, is essentially a contract with the state, upon which the state may be sued; and upon *Moore v. Garneau,* 39 Neb. 511, 58 N. W. 179, to the effect that a principal is bound by the acts of his agent, within the scope of the agent's authority, and that that rule applies to the state as well as the individual.

The question here is not whether the state may be sued upon its contract, but whether the contract alleged is one

that the legislature has authorized or ratified or is founded upon any law of the state.

Plaintiff alleges that he was a special employee of the defendant in the handling of the affairs of the insurance company, which had been placed in the hands of the department in proceedings brought under section 44-204, Comp. St. 1929. That act, in paragraph 4, not only provides that the department shall have power to appoint special employees and to give them "such powers * * * as the department * * * may consider proper," but also that "The compensation of such assistants, counsel and clerks, and all expenses of taking possession of and conducting the business of liquidating any such company, shall be fixed by the department of trade and commerce, subject to the approval of the court, and shall on the certificate of the department of trade and commerce, be paid out of the funds or assets of such company." Here, then, is a legislative direction as to the source of the funds to be used in the payment of compensation for services and expenses. It is a part of the same paragraph defining the powers of the department upon which plaintiff bases his claim and clearly imposes a legislative restriction as to the funds which may be used in the administration of the affairs of insurance companies under the act. By this provision the state does not underwrite those items of compensation and expenses, but specifically defines the source from which payment must come. The plaintiff, obviously, in relying upon the statute for the authority of his employment, likewise must accept that employment subject to the limitations imposed by the act. Plaintiff cites *Moore v. Garneau, supra,* as authority for the defendant to make the contract to save him harmless and to pay his compensation. The case is not in point. In that case the authority of the state to contract and its liability were not questioned. It was there contended that the contract price for certain goods purchased for the state was excessive. This court there discussed the evidence and held that the state was bound, the agent of the state having acted within the scope of his authority in making the contract.

The rule applicable to this situation is clearly stated in *Stanser v. Cather,* 85 Neb. 305, 123 N. W. 316, where this court said:

"It is a well-established principle that, if a public officer in performing his ministerial duties acts beyond the express authorization of the law, his acts will be held to be void." The rule is that, where an officer exceeds his powers in the performance of his ministerial duties, "the body for which he acts, whether it is the state, a municipal corporation, or other public organization, is not bound by his acts; and every person dealing with an officer must, at his peril, ascertain the extent of his powers." Throop, Public Officers, sec. 551. In Mechem, Public Officers, sec. 829, it is said: "Every person, therefore, who seeks to obtain, through the dealings with the officer, the obligation of the public, must, at his peril, ascertain that the proposed act is within the scope of the authority which the law has conferred upon the officer." In section 830 of the same work it is further said: "The authority of the officer being a matter of public record or of public law of which every person interested is bound to take notice, there is no hardship in confining the scope of the officer's authority within the limits of the express grant and necessary implications, and such is the well-established rule."

Plaintiff further founds his second cause of action upon the theory that he was an employee of the defendant and that the defendant received the benefit of his service.

These arguments all go contrary to the record of the case of *State v. Lincoln Hail Ins. Co., supra,* upon which judgment plaintiff of necessity bases his causes of action. He refers to it in his petition; he was a party to that litigation; that litigation, as the decision of this court shows, established that the receiver of the insurance company for that company was the beneficiary of the judgment, and that the claim for salary was presented in that case as a claim for services rendered the insurance company. Plaintiff cannot now argue contrary to that record, which he helped to make, and upon which he now relies. The plaintiff not only calls

direct attention to that record but bases his causes of action upon it. Without that record his alleged causes of action would not exist.

The trial court took, and this court may properly take judicial notice of that record. The general rule is that, while a court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. *Fassler v. Streit,* 92 Neb. 786, 139 N. W. 628. However, "There may be cases so closely interwoven, or so clearly interdependent, as to invoke a rule of judicial notice in one suit of the proceedings in another suit." 23 C. J. 114; and a court "will take notice of its records to the extent of knowing that the controversy involved in an appeal has already been considered by it on a previous occasion." 20 Am. Jur. 105, sec. 87. "In a case like this the court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it." *Dimmick v. Tompkins,* 194 U. S. 540, 24 S. Ct. 780. Plaintiff cannot rely in part upon the record made in the former litigation to which he was a party, and ignore, or expect courts to ignore, that part of the record which is not to his liking. Under the circumstances here existing, matters determined in that proceeding are *res adjudicata* and that question may be presented by demurrer. *Van Etten v. Leavitt,* 90 Neb. 461, 133 N. W. 649; *Marsh-Burke Co. v. Yost,* 102 Neb. 814, 170 N. W. 172.

Plaintiff, however, contends that his right to recover under the alleged contract with the defendant did not arise until the termination of the prior litigation, and that that matter of necessity could not have been adjudicated in the former action. As to that it is patent that the defendant was without power or authority to enter into the contract alleged.

The judgment of the district court is

AFFIRMED.

SAM LUCHSINGER, APPELLEE, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.

299 N. W. 549

FILED JULY 25, 1941. No. 31105.

1. **Eminent Domain.** An irrigation district organized under the provisions of section 70-707, Comp. St. Supp. 1939, is liable for damages caused by seepage from its irrigation works, regardless of whether the district was guilty of negligence in the construction and operation of such works.
2. **Waters.** Subirrigation in the natural condition of land used for farming is a valuable property right attached to the land itself.
3. **Eminent Domain.** Under 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), a public power district constructing and maintaining a tailrace which destroys by drainage subirrigation of farm lands of others is liable for resulting damages.
4. ———. "Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled." *Lowell v. Buffalo County*, 119 Neb. 776, 230 N. W. 842.
5. ———. Evidence outlined in opinion *held* sufficient to support a verdict in favor of plaintiff for $4,500 in an action to recover from a public power district damages for destroying by drainage subirrigation of farm lands.
6. **Appeal.** Harmless error in limiting the number of witnesses for defendant on a particular issue is not a sufficient ground for the reversal of a judgment.

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

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

Walter, Flory & Schmid, contra.

Heard before ROSE, EBERLY and PAINE, JJ., and ELDRED and ELLIS, District Judges.

ROSE, J.

This is an action by Sam Luchsinger, plaintiff, to recover from the Loup River Public Power District, defendant, damages for destroying by drainage subirrigation of lands owned by him.

Plaintiff alleges in his petition that he owns in Platte county 68 acres of land in the north half of the northeast quarter of section 16, and 80 acres consisting of the east half of the northeast quarter of section 17, township 17 north, range 1 east of the sixth P. M., and that defendant excavated adjacent to or near these lands below the underground water-table a permanent tailrace extending from its power plant near Columbus to the Loup River and thus destroyed by drainage the formerly existing subirrigation essential to the production of crops on his lands, to his damages in the sum of $6,035.

Defendant resisted plaintiff's claim for damages on the grounds that it owns in fee the lands in its right of way for its tailrace and as such owner had a right, under the common law adopted by Nebraska, to intercept percolating waters under other lands without liability for resulting damages; that the value of plaintiff's lands was not depreciated by defendant; that defendant did not lower the water-table under plaintiff's lands; that the water-table was lowered by drought and other causes before the tailrace was excavated; that plaintiff was not deprived of subirrigation or damaged by excavation and maintenance of the tailrace.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $4,500. From judgment therefor defendant appealed.

The petition and the evidence were challenged by motion for a peremptory instruction in favor of defendant after both parties had rested, and the overruling thereof is assigned as error. In the argument on this ruling defendant stated its position as follows:

"The defendant further contends that the common law is in force in this state as to subsurface percolating waters and that it had a lawful right to dig on its own land without liability for resulting drainage of subsurface waters from the adjacent lands"—citing in support of the common law cases from other jurisdictions.

The common law of England invoked by defendant was

first adopted by statute in 1866. In its present form it is as follows:

"So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature of this state, is adopted and declared to be law within the state of Nebraska." Comp. St. 1929, sec. 49-101.

By a divided court the common law applicable to seepage was stated as follows in 1930:

"In this state the owner of an irrigation canal or ditches is not liable to one whose land is injured by seepage from said canal or ditches, not intentionally caused by him, unless he is negligent in the construction or operation of the works. Therefore, the owner of an irrigation canal or ditch is not an insurer against seepage therefrom, but is liable only for negligence and intentional wrong-doing." *Spurrier v. Mitchell Irrigation District,* 119 Neb. 401, 229 N. W. 273.

In the case at bar, the damages of which plaintiff complains were not caused by negligence or malice. The common-law rule applicable to seepage was rejected in 1933 in so far as seeped lands within public power and irrigation districts organized under the 1933 act were concerned. The statute provides:

"Any district organized under the provisions of this act shall be liable for all breaks, overflow and seepage damage. Damages from seepage shall be recoverable when and if it accrues." (1933 p. 349.) Comp. St. Supp. 1939, sec. 70-707.

While this enactment does not say that drainage of subirrigation waters creates a liability for resulting damages, it departs from the common law and is in harmony with a constitutional provision which is superior to, and at variance with, the common law. The Bill of Rights declares:

"The property of no person shall be taken or damaged for public use without just compensation therefor." Const. art. I, sec. 21.

The Constitution of Nebraska does not make negligence or malice a condition of recovering from a public power dis-

trict damages for destroying by drainage subirrigation essential to the production of crops on lands of a private owner. Subirrigation in the natural condition of land used for farming is a valuable property right attached to the land itself. *Osterman v. Central Nebraska Public Power and Irrigation District,* 131 Neb. 356, 268 N. W. 334, following *Olson v. City of Wahoo,* 124 Neb. 802, 248 N. W. 304. A rule of law in conflict with the common law of England has been adopted in Nebraska in the following language:

"The American rule is that the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole, and while a lesser number of states have adopted this rule, it is, in our opinion, supported by the better reasoning." *Olson v. City of Wahoo,* 124 Neb. 802, 248 N. W. 304.

It is argued, however, that this is dictum in the opinion in which it appears and not binding on defendant in the present controversy. Whatever may be thought of its applicability to the case in which the rule was adopted, it answers for itself as a sound proposition of law essential to the protection of property rights of private individuals and is consistent with the Constitution and with morality and justice. It expresses the wisdom of the Roman Senate to the effect that private property cannot be taken for public purposes except on an estimate of its value; of the Magna Charta which declares that no one shall be deprived of his property except by the law of the land and by the judgment of his peers; of the Code of Napoleon which provides that no one can be compelled to give up his property except for the public good and for a just and previous indemnity; of the people of the United States who inserted in their Constitution the fundamental principle that private property shall not be taken for public use without just compensation; of

the Nebraska Bill of Rights declaring that "The property of no person shall be taken or damaged for public use without just compensation therefor."

The American rule is not only law in Nebraska, but it applies to property damaged for public use as well as to property taken for public use. In an early case the supreme court said: "The words, 'or damaged,' in sec. 21, art. I, of the Constitution, include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property." *City of Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295.

Later it was held: "Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled." *Lowell v. Buffalo County*, 119 Neb. 776, 230 N. W. 842. See, also, *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239, 78 N. W. 521; *James Poultry Co. v. City of Nebraska City*, 135 Neb. 787, 284 N. W. 273.

The demurrer to the petition was properly overruled.

Is the evidence sufficient to sustain a verdict in favor of plaintiff on the controverted issue that defendant, by drainage, destroyed subirrigation under the lands described in the petition and thus reduced the value thereof? Is the verdict excessive? The water that passes through defendant's powerhouse near Columbus empties into the Loup River by means of the tailrace, or artificial canal, which was excavated by defendant from the outlet to the powerhouse, a distance of three miles or more. One bank of the open canal adjoins the east 68-acre tract of plaintiff in section 16, but is some distance from the 80-acre tract in section 17. This land is in a valley and is nearly level, except for slight elevations of perhaps an acre or two above the general surface of the ground. The testimony of witnesses called to the witness-stand by plaintiff tends to prove the following facts:

The soil on plaintiff's lands is fertile, sandy loam. The water-table thereunder was generally from two to five feet below the surface and produced subirrigation before the tail-

race was excavated and from 13 to 20 feet afterwards. The normal fluctuation of the water-table under the 68-acre tract varied generally a foot or two on account of drought or other normal factors. Before defendant drained water from these lands into the tailrace, all of the soil but an acre or two was within the reach of subirrigation, but thereafter the water-table was beyond the reach of it. The lowering of the water-table lessens the productivity of the land even in wet seasons, owing, in such an event, to more rapid evaporation of rain water in the soil and quicker passage of it through sand and gravel to the water-table. While excavation was in progress water ran out of the bank adjacent to plaintiff's land and started a stream in the bottom of the ditch. The tailrace at one place when completed was 256 feet wide between the banks, 19 feet from the surface to water from the powerhouse, and about 45 feet deep. Before the tailrace was excavated, plaintiff's 68-acre tract produced good crops in normal seasons and partial crops in years of extreme drought. During the drought of 1934, before drainage, this tract, with subirrigation, produced about 30 or 35 bushels of corn to the acre. After completion of the tailrace the next year the corn crop on the same land, without subirrigation, was a failure. Crops in subsequent years were lost or seriously affected by drainage. The loss of subirrigation by drainage is permanent. The record contains evidence of the facts thus summarized. At the trial, the evidential facts presented a case for the jury on the issue of subirrigation.

A witness for plaintiff testified that the market value of the 68-acre tract in section 16 was $140 an acre before defendant excavated its tailrace and $60 an acre thereafter; that the value of the north half of the 80-acre tract in section 17 was $120 an acre before drainage and $40 an acre less afterward. The testimony of seven other witnesses for plaintiff varied somewhat from the foregoing estimates but evidenced damages in excess of the amount found by the jury. The witnesses for plaintiff generally gave the data or measurements or personal knowledge or observations

on which they based their testimony. Evidence on the existence and destruction of subirrigation includes testimony and opinion of an expert on ground-water hydrology. While evidence adduced by plaintiff is at variance with testimony of defendant's witnesses in many material respects, the record does not disclose any uncontradicted physical facts to disprove plaintiff's case or anything else to make the testimony of plaintiff's witnesses unworthy of belief.

A review of the entire record leads to the conclusion that the evidence is sufficient to sustain the verdict and that the damages allowed are not excessive in the sense that they show passion or prejudice of the jury requiring a reversal of the judgment.

The trial court permitted eight witnesses for plaintiff to testify on the issue of values and defendant complains that it was erroneously limited to four witnesses on the same issue. There seems to be no complaint of a preliminary ruling limiting each side to eight witnesses on values, but defendant contends it was entitled to a new trial because it was limited to four witnesses on the controversy over the value of plaintiff's lands before and after excavation of the tailrace. The record indicates that little attention was paid to this question during the trial, but that it was the subject of a spirited contest by affidavits at the hearing of the motion for a new trial. The record shows that the trial judge examined with deliberate care his rulings limiting the number of witnesses for defendant and expressed the conviction that he did not thereby affect the result of the trial or prejudice defendant in view of all the proceedings and evidence. What actually occurred at the trial is a material inquiry. It is shown without dispute that plaintiff produced eight witnesses, each of whom testified to the market value of the lands before and after construction of the tailrace. After he rested, defendant called a witness who testified in substance that the fair and reasonable market value of plaintiff's lands was $125 an acre before the tailrace was constructed and the same afterwards. Three other witnesses for defendant testified that the values were the same

after as before, giving figures. In addition defendant called four or more other witnesses whose testimony tended to prove that the water-table, except in depressions, was too far below the soil for subirrigation before the tailrace was excavated or was previously lowered by drought and other causes not attributable to the tailrace or that defendant did not by drainage deprive plaintiff of subirrigation for crops. The plain import of such testimony, if true, was that defendant did not, by construction and maintenance of the tailrace, depreciate the market value of plaintiff's lands. The jury necessarily so understood, but evidently disbelieved testimony of this nature, though the additional witnesses were not asked the difference in the value of the lands before and after construction of the tailrace. In these views of the record, error prejudicial to defendant does not affirmatively appear in the proceedings and judgment of the district court.

AFFIRMED.

LOCAL UNION NO. B843, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, APPELLANT, V. WESTERN PUBLIC SERVICE COMPANY, APPELLEE.

299 N. W. 531

FILED JULY 25, 1941. No. 31149.

1. **Parties.** "Indispensable parties to a suit are those who not only have an interest in the subject-matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *Jordan v. Evans*, 99 Neb. 666, 157 N. W. 620.
2. **Injunction.** In a suit in equity by a labor union for an injunction to prevent a public service corporation from retaining in its employ union members in arrears in the payment of union dues, employees in arrears are indispensable parties defendant.

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

George I. Craven, for appellant.

Mothersead & York, Davis & Stubbs and *James N. Ackerman, contra.*

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

ROSE, J.

This is a suit in equity by a labor union to enjoin an employer of labor from retaining in its employ any member or members of the union in arrears in payment of union dues.

The plaintiff is Local Union No. B843 of the International Brotherhood of Electrical Workers, affiliated with the American Federation of Labor, an unincorporated voluntary association. The only defendant is Western Public Service Company, Western Division, a corporation.

In the petition plaintiff names 12 members of the union, employees of defendant, who are alleged to be in arrears in the payment of dues. The working contract between plaintiff and defendant, relating to employment and discharge of employees, to time of service and to other mutual obligations, is made a part of the petition for an injunction. One paragraph of the contract is as follows:

"The company agrees upon written notice and satisfactory proof from the union that any member who is not in good standing (arrears in respect to dues) with the union shall not be retained in the employment of the company beyond a period of ten (10) days after receipt of the said notice and proof."

It is also alleged in the petition that plaintiff has performed the contract ever since it was executed October 1, 1938; that defendant gave notice October 1, 1939, that it would no longer be bound by the contract and in the future would retain in its employ members of the union who are in arrears in payment of union dues; that plaintiff gave notice to defendant and made satisfactory proof that the following named members of the union and employees of

defendant had lost their standing in the union because of arrears in the payment of dues, and that defendant cannot retain them as employees without violating the contract, to the irreparable injury of plaintiff: Clyde Vorse, J. H. Rehr, L. F. VanNoy, E. F. Kimbrell, H. L. Miller, J. D. Pearre, George Trumbo, S. B. Dozier, C. E. Horn, Roy LaFollette, Don Taylor and Charles Wilson. These employees are not parties to the contract nor to this suit in equity. A prayer of the petition for an injunction reads thus:

"That defendant, and all persons acting by, through or under it, its agents and attorneys, be temporarily restrained and temporarily and permanently enjoined from retaining in its employ any members of the plaintiff union for a period of time longer than ten days from and after receipt of written notice and satisfactory proof that said member or members are in arrears in the payment of their dues to plaintiff union."

The petition was attacked by demurrer on the ground "That there is a defect of parties defendant." As already indicated, no employee alleged to be in arrears for union dues is a party plaintiff or defendant herein. On account of such defect the district court sustained the demurrer. Plaintiff refused to make the employees named parties defendant, though permitted by the district court to do so, and elected to stand on the petition. The suit was dismissed. Plaintiff appealed.

The rule of equity by which the trial court was guided in sustaining the demurrer for defect of parties defendant and in finding that the employees were indispensable parties was stated in a former case as follows:

"Indispensable parties to a suit are those who not only have an interest in the subject-matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." *Jordan v. Evans*, 99 Neb. 666, 157 N. W. 620.

This is a general rule of equity recognized as such in both federal and state courts. Plaintiff does not seem to question it, but appears to rely on exceptions to the general rule and states its position as follows:

"There are exceptions to the rule in equity that all persons interested in the subject-matter of the suit or whose rights will be affected thereby must be made parties. Where there are interested persons, who are not before the court in person, but who are represented by a voluntary association of which they are members, their actual joinder as plaintiffs or defendants is not indispensable. A further exception is that, if it is impracticable for any reason to make them parties defendant, they need not be joined. If they are members of a class likely to increase in number during the pendency of the case, so as to delay its trial by the necessity of making new parties, that fact alone is sufficient reason for not joining them. If there is danger of a change of status of members of a class during the pendency of a case so as to subject the proceedings to the danger of continual abatement, that fact is also sufficient reason for not making the members of such class parties defendant."

The position thus taken is untenable on the face of the petition itself. The 12 employees who are members of the union have a vital interest in the subject-matter of the suit. A final decree cannot be entered without affecting their interests. An injunction, if granted, might deprive them of their means of livelihood. As parties defendant, they would have the right to plead and prove they are not in arrears and are in good standing in the union, if such are the facts. Exceptions to a general rule of equity must be based on substantial grounds. Equity does not recognize an unauthorized, voluntary, hostile litigant as the representative of an indispensable party who has not been made a party to the cause. In the present case there are only two parties—the union and the employer. Neither is a competent representative of the 12 employees in this controversy. Plaintiff in its petition declared open hostility to them and asked a court of equity to terminate their em-

ployment by injunction without making them parties to the suit or giving them a chance to be heard personally in defense of their own individual rights. It is asking too much of equity to terminate by injunction at the suit of the union the employment of 12 of its members and in the same suit permit the union to represent them in defense of their rights as employees instead of making them defendants. Defendant does not assume to act for these employees. It is a public service corporation and as such has declined by its demurrer to represent them in defense of their rights as employees. It attacked the petition because the employees were not made defendants to answer for themselves. It is clear therefore that the employees are not represented herein by any party to this suit. Neither inconvenience to plaintiff nor the risk of delay in reaching a final decision does away with the necessity for joining indispensable parties as defendants in this case.

The demurrer to the petition for defect of parties defendant was properly sustained. The petition, however, should not have been dismissed without prejudice. The judgment is modified to correct that defect and the costs taxed to plaintiff.

AFFIRMED AS MODIFIED.

CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE, V. CHARLES F. WALSTON ET AL., APPELLANTS.

299 N. W. 609

FILED JULY 25, 1941. No. 31031.

1. **Appeal.** "It is a rule of universal application in appellate proceedings that the examination of the reviewing court, whether on appeal or writ of error, will be confined to the questions determined by the trial court." *Coombs v. MacDonald*, 43 Neb. 632, 62 N. W. 41.
2. ———. A question not presented by pleadings or evidence in the trial of a case will not be considered on appeal by this court. Likewise, questions which are discussed in the briefs, but which

are not properly presented by the record, will not be considered.

3. **Pleading.** "When the objections stated in a demurrer are not those provided by the Code, it can only be considered as a general demurrer that the petition does not state facts sufficient to constitute a cause of action." *McClary v. Sioux City & P. R. Co.*, 3 Neb. 44.
4. ———. "A party may demur to a pleading upon such grounds as are specified in the Code or statutes, and no others." 1 Bancroft, Code Pleading, 300, sec. 175.
5. ———. "A general demurrer tests the substantive legal rights of parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from facts which are pleaded. And, * * * if the complaint states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action." 1 Bancroft, Code Pleading, 313, sec. 183.
6. ———. "A party who stands upon his general demurrer to a pleading, thereby admits the material facts averred, and must take all the consequences which result from such admission." *People v. Weston*, 3 Neb. 312.
7. ———. Notwithstanding the prayer for relief is a part of the petition, it is no portion of the statement of facts which are required to constitute a cause of action, and the entire omission of any demand for judgment would not subject the petition to a general demurrer.
8. ———. From the facts stated in the petition, if it appears that plaintiff is entitled to any relief, a general demurrer will not lie.
9. ———. A general rule, variously stated, is that, where plaintiff is entitled to some relief, the objection to the relief asked for or to the particular remedy incorporated in the prayer cannot be raised by demurrer, either at common law or under the Code.
10. **Waters.** The admitted statement of facts contained in the amended petition is wholly inconsistent with retention of possession of the premises and present occupation and continued use thereof by the appellants as alleged in such petition.
11. **Eminent Domain.** The necessity for and extent of the taking of property for a public use is a legislative question, and the time when the public utility requires the use of the property condemned, after payment has been made to the owner, rests within the determination of the condemner.

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

Cloyd E. Clark, for appellants.

R. O. Canady, P. E. Boslaugh and *R. H. Beatty, contra.*

Wright & Wright and *Gerald J. McGinley, amici curiæ.*

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

EBERLY, J.

This is an appeal prosecuted by Charles F. Walston *et ux.*, defendants, from the judgment of the district court for Gosper county, overruling their demurrer to the amended petition of the plaintiff filed in the above entitled cause.

To summarize the allegations of this petition, it may be said: That the plaintiff, the Central Nebraska Public Power and Irrigation District, "is and has been since about the first day of November, 1933, a corporation organized, created and existing under and by virtue of Senate File 310 of the laws of the state of Nebraska for the year 1933, which as amended is now section 70-701 to section 70-717, inclusive, of the 1939 Cumulative Supplement to the Compiled Statutes of Nebraska for 1929; that it is a public and municipal corporation and a political subdivision of the state of Nebraska with its principal place of business in the city of Hastings, Adams county, Nebraska," and that the constating act under which it is organized vests it with the right and power of eminent domain. Further, it was alleged "That the plaintiff was organized for the purpose of constructing, maintaining and operating appropriate works to irrigate lands in the state of Nebraska, and for the construction, maintenance and operation of hydroelectric plants and a hydroelectric system for the generation, transmission and distribution of electrical energy to the inhabitants and users thereof within the state of Nebraska; that plaintiff is and has been since about the first of November, 1935, engaged in the construction of works of internal improvement consisting of an irrigation system and works sufficient and appropriate to irrigate about 250,000 acres of land in Gosper, Phelps, Kearney and Adams counties in the state of

Nebraska, and hydroelectric plants and a hydroelectric system for the generation, transmission and distribution of electric energy to the inhabitants and users thereof within the state of Nebraska; that all of the works being constructed and which have been constructed by the plaintiff as aforesaid are works of internal improvement, and the District was organized and exists for the purpose of the construction, maintenance and operation thereof; that the works of the District consist and will consist of an on-river or channel dam across the North Platte river about three miles west of the town of Keystone of a nature and character sufficient to create a reservoir for the storage and will store a maximum of two million acre-feet of water, diversion works in the Platte River near the confluence of the North Platte and South Platte rivers, and in the Platte river south and a short distance east of the city of Lexington, Nebraska, and regulating reservoirs, three hydroelectric power plants on the main supply canal, laterals and all things incidental, necessary and proper for a complete system to transport and furnish water for irrigation, and to generate, transmit and distribute electrical energy; that said District has complied with all the requirements of the laws of the state of Nebraska and has secured authority and license from the state to construct said works and it has secured and has a grant of water rights from the state of Nebraska for appropriation, use, and storage of waters of the North Platte and Platte rivers proper and sufficient for the operation of all of its said works as aforesaid; that the works of the District necessary and to be utilized in the irrigation of lands in Nebraska as aforesaid have their western terminus in the North Platte valley in Keith county, Nebraska, and they extend to, into and through a part of Adams county, Nebraska; that the works of the District to be used and utilized in the generation, transmission and distribution of electrical energy have their western terminus in the North Platte valley in Keith county, Nebraska, and extend eastward through south central Nebraska with the eastern terminus in or near the city of Lincoln, Lancaster county, Nebraska;

that a part of the said works of the District have been completed and have been and are being used to irrigate land and to transport and distribute electric energy; that the total cost of the said works of the District when completed will be in excess of $25,000,000, and the works of the District are and will be permanent and perpetual, and the operation and maintenance of said works to perform the functions and services for which they are designed and constructed will require the continuous, perpetual and exclusive occupation, control and ownership of all of the locations upon which said works are located."

It was alleged further "That the defendant, Charles F. Walston, was at the time of the commencement of the condemnation proceeding on April 23, 1938, hereafter referred to, the owner in fee simple of the Northwest Quarter (NW¼) of Section 6, Township 8, North, Range 22, West of the 6th P. M., in Gosper county, Nebraska," subject to the liens of certain mortgages duly described in this amended petition, "and he was and is the husband of the defendant, Nettie Walston, who has no interest in said land except such as results from said marital relationship; that the defendants have at all times herein referred to actually resided upon and occupy said land; that it was necessary for the plaintiff in the construction of its said works of internal improvement to acquire and have said real estate and the whole thereof in fee simple, to be used, and it will be used by the District, together with adjoining real estate, as a regulating reservoir, and for that part of the system and works of the District known as the Johnson regulating reservoir; that said regulating reservoir will have a capacity of 54,000 acre-feet of water, and will be used for the purpose of regulating an even flow of water through the turbines of the electric generators of the District which will be located in the Northeast Quarter (NE¼) of Section 4, in Township 8, North, Range 22, West of the 6th P. M., and the Northeast Quarter (NE¼) of Section 7, Township 8, North, Range 21, West of the 6th P. M., in Gosper county, Nebraska, and for the storage of water which will be used

for the irrigation of land in Gosper, Phelps, Kearney and Adams counties, Nebraska; that the plaintiff was unable to procure said land by the voluntary purchase thereof from the owners. That on the 23d day of April, 1938, the plaintiff, as it was entitled and authorized to do, commenced proceedings in the county court of Gosper county, Nebraska, for the appropriation of said land in fee simple by the District by the exercise of the right and power of eminent domain;" that it filed with the county court of Gosper county in due and proper form its petition and application to appropriate the northwest quarter of section 6, township 8 north, range 22 west of the 6th P. M., which petition and application set forth "That it is necessary for said District, the petitioner herein, to acquire and have said land, and the whole thereof, to be used and it will be used by the District, together with adjoining real estate, for that part of the system and works of the District known as the Johnson Regulating Reservoir; that said Reservoir will have a capacity of 54,000 acre-feet of water, and will be used for the purpose of regulating an even flow of water through the turbines of the electrical generators of the District, located in the Northeast Quarter of Section 4, Township 8, North, Range 22, West of the 6th P. M., and in the northeast quarter of Section 7, Township 8, North, Range 21, West of the 6th P. M., in Gosper county, Nebraska, and as a storage for water which will be used for the irrigation of land in Gosper, Phelps, Kearney and Adams counties, Nebraska." (A true copy of such county court petition is attached and made a part of plaintiff's amended petition as exhibit 1.) It was further alleged that appraisers were appointed by the county judge pursuant to such petition, after due and proper notice, and after due hearing and investigation such appraisers assessed and fixed the total amount of damages of those having an interest in the northwest quarter of section 6, township 8 north, range 22 west of the 6th P. M., in Gosper county, Nebraska, at the sum of $13,512. (A true copy of this report of the appraisers is made a part of the amended petition filed herein as exhibit 2.) The petition

further set forth that an appeal was prosecuted by the plaintiff district from the appraisement as made; that issues therein were submitted to a jury, who, after hearing the evidence offered by the parties, returned a verdict in favor of the defendant Walston for the sum of $14,580, and that said amount including interest and costs accrued was fully paid by the Central Nebraska Public Power and Irrigation District on June 29, 1939, and the amount ordered and adjudged to be paid Charles F. Walston has been received and accepted by him and said judgment duly and finally released; "and because thereof, said land has been wholly and finally appropriated in fee simple by the plaintiff in this case for permanent and perpetual use for which it was condemned as a part of the works of internal improvement of the District as aforesaid; that the law under which the District was created provided that any real estate acquired by the District shall be by title in fee simple; that the full value of said land has been paid by the District and received by the owner thereof; that the land involved herein is located in about the center of the regulating reservoir of which it will form a part, and from the time of the completion of all of the works of the District, it will be permanently and continuously flooded and inundated by water to a great depth. That the cost of the construction of the works of internal improvement of the plaintiff as aforesaid is provided by funds furnished as a loan and grant to the plaintiff by the Public Works Administration of the United States; that it is and has been one of its requirements that all real estate required for the works of said project shall be secured by fee simple title except right of way for transmission lines and irrigation laterals of minimum capacity; that as a condition of securing the approval of and financing from the Public Works Administration sufficient to permit the construction of the works of the District, including the land acquired for such purpose, it was necessary for the District to acquire the title to all real estate by fee simple title, except as above stated, and because thereof the plaintiff has in all condemnation proceedings asserted the neces-

sity for and condemned by absolute title, except in the instances above set forth. That it was and is necessary for the plaintiff to have the Northwest Quarter (NW¼) of section 6, township 8, north, range 22, west of the 6th P. M., Gosper county, Nebraska, as a part of its said works of internal improvement; that it is and will be permanently and perpetually a part of the Johnson Canyon Regulating Reservoir of the plaintiff, which has and will have a shore line of approximately eighteen miles, a water surface of 2,800 acres, a storage capacity of 54,000 acre-feet of water, a maximum depth of 45 feet, and is an integral part of the canal system of the plaintiff and essential to the successful operation of the said project of the plaintiff in supplying irrigation water to irrigate more than 200,000 acres of land, and in the generation of firm power; that the reservoir during normal operation will remain at a constant level, but it can and will be drawn down to meet any necessity of operation if for any reason the parts of the canal and reservoir system above or to the west of this reservoir are temporarily cut off from the rest of the project; that the Johnson Canyon Reservoir will be able to supply sufficient water to meet the guarantees of the plaintiff to irrigators for a period of approximately twenty-five days, and to supply the means to produce firm power for an equal length of time; that the water in this reservoir will be directly above all of the irrigated area and directly above two-thirds of the power producing installation of the plaintiff, and without this reservoir temporary fluctuations in the supply of water resulting from causes beyond the control of the plaintiff would interfere with its ability to successfully carry out its purposes and operations. That none of the land within the area of this reservoir will ever be suitable for agricultural or commercial use, or for any use except as a part of the reservoir; that before the land in the reservoir is submerged it must be cleared of all vegetation and structures, and during all normal operation, since this will be a constant, level lake under ordinary conditions, this land will

be inundated; that it is necessary for the plaintiff to have absolute and exclusive control of the tract of land above described because of the nature of the lake to be created; that said land is in the path of the inlet, and the incoming water from the canal will cause eddies and undercurrents, and will carry floating and submerged débris, and the plaintiff must have absolute and continuous control of the premises to protect the general safety of the public; that a small part of said land will approach the shore line of the reservoir, and during some parts of each season the canal will carry an appreciable amount of sediment into the reservoir which will deposit itself along or near the shore line of the lake and will create a mucky or boggy condition, and if there should be a draw-down of the reservoir after such a deposit, the deposited material will remain treacherous and dangerous to stock entering thereon for a long period of time, and will make it impossible to use the part of the reservoir area which may be exposed for any useful purpose; that no part of the reservoir area will be suitable for the planting or raising of any crop under any condition, and could not be permitted because of the fact, in addition to the foregoing, that the root structure of crops in any part of the reservoir area would cause a piping condition to exist in the underground soil, which would result in seepage and would defeat the purpose for which the reservoir is constructed by the plaintiff, and would subject it to great and numerous claims for damages; that any disturbance of the surface of the basin of the reservoir must be and will be controlled scientifically for the purpose of preventing seepage; that because of the facts herein alleged it was proper and necessary that the plaintiff acquire the fee simple title to said land, which it did do by the proceedings hereinbefore had for the appropriation and taking of said land, and it is now the absolute owner thereof, and no title or right less than a fee simple title to said land would conform to the necessities of the plaintiff in reference thereto. That the defendants and each of them now claim and assert that the plaintiff herein acquired, took and has no other and further right in said real

estate than an easement, and the defendants and each of them claim and assert the right to occupy and use said premises, and they and each of them are occupying and using said premises, and they and each of them claim and assert the right to sell, convey and encumber the title of said land, subject only to an easement therein in favor of the plaintiff in this case; that said claims and assertations cast a cloud upon the title of the plaintiff herein to said real estate, and the plaintiff is entitled to have the title of said land quieted against such claims and assertations, and to have it found and decreed by the court in this case that by virtue of the facts hereinbefore alleged and said condemnation proceedings, the plaintiff in this case acquired, has and owns said land by an absolute fee simple title, and that the defendants or any of them, or any person claiming or to claim under or through them or any of them, have no right, title, interest, claim or lien in, to or upon said land or the possession thereof. That the plaintiff has no clear, adequate or speedy recovery at law and can obtain complete relief only by and in a court of equity."

Then follows an appropriate prayer.

To this amended petition, the defendants, Charles F. Walston and Nettie Walston, filed a demurrer, each for himself, "for the reason that said petition fails to state facts sufficient to constitute a cause of action against said defendants, or either of them; and said petition fails to state facts sufficient to entitle the plaintiff to the relief prayed for, or to any relief."

On March 11, 1940, after due submission thereof by the demurrants, the district court adjudged and decreed "That said demurrer of the defendants to the amended petition of the plaintiff should be and the same is hereby overruled. Defendants except." This cause "came on further to be heard at said time, and the defendants in open court elected to stand on their demurrer to the amended petition, and elected not to plead further to the amended petition of the plaintiff, and on motion of the plaintiff made in open court for the default of the defendants, their default was duly

called and taken and is entered herein." Thereafter the trial court entered a final judgment or decree and awarded relief substantially as prayed.

The defendants' claim, in the light of the factual admission of their demurrer, including the condemnation proceedings, the payment by the condemner of the sum of $14,580 as the adjudicated value of the quarter-section taken, and its receipt and acceptance as such by the defendants and appellants herein, as well as the contentions set forth in their briefs filed in this court, is not that these condemnation proceedings are void, but that the appellee herein obtained thereby a mere easement and not a fee title to the property, and that the owner of land condemned retains the fee title, has a right to every use and profit which can be derived from such land consistent with the easement, and that the possession and use asserted by defendants as set forth in the amended petition to the land condemned do not interfere with the enjoyment of the easement actually vested in the condemner. In the light of the allegations in plaintiff's amended petition contained, and above referred to, these contentions cannot be accepted.

In consideration of appellants' contentions it is to be remembered that "It is a rule of universal application in appellate proceedings that the examination of the reviewing court, whether on appeal or writ of error, will be confined to the questions determined by the trial court." *Coombs v. MacDonald*, 43 Neb. 632, 62 N. W. 41.

So, also, "A question not presented by the pleadings and evidence on the trial of a case will not on appeal be considered in this court." *Hyde v. Hyde*, 60 Neb. 502, 83 N. W. 673. See, also, *Nielsen v. Central Nebraska Land & Investment Co.*, 87 Neb. 518, 127 N. W. 897; *Omaha Fire Ins. Co. v. Dierks*, 43 Neb. 473, 61 N. W. 740; *Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320; 2 Standard Ency. of Procedure, 237.

"Questions discussed in briefs which are not properly presented by the record will not be considered." *Moulthan v. Apking*, 64 Neb. 378, 89 N. W. 1051. See, also, *Dufrene v.*

Johnson, 60 Neb. 18, 82 N. W. 107; 2 Standard Ency. of Procedure, 343.

The sole question presented here is the correctness of the trial court's final order overruling the general demurrer filed by the defendants in the district court. In other words, what did that decision involve?

First, it will be noted that the separate demurrer of the defendants contains certain statements in addition to the ground assigned therein—"That said petition fails to state facts sufficient to constitute a cause of action." Section 20-806, Comp. St. 1929, sets forth the provisions relative to demurrer under our Code. The additional objections in defendants' pleading referred to are not those provided for in that section. The applicable rule invoked by this situation is: "When the objections stated in a demurrer are not those provided by the Code, it can only be considered as a general demurrer that the petition does not state facts sufficient to constitute a cause of action." *McClary v. Sioux City & P. R. Co.,* 3 Neb. 44. The demurrer in this case, viewed as an entirety, will be so considered. This is in harmony with section 20-807, Comp. St. 1929. The rule is in fact general under the Code that "A party may demur to a pleading upon such grounds as are specified in the Code or statutes, and no others." 1 Bancroft, Code Pleading, 300, sec. 175. Thus, we accept defendants' pleading in this case as a general demurrer to the amended petition, and as admitting the truth of all allegations well pleaded therein. *Hallstead v. Perrigo,* 87 Neb. 128, 126 N. W. 1078; *Spalding v. Douglas County,* 85 Neb. 265, 122 N. W. 889.

An accepted authority states the applicable rule as follows:

"A general demurrer tests the substantive legal rights of parties upon admitted facts including proper and reasonable inferences of law and fact which may be drawn from facts which are pleaded. And, * * * if the complaint states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action." 1 Bancroft, Code Pleading, 313, sec. 183.

This jurisdiction at an early date announced, in substance, the foregoing rule, and in connection therewith the effects of the application thereof, in the following terms: "A party who stands upon his general demurrer to a pleading, thereby admits the material facts averred, and must take all the consequences which result from such admission." *People v. Weston*, 3 Neb. 312. See, also, *McArthur v. Clarke Drug Co.*, 48 Neb. 899, 67 N. W. 861; *Spalding v. Douglas County*, 85 Neb. 265, 122 N. W. 889.

Some of the established rules limiting the scope and purpose of a general demurrer are invoked by the situation presented in this case. Thus, "Although the prayer for relief is a part of the petition, it is no portion of the statement of facts required to constitute a cause of action. The entire omission of any demand for judgment would not subject the petition to general demurrer." *Fox v. Graves*, 46 Neb. 812, 65 N. W. 887. See, also, *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 68 Neb. 222, 94 N. W. 136; *Missouri Valley Land Co. v. Bushnell*, 11 Neb. 192, 8 N. W. 389; *Tomson v. Iowa State Traveling Men's Ass'n*, 88 Neb. 399, 409, 129 N. W. 529.

"If from the facts stated in the petition it appears that the plaintiff is entitled to any relief, a general demurrer will not lie." *George v. Edney*, 36 Neb. 604, 54 N. W. 986. See *Darr v. Berquist*, 63 Neb. 713, 89 N. W. 256; *Griggs v. LePoidevin*, 11 Neb. 385, 9 N. W. 557.

And the "general rule, variously stated, is that, where plaintiff is entitled to some relief, the objection to the relief asked or the amount of damages prayed for cannot be raised by demurrer, either at common law or under the Codes." 49 C. J. 395. See, also, *Lederer v. Union Savings Bank*, 52 Neb. 133, 71 N. W. 954; *Western Union Telegraph Co. v. Mullins*, 44 Neb. 732, 62 N. W. 880; *George v. Edney*, 36 Neb. 604, 54 N. W. 986.

From an inspection of the allegations contained in plaintiff's amended petition, well pleaded, which are admitted by defendants' demurrer, it clearly appears that plaintiff is entitled to substantial relief irrespective of whether the

rights that accrued to it by virtue of the condemnation proceedings are properly denominated an "easement" or a "fee title." The admitted statement of facts is wholly inconsistent with retention of possession of the premises and present occupation and continued use thereof by the appellants, as alleged in the petition.

In *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8, 17, 102 N. W. 60, a case where similar claims were before this court and where the matter involved was a railroad right of way, Barnes, J., in delivering the opinion of the court included the following observations:

"It is said that there is no evidence that the 50-feet strips of right of way in dispute are necessary for the operation of defendant's railroad, and therefore the plaintiff claims that he ought at all events to be awarded the injunction prayed for. The statute provides that a railroad company may acquire for right of way purposes so much land as may be necessary therefor, not exceeding 200 feet in width. Whether the amount asked for in a condemnation proceeding is necessary or not must be determined in such proceeding; and the condemnation of a certain width for a right of way is an adjudication that said width is necessary.

"The case of *Northern P. R. Co. v. Smith,* 171 U. S. 260, was an ejectment suit against the company to recover a portion of its right of way. The trial court found that the company claimed a 400-feet right of way under a grant by congress; that the company had actually used only 25 feet thereof; that the remaining part was not necessary for the operation of the road, and that the plaintiff should recover. The supreme court of the United States reversed the case, holding that a grant of a 400-feet right of way was conclusive that such an amount was necessary, and that a showing of the amount actually used was immaterial. The case is also an authority that ejectment will not lie against a right of way obtained with the knowledge of the owner of the fee. Under this decision the plaintiff herein could not recover the land in question by ejectment, and it is therefore doubtful about his right to an injunction to prevent the company taking its own.

"The most logical rule is that announced in *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116, in which the supreme court of that state held that those from whom land has been taken for a right of way retain no unquestionable right to its use for pasturage or otherwise, and that the right of the railroad company to the use and possession of its right of way is absolute during the existence of the easement.

"*Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb. 361, is a decision to the effect that the judgment of a railroad manager that a certain tract of land ought to be condemned for railroad purposes is *prima facie* evidence that said land is necessary for the operation of the road. If this be so, then the judgment of the defendant, as indicated by the threat alleged that it ought to take possession of its right of way to its full width, ought to be at least *prima facie* evidence of the necessity of such taking, and casts upon the plaintiff the burden of proving that the company does not need the land in controversy; and the cases of *Forney v. Fremont, E. & M. V. R. Co.*, 23 Neb. 465, and *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740, decide nothing contrary to this rule. It cannot be the law that even a railroad company must prove that it needs its property in order to recover possession of it. If plaintiff believed that defendant did not need a 200-feet right of way through his homestead, he should have raised that issue in the condemnation proceedings. He did not do so, and we do not perceive how he can do so now, either justly or lawfully, without at least tendering back to the company a proper part of the $500 which he received as compensation for the 200-feet easement."

It is obvious that the right of defendants in this land taken in this case by eminent domain, under the circumstances detailed in the petition, ceased when the purchase money was received by them, and even if the right be asserted pursuant to what in law amounted to an easement, their rights would not be increased thereby.

In the instant case neither by pleading nor by brief do the defendants challenge the lawful incorporation of the plaintiff district or the complete compliance by it of all

statutes pertaining to the subject of the rights and powers of eminent domain with which it had been legislatively endowed. Defendants' brief, in addition to their claim of lawful possession, challenges only the allegation in the amended petition that from the condemnation proceeding plaintiff derived a fee simple title to the land taken by it.

However, in this case, in view of the allegations of plaintiff's amended petition, demurred to by the defendants and admitted thereby, the right of plaintiff to enter into complete, immediate and absolute possession of this tract of land to prepare and employ it in the accomplishment of the public purpose for which it had been taken, condemned, and paid for, as well as the unlawful retention, occupation and use thereof by the defendants, cannot be gainsaid. It matters not whether these rights conferred on plaintiff by the statutes of eminent domain and the acts authorized thereby were, under the terms of the decree entered, to be exercised and performed by an owner in fee simple of the land involved or by virtue of the ownership of an easement therein, for still the rights and dominion and acts whose performance was necessary to accomplish the public purpose were identical in either case and contemplated by the statutes and proceedings had thereunder. At all events, the necessity for and extent of the taking of property for a public use is a legislative question, and the time when the public utility requires the use of the property condemned, after payment has been made to the owner, rests within the determination of the condemner. *Paxton & Hershey Irrigating Co. v. Farmers & Merchants Irrigation Co.*, 45 Neb. 884, 64 N. W. 343; *People v. Jefferson District Court*, 46 Colo. 386, 104 Pac. 484, 24 L. R. A. n. s. 886; *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8, 102 N. W. 60.

It is obvious that the issue actually formed by the demurrer to the amended petition in the present case and determined by the trial court, as a matter of pleading, did not necessarily challenge the lawfulness of plaintiff's claim of ownership in fee simple. The question presented was determined by the existence in plaintiff of a present right of

possession, dominion and exclusive use of the property taken for the advancement of the public purpose for which it was condemned by eminent domain. These facts, which the admission made by the demurrer conclusively establish, disclose that plaintiff was entitled to redress in this proceeding for the rights so infringed. On the basis of the situation here outlined, the order entered by the trial court overruling defendants' demurrer was correctly made. After the ruling on the demurrer the defendants pleaded no further and permitted their defaults to be entered. Following these proceedings the district court entered a judgment by default on the merits, but all that is presented here is the claimed error in the ruling upon the demurrer which, as here determined, was correctly made.

It follows that the judgment entered in the trial court is proper, and is in all respects

AFFIRMED.

PAULINE SAILORS, APPELLEE, V. FRANK O. LOWDEN ET AL., TRUSTEES, APPELLANTS.
299 N. W. 510

FILED JULY 25, 1941. No. 31027.

1. **Railroads.** "A railroad company blocking a highway with a standing train at night has a right to assume that one driving an automobile along the highway will adopt such lights and rate of speed that he can bring his machine to a standstill within the distance that he can plainly see the obstruction, and therefore is not negligent in failing to give warning of the presence of the train." *Philadelphia & R. Ry. Co. v. Dillon,* 15 A. L. R. 894 (1 W. W. Harr. [Del.] 247, 114 Atl. 62).
2. ———. In order to recover for injuries received when automobile in which he was riding struck freight car blocking highway crossing, an automobile guest would be required to adduce evidence tending to prove that the railroad company was negligent and that such negligence was the proximate cause of his injury.
3. ———. A railroad company has the right, in its reasonable and ordinary course of business, and under proper conditions, to stop

its trains upon crossings at highways, even though it blocks traffic and temporarily excludes the use of the highway over the crossing by those traveling thereon.

4. ———. A railroad company is not obliged under the law to maintain flagmen, or watchmen, or install signal devices, under all conditions, at ordinary highway crossings, even though such highway be an arterial one.

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

Chambers, Holland & Locke, for appellants.

Eugene D. O'Sullivan and *L. R. Doyle, contra.*

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

PAINE, J.

This is an action for damages for personal injuries suffered by the plaintiff when the automobile of which she was the owner, but in which she was riding as a guest, collided with a standing freight train at a highway crossing in Havelock. Ten members of the jury returned a verdict in the sum of $1,750, for which amount a judgment was entered. The plaintiff filed a motion, setting out 14 errors committed by the court, and asking for a new trial, and on the same day the defendants also filed a motion for a new trial, setting out 34 errors for reversal. The trial court overruled both motions for new trial. Notice of appeal was filed by the attorneys for the defendants.

The plaintiff's evidence discloses that the plaintiff, Mrs. Pauline Sailors, was 28 years of age at the time of the trial, and is a waitress in the café in the Union Pacific depot in Omaha. She had been separated from her husband, who was living in California and not supporting her. Exhibit No. 1 was an assignment from her husband to her of any claim which he might have because of this accident to his wife.

Plaintiff testified that at the time of the accident she lived with her mother, and had been acquainted with Clyde

O. Severs for about four or five months. Severs came to her about 10:30 p. m. on the night of the accident and told her that he wanted to apply for a job which required him to use a car, and wanted to borrow her car for two or three days until he could arrange for another if he got this job as a cigarette salesman. Mrs. Sailors loaned him her Ford coupé, and then proposed that she go to Lincoln for the ride, and would come back the next day by bus or train, as she did not have to go to work until 1 o'clock the next afternoon.

They started for Lincoln, Mr. Severs driving the car, and stopped at Ashland and had coffee at a café. It was a very, very cold night. Mrs. Sailors had recently had the Ford equipped with an electric plate defroster on the windshield on the driver's side, and she could not see out of her side of the windshield at all, as it was frosted over. She did not know that they were approaching a railroad track until they struck the stock car, and she was seriously injured. She cannot remember much about it, except her legs were numb, and she suffered pain in her head, and the blood was running down her face. Some of her teeth were knocked out, and she had bruises and cuts on her face. Dr. Czar Johnson bandaged her injuries at the hospital, where she remained for some eight days, X-rays being taken at the St. Elizabeth Hospital by Dr. Kail.

Clyde O. Severs testified that he had lived in Lincoln for 20 years; that he was 38 years of age, had been traveling for Thomas L. Dawson Construction Company of Kansas City; that during part of the winter of 1936 and 1937 he worked for Browning & King in Omaha, during which time he became acquainted with the plaintiff. The accident happened at Touzalin avenue in the south side of Havelock, a suburb of Lincoln, and Severs testified that he was very well acquainted with this crossing, for he drove a milk wagon, drawn by horses, across it daily in 1930 and 1931, and described the three sets of tracks at this Rock Island crossing on Touzalin avenue, and told how the road went up an incline from the switch track on the north side to the main line track.

The testimony of the defendants' witnesses was that this accident occurred at 1:35 to 1:40 a. m., January 10, 1937. A through train from Texas, consisting of 38 cars of stock and five other cars, was run as an extra freight, pulled by one of the largest engines, X2558. This east-bound train had orders to take the passing track at Havelock, to allow west-bound passenger train No. 7, which was several hours late, to pass it there.

As this east-bound stock train reached the west end switch to the passing track, the head brakeman opened the switch and got back on the engine, and the train slowly pulled into the passing track. When the rear of the caboose reached the west end switch, the rear brakeman got off, and the train pulled on down a short way to clear the switch, and then stopped, and the rear brakeman threw the switch and then threw his electric lantern light on the switch-points to see that they were set properly against the stop-rail, so the passenger train could safely go through at regular speed.

The rear brakeman then started down the middle of the main line track, which was some ten feet to the north of the passing track, for the purpose of cutting the train to open Touzalin avenue to the highway traffic. When he was within about one and a half car lengths from the crossing, there being only four cars and the caboose standing west of this crossing, he saw this automobile crash into the side of stock car No. 73612.

The automobile wedged itself under the freight car, with its radiator smashed, while the rear of the automobile reached back far enough to block the main line track, and the brakeman and the driver, Severs, could not pull it out. The conductor coming down from the caboose, Mr. Calder, the rear brakeman, called to him to bring the red lantern, fusees, and torpedoes to stop the passenger train, expected any moment. The conductor brought them, and when the brakeman had taken these down the track about a block or more he could see that, with the help of others who had driven up, the conductor had pulled the auto back from under the stock car, and the main line track being now

cleared he did not put out the signals, but came back to the little depot, on the east side of Touzalin avenue and just north of the main line track, and called the Lincoln agent and reported the accident, and told him to send out an ambulance and police. The accident was reported to the dispatcher at Fairbury at 1:52 a. m., according to the dispatcher's record sheet in evidence. The brakman then woke up the attendant in the depot and had him build a fire, and soon the plaintiff was brought into this depot, from which place she and the driver of her automobile were taken by ambulance to St. Elizabeth Hospital at about 2:30 a. m. The passenger train, No. 7, came through at about 2:15 a. m.

The fireman on the engine of the stock train testified that, looking back up the track, he saw the rear brakeman, Calder, coming down the track with his white lantern to uncouple the cars, and saw the automobile run into the side of the train, showing that, while it was a very cold night, some 15 degrees below zero, the visibility was clear enough for the fireman to see back nearly the full length of a 43-car train, the stock cars being 36 feet in length, and a few of the other cars being 40-foot cars.

At this point Touzalin avenue consists of 70 feet of parking in the middle and two narrow brick-paved roads on each side, one for north-bound and the other for south-bound traffic, the brick paving being 18 feet wide in each, according to the measurements of Arthur J. Whalen, who testified there was a street light to the north 180 feet 6 inches, and also a street light on the south side of the crossing. He gave the distance between the nearest rail of the passing track to the nearest rail of the main line track as eight feet five inches.

This automobile first crossed the switch track, which loops out to the north from the main line to serve an elevator, coal yards, and other commercial purposes, this switch track being some 60 feet north of the main line track. Close to the switch track there was the required tall standard, with cross-arms, indicating to any driver that he was about

to cross railroad tracks. The two red lights, or electric wigwags, were lower down on this same standard, but could only be operated by a train on the main line.

To the south of the main line was the long passing track, with a capacity of 50 to 55 freight cars, which passing track served no commercial uses at all. The very purpose of this long passing track, parallel with and close to the main line track, was for a freight train to stand there while a passenger train could safely pass it in either direction. This is the only plan and method devised for the handling of slow and fast traffic on the same line.

We will now consider a few of the many legal questions involved. The train standing on the crossing was not a cause of the accident, but merely a condition making the accident possible. "Presumably railroad maintaining statutory safeguards at crossings need keep no others, and traveler on highway has burden in action for injuries to prove special conditions requiring special protection." *McParlan v. Grand Trunk Western R. Co.*, 263 N. W. 734 (273 Mich. 527).

"A railroad company is not bound to give warning of the presence of a train on a highway crossing in the night, if a traveler on the highway could, by proper diligence, discover its presence by the aid of the lights on his machine." *Gallagher v. Montpelier & Wells River R. Co.*, 52 A. L. R. 744 (100 Vt. 299, 137 Atl. 207).

"A railroad company blocking a highway with a standing train at night has a right to assume that one driving an automobile along the highway will adopt such lights and rate of speed that he can bring his machine to a standstill within the distance that he can plainly see the obstruction, and therefore is not negligent in failing to give warning of the presence of the train." *Philadelphia & R. Ry. Co. v. Dillon,* 15 A. L. R. 894 (1 W. W. Harr. [Del.] 247, 114 Atl. 62).

"In the absence of statutory requirements, the mere leaving of a train across a highway without lights or other signals to disclose its presence is not *per se* negligent, and

cannot be considered as the effective cause, but merely as the condition, of injuries resulting from a traveler upon the highway running against the train." *St. Louis-San Francisco Ry. Co. v. Guthrie,* 56 A. L. R. 1110 (216 Ala. 613, 114 So. 215).

Each of these last two cases is followed by annotations in the A. L. R., and the latest and most extensive notes are found in 99 A. L. R. 1454.

In *Pennsylvania R. Co. v. Huss,* 96 Ind. App. 71, 180 N. E. 919, the Indiana court said: "It would seem to be true that an object as large as a freight car would of itself, under ordinary conditions, be sufficient notice of its presence to warn any person using the highway with ordinary care that the highway was obstructed, and that it would not be necessary to have an employee present to call to the attention of travelers such fact." See *Trask v. Boston & Maine Railroad,* 219 Mass. 410, 106 N. E. 1022; *Morris v. Atlantic City R. Co.,* 100 N. J. Law, 328, 126 Atl. 295.

It is suggested that, when an automobile truck is disabled, or stops at night on a highway, the law requires that the driver at once display flares at each end to warn the traffic.

Our attention has not been called to any law which provides that, when a long freight is using a passing track, has stopped and the rear brakeman is coming right up to cut a highway crossing, prior thereto he must bring up flares and light them to warn passing motorists, for every driver knows, when he sees the large standard with the cross-arms, that a train may be standing on the railroad track, for that is the usual and ordinary plan of railroading, for freight trains must take the passing track to permit passing trains to move on schedule time.

In the case of *Coleman v. Chicago, B. & Q. R. Co.,* 5 N. E. (2d) 103 (287 Ill. App. 483), a verdict in the plaintiff's favor for $2,500 was set aside and a judgment was entered for the defendant. It was held by the court: "To recover for injuries received when automobile in which he was riding struck freight car blocking highway crossing, automobile guest would be required to adduce evidence tending

to prove that railroad company was negligent and that such negligence was proximate cause of his injury."

Another case closely in point is *Mabray v. Union P. R. Co.*, 5 Fed. Supp. 397. In this case an experienced driver started home about 3 a. m. on November 7, 1932, on Brighton boulevard, leading out of the city of Denver, and collided with a freight train of stock cars so constructed that lights from the opposite side of the train could be easily visible to travelers on the other side. It was a dark night, and the vision was obscured by reason of snow and sleet, and it is alleged that the railroad company, knowing these conditions, failed to warn the traveling public of the danger existing across the highway. In this case it was said that courts have held that crossing signals are intended to protect the traveler from approaching trains, but that a train standing on a crossing is a sufficient warning to automobile drivers. The driver of the automobile and four of the guests with him each filed separate causes of action against the Union Pacific. Demurrers to each of the petitions were sustained.

In *Megan v. Stevens*, 91 Fed. (2d) 419, 113 A. L. R. 992, this was an appeal from Iowa to the court of appeals for the eighth circuit before Judges Stone, Sanborn and Thomas. A freight car was standing upon a grade crossing, where highway No. 10 crossed the Chicago & Northwestern railroad line at Dumont, Iowa. The accident happened at 9:30 at night, January 28, 1936, and visibility was affected by falling snow. The crossing had been blocked four or five minutes to perform certain switching operations. An experienced driver was at the wheel, and testified he saw the train when he was distant 50 to 75 feet from the crossing, and put on his brakes immediately, but because of the ice under the snow he skidded into the train. The case was submitted to a jury, and a portion of the court's charge reads as follows: "Now, Gentlemen, I charge you that a railway company has the right, in its reasonable and ordinary course of business, and under proper conditions, to stop its trains upon crossings at highways, even though it blocks traffic

and temporarily excludes the use of the highway over the crossing by those traveling thereon. I further charge you that a railway company is not obliged under the law to maintain flagmen or watchmen or install signal devices, under all conditions, at ordinary highway crossings, even though such highway be an arterial one. On the other hand, railway companies or those operating railways, in using their tracks at points crossing arterial highways in cities and towns, should consider the time and circumstances of stops at such crossings, including weather conditions, and avoid unnecessary blocking of the highway at times when such use would be likely to endanger the lives of the traveling public upon the highway, and in such circumstances those operating railways should refrain from blocking such highways for an unreasonable length of time."

The case just reviewed was retried by Judge Scott of the United States district court for the northern district of Iowa, and brought to the circuit court of appeals again as *Thomson v. Stevens,* 106 Fed. (2d) 739, and was heard by Judges Gardner, Sanborn and Woodrough, the opinion being written by Judge Sanborn. Upon retrial of the case, the plaintiff again prevailed, and for the second time the judgment was reversed, it being held that the defendant company had the right to occupy this crossing for legitimate business purposes; that there was no evidence which would justify the conclusion that the train crew had caused the crossing to be unnecessarily obstructed. It is held: "Under Iowa law, a railway's trustee was not liable for death of guest in automobile which collided with freight car standing, without any warning, on highway crossing at night, where there was no evidence that train crew had caused crossing to be unnecessarily obstructed, and automobile driver's vision was obscured by a sudden flurry of snow."

In *Probert v. Chicago, I. & L. Ry. Co.,* 93 Fed. (2d) 259, when an automobile ran into a caboose the driver was killed. The plaintiff, sitting on the front seat, had a Boston bull dog on his lap, and said he was trying to make him more comfortable at the time of the accident, and was not concerned

in the driving of the car and paid no attention to it, that he had implicit faith in his brother's driving. It is said: "Any negligence on the part of the driver cannot be imputed to appellant, but it cannot be said that, because he was a gratuitous passenger, he was relieved from the exercise of ordinary care for his own safety. Even though he may have exercised ordinary care for his own safety, if the proximate cause of the accident was the negligence of the driver of the automobile, he cannot recover."

The verdict was returned in the case at bar on February 17, 1940, and on July 12, 1940, this court released the opinion in the case of *Fischer v. Megan,* 138 Neb. 420, 293 N. W. 287, so the trial court and counsel did not have the benefit of that opinion in the trial of this case in the district court.

This case is very closely in point with the case at bar. Herman J. Fischer, the deceased, whose widow, Kathryn Fischer, brought suit against the trustees of the Chicago & Northwestern Railway Company, was riding from St. Edward in the cab of a cattle truck, with a driver whom he had never met until this occasion, and at the Rivett siding near Maple street, Omaha, the cattle truck ran into a freight train standing still on the main line, and Fischer was instantly killed. The accident occurred at 1:05 a. m., November 27, 1934. It was a dark, cloudy, rainy, foggy night. The negligence charged was in blocking the highway without placing a trainman there to give a warning by signal lights, flares, torches, or other means. The jury returned a verdict of $25,000.

It was held by this court that, if the plaintiff does not make a case for negligence, it is error to submit that issue to the jury; second, that a motorist who drives his automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his headlights is negligent as a matter of law (*Redwelski v. Omaha & C. B. Street R. Co.,* 137 Neb. 681, 290 N. W. 904); and, third: "Evidence *held* insufficient to sustain a verdict for plaintiff in an action to recover dam-

ages 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."

In our opinion, the facts are practically the same as in the case at bar, for an automobile ran into a standing freight train in the nighttime, and somewhat similar charges of negligence were made. This court held that no actionable negligence of the defendant was shown, therefore there was nothing to submit to the jury, and the motion for a directed verdict should have been sustained.

We have reached the same conclusion in the case at bar. The motion made by the defendants for a directed verdict at the close of all the evidence gave the following reasons: (1) The evidence is insufficient to establish negligence on the part of defendants, which was the proximate cause of the accident; (2) the evidence conclusively established that plaintiff, through her agent, was guilty of more than slight negligence contributing to the collision; (3) the evidence was insufficient to sustain a verdict in favor of the plaintiff and against the defendant trustees.

For error of the trial court in not sustaining this motion, the judgment is hereby

REVERSED.

DONALD FISHER V. STATE OF NEBRASKA.

299 N. W. 501

FILED JULY 25, 1941. No. 31187.

1. **Criminal Law.** In a case where the defense of insanity is properly raised by the evidence, the burden devolves upon the state to prove the sanity of the defendant beyond a reasonable doubt as one of the elements necessary to establish guilt.
2. ———. Under the law of this state, no form of insanity is recognized as a defense to a criminal action, unless it affects the mind of the accused to such an extent that it renders him incapable of distinguishing between right and wrong with reference to the act committed.
3. ———. Evidence of the commitment of a defendant to a hospital

for the insane raises no presumption that the accused was at the time in question insane in the sense that he was not accountable for the act charged.

4. ———. It is error to require a defendant, or his attorney, to produce incriminating documents which are the basis of a criminal prosecution, and likewise error to conduct proceedings to compel their production in the presence of the jury.

ERROR to the district court for Jefferson county: CLOYDE B. ELLIS, JUDGE. *Reversed.*

Merril R. Reller and *Jack W. Price,* for plaintiff in error.

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

Heard before ROSE, EBERLY, PAINE, MESSMORE and YEAGER, JJ.

YEAGER, J.

This is a criminal action wherein in the district court for Jefferson county, Nebraska, it was charged in an information in due and proper form that Donald Fisher, defendant and plaintiff in error herein, on the 20th day of July, 1940, had in his possession a certain false, forged and counterfeited bank check for the payment of money, which check, on the same day, he knowingly, falsely and feloniously uttered and published as true and genuine, with the intent to prejudice, damage and defraud.

The defendant was duly tried, and on December 11, 1940, he was found guilty by the verdict of a jury. Following ruling on his motion for new trial, the defendant was, on the 17th day of December, 1940, sentenced to serve an indeterminate sentence in the state penitentiary of not less than three nor more than five years.

The defendant, by petition in error, has brought the case to this court for review. His assignments of error are numerous.

There was, of course, a plea of not guilty, and under the plea the defense presented and urged was that of insanity. From an examination of the bill of exceptions it appears

beyond any real dispute that the defendant committed the acts charged against him.

The defense of insanity was properly raised by the evidence adduced by the defendant; therefore, it follows that the burden devolved upon the state to prove the sanity of the defendant beyond a reasonable doubt as one of the elements necessary to establish guilt. *Wright v. People,* 4 Neb. 407; *Prince v. State,* 92 Neb. 490, 138 N. W. 726; *Torske v. State,* 123 Neb. 161, 242 N. W. 408; *Plessman v. State,* 130 Neb. 758, 266 N. W. 629. The evidence on this proposition was in conflict, and from an examination of the entire record the only conclusion that can be arrived at is that this was a question for determination by the jury. The jury having determined it adversely to the defendant, we can find no basis upon which to say that this determination was wrong. In fact, it appears that the weight of the evidence on this question is strongly favorable to the state.

The evidence discloses that the defendant had, in February, 1939, been committed by the insanity board of Jefferson county, Nebraska, to Ingleside, a hospital for mental incompetents, and that at the time of the commission of the alleged crime defendant was at large, he having escaped from this institution. In this connection the defense urges that it must be presumed that defendant continued to be or remain insane until sanity returned. The evidence did not show a return to sanity; in fact, no such character of proof was offered. The state sought to show only that defendant was capable of distinguishing between right and wrong with reference to the act committed and to show that he was sane. This was the burden of the state. Under the law of this state, no form of insanity is recognized as a defense to a criminal action, unless it affects the mind of the accused to such an extent that it renders him incapable of distinguishing between right and wrong with reference to the act committed. *Torske v. State, supra; Plessman v. State, supra.*

The evidence of the commitment of defendant to a hospital for the insane does not raise the presumption contended for.

As pointed out in *Pflueger v. State,* 46 Neb. 493, 64 N. W. 1094, it is, at most, evidence of the defense relied upon, and raised no presumption that the accused was at the time in question insane in the sense that he was not accountable for the act charged.

On the issues presented it is a fair observation to say that the case was one proper for submission on the evidence adduced, and no just complaint may be found with the instructions of the court. If this were all requiring consideration, there could hardly be any question that the case would be for affirmance.

Another and vital question, however, is raised as to whether or not the defendant was accorded a fair trial. The defendant insists that there was irregularity in the proceedings in that the chief counsel for the defendant was required to take the witness-stand in the presence of the jury and, over objection, produce the instrument forming the basis of the charge against the defendant.

The substantial facts in this connection were that after the uttering of the check in question the agent of the Lincoln Telephone & Telegraph Company, the recipient of the check, turned the check over to the chief of police of Fairbury, Nebraska, who, on July 25, 1940, arrested the defendant, and while the check was out of the possession of the Lincoln Telephone & Telegraph Company the county attorney drafted a complaint against the defendant charging him with the crime in question here. Thereafter the check was returned to the Lincoln Telephone & Telegraph Company. Then on November 30, 1940, Merril R. Reller, attorney for defendant, went to the office of the Lincoln Telephone & Telegraph Company and paid the face amount of the check, whereupon the check was delivered over to him upon the execution of a receipt wherein Reller agreed to deliver the check to any person designated by the agent of the Lincoln Telephone & Telegraph Company. No such designation was ever made by the agent of the Lincoln Telephone & Telegraph Company. Reller testified, and the testimony on this point is undisputed, that he delivered the

check to the defendant who, in turn, delivered it back to him. The case was called for trial on December 9, 1940. On said date the county attorney filed an application for an order requiring Merril R. Reller to show cause why he should not be required to deliver the check herein in question to the county attorney, and that for failure so to do that Reller be found to be in contempt of court.

Before the jury were impaneled, Reller made an oral showing and showed to the court, among other things, that the instrument was canceled; that it came into his possession in his capacity as attorney for the defendant; that the check came to him from Tom Longdon, manager of the Lincoln Telephone & Telegraph Company, upon the payment of the sum represented, without duress and of the free will of the said Tom Longdon, with instructions that upon his direction the instrument would be turned over to such parties as Longdon might direct, but that no such direction or instruction was ever given. Pursuant to the showing of Reller no ruling was made, but the trial court indicated that Reller might be put on the witness-stand and that then the instrument might be demanded of him, and stated, "* * * and I will say to Mr. Reller that no protestation of privilege will be effective and that he will either deliver it or be adjudged in contempt of this court. That's the way the matter will be handled and we will proceed with that knowledge on the part of everybody." Reller did not deliver the check.

The jury were duly impaneled and Reller was called as the first witness. He first gave testimony as to his identity and his relation to the defendant, and was then asked concerning possession of the check and, after claiming his privilege as attorney for the defendant, agreed to answer and to deliver the check if ordered so to do by the court. He was ordered finally to deliver the check to the court reporter. The questions, objections, answers and remarks of the court, with reference to this matter, cover approximately nine pages of the bill of exceptions, all taken in the presence of the jury. That the tension was acute and the atmosphere of the

courtroom was charged by this examination and interchange cannot be seriously questioned upon a reading of that part of the record.

This situation presents two questions: 1. Did the court err in requiring that the check be delivered up? 2. Assuming the propriety and legality of an order to deliver up the check, were the proceedings in relation thereto erroneous to a degree that they prejudiced the right of the defendant to a new trial?

By the greater weight of authority it is held that it is error to require the defendant, or his attorney, to produce incriminating documents which are the basis of a criminal prosecution, and by the same token that it is prejudicially erroneous to conduct proceedings to compel their production in the presence of the jury.

In *People v. Minkowitz,* 220 N. Y. 399, 115 N. E. 987, the court said: "A demand should not be made in the presence of a jury for a defendant to produce an incriminating document which appears to be in his possession, and there is no distinction between making a demand upon the defendant and making a demand upon the defendant's lawyer in his presence and in the presence of the jury. When a lawyer has received a defendant's papers from the defendant after retainer as his attorney he cannot be called upon to produce them in court."

In the opinion in *Boyd v. United States,* 116 U. S. 616, 635, 6 S. Ct. 524, on this subject it is stated: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and

against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

In *Powell v. Commonwealth,* 167 Va. 558, 189 S. E. 433, a forgery case presenting a situation similar to the one with which we are dealing here, the prosecuting attorney, having had subpœna *duces tecum* issue as in this case, asked the attorney for defendant in the presence of the jury to produce a note for $1,000. In its comments, holding this to be error, the court there said: "The Commonwealth contends that this error, conceding it to be error for argument's sake, is harmless. It is error and is presumed to be harmful. Plainly we cannot undertake to say that it is not."

In *McKnight v. United States,* 115 Fed. 972, the court said: "Nor is it essential to the ends of justice that the accused may be thus called upon to produce evidence of a documentary character. The authorities seem very clear that in such cases, where a criminating document directly bearing upon the issue to be proved is in the possession of the accused, the prosecution may be permitted to show the contents thereof, without notice to the defendant to produce it. As it would be beyond the power of the court to require the accused to criminate himself by the production of the paper as evidence against himself, secondary evidence is admissible to show its contents. As the introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant, it will ordinarily be in his power to produce it, if he regards it for his interest to do so. The court, as we have seen, cannot compel a defendant in a criminal case to produce an incriminating writing. The notice would therefore be futile as a means of compelling the production of the document, and refusal to comply therewith might work injustice to the defendant in the inferences drawn from its nonproduction."

In *Gillespie v. State,* 5 Okla. Cr. 546, 115 Pac. 620, the court said: "If a county attorney can, in the presence of the jury, demand of the defendant, or his counsel, the production of any letters or papers which may be proved to be in

the possession of the defendant, of what value is this constitutional provision? It is true that making a demand upon a defendant to produce such letters or papers is a different thing from forcing him to produce them; but the effect is the same, because if a defendant refuses to comply with such a demand it is equivalent to admitting that the evidence demanded would incriminate him, if it were produced. The observation and experience of all practicing attorneys will sustain the statement that such an inference is more damaging to a defendant than a proved fact would be. When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminate himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body and soul of the Constitution would be violated and trampled upon."

With particular reference to *McKnight v. United States, supra,* Professor Wigmore, in his work on Evidence, vol. 4 (2d ed.) sec. 2268, has criticized the rule; however, the rule appears to us to have a firmer foundation than the criticism. There can be no doubt concerning the likelihood of embarrassment of the prosecution or even of obstruction of justice resulting from the enforcement of the rule, and yet a departure would make it possible to create a situation wherein the presumption of innocence, which is a constitutional cloak thrown about all persons charged with criminal offenses, would no longer have any significance. A demand in open court before a jury by a prosecutor for the production of an existent or nonexistent document, whether based on honest belief in its existence and location or on artifice, the purpose of which would be to place the accused in a disadvantageous position, would be damning indeed. It would have the ineradicable force of evidence if the instrument were not produced without any of the legal sanctity surrounding the proper introduction of evidence. If produced it would be under a definite requirement that the accused give evidence against himself.

An insistence in this case that the instrument was in ex-

istence, that it was in the hands of the attorney for the defendant, and that it came into his hands surreptitiously, is without merit when weighed against the reasons for the rule, which reasons have already been set out, and the further rule of proof when the instrument is in the hands of the defendant or his attorney.

As has also already been indicated, the rule is that, when the instrument is in the hands of the defendant or his attorney, it may be proved by secondary evidence. This, of course, would present some difficulty in case of questioned authenticity of handwriting, but after examination of the evidence we find that no such difficulty was presented in this case. The county attorney had previously copied the check, and the defendant did not deny its execution, but denied only a memory of executing or uttering it.

We are not called upon to pass upon the ethics of obtaining the check by the attorney for the defendant, which seems to have been the question disturbing the mind of the trial judge at the time of the trial. It is not an issue. Whether or not the conduct of this attorney furnished justification for disciplinary action we do not decide, but, however that be, the rights of an accused may not suffer abridgment by threatened punishment of his attorney for his efforts to preserve the constitutional rights and immunities of his client.

As an observation on the question of the ethics of the attorney, in order to protect against false or unfair inferences, the record shows that this attorney obtained the check from the agent of the Lincoln Telephone & Telegraph Company under a stipulation that he would turn it over to whom requested by this agent. This agent never made any such request, and there is no indication or suggestion that the attorney would have failed or refused to comply with any such request if it had been made.

For the reasons set out herein, the judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED.

CLAUDE E. REINSCH, APPELLEE, V. PACIFIC MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

299 N. W. 632

FILED JULY 25, 1941. No. 31050.

1. **Insurance.** Inability to do any of the material acts necessary for the transaction of an insured's usual business or vocation, or of any business or employment for which he may be fitted, which prevent the substantial and practical conduct or pursuit of any such business or employment for which he is fitted, is equivalent, in insurance law, to inability to do all the substantial and material acts necessary to the prosecution of every occupation or employment for which insured was fitted, for compensation, gain or profit, in the customary and usual manner. *Miceli v. Equitable Life Assurance Society,* 138 Neb. 374, 294 N. W. 659.
2. **Contracts.** Every contract is made with reference to, and subject to, existing law, and every law affecting such contract is read into and becomes a part of the same. This principle embraces alike those which affect its validity, construction, discharge and enforcement. *McWilliams v. Griffin,* 132 Neb. 753, 273 N. W. 209.
3. **Judgment.** In a subsequent action on an accident and health insurance policy, a judgment of a court of competent jurisdiction upon a question directly involved in the first suit thereon is conclusive as to that question in the later suit between the same parties, when it appears either on the face of the record or is shown by intrinsic evidence that the precise question was raised and determined in the former suit, and it does not appear that there has been any change since the former trial in the physical condition of plaintiff, which was a question involved and determined in first case.
4. **Trial.** It is not error for a trial court to fail to charge a jury on a question not relevant to an issue under the pleadings in the case.
5. ———. Remarks of counsel for appellee in argument to jury referring to testimony of a witness on former trial, under facts in instant case, *held* not prejudicial.
6. **New Trial.** Application for new trial upon the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and its ruling thereon will not be disturbed unless an abuse of discretion is shown.
7. **Trial.** Where the evidence as to material facts is conflicting and such that reasonable minds might draw a different conclusion therefrom, the question is for the jury. Evidence examined and *held* sufficient to support verdict in favor of plaintiff.

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

Kennedy, Holland, DeLacy & Svoboda, for appellant.

Gaines, McLaughlin, Shoemaker & Fitzgerald and *Lawrence Fredericksen, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

ELDRED, District Judge.

This is an action by Claude E. Reinsch against the Pacific Mutual Life Insurance Company of California to recover 36 monthly disability instalments of $200 each, being from December 17, 1936, to November 17, 1939, under a health and accident policy issued by said insurance company February 5, 1935.

Plaintiff, appellee, in his petition claims that he became totally and permanently disabled on the 17th day of August, 1935; that he duly paid the premiums required by said policy up to said date; and that said policy is and has been since its issuance in full force and effect. The policy, a copy of which is attached to the petition, among other things, provides:

"Part B. (1) The Company will pay indemnity at the rate of Two Hundred * * * Dollars per month (herein called initial monthly indemnity) throughout the period, not exceeding twelve months, that the disability described above, shall totally disable the Insured and prevent him from performing any and every kind of duty pertaining to his occupation; and after the payment of initial monthly indemnity for twelve months as aforesaid, initial monthly indemnity will be paid as long as the Insured shall be totally and continuously disabled and prevented from engaging in any and every occupation or employment for compensation, gain or profit."

The petition alleges that on the 27th day of November, 1937, in an action theretofore instituted by plaintiff against said insurance company, he recovered a judgment against

said insurance company for the payments accruing under said policy up to December 17, 1936, for the first year period; that no appeal was taken therefrom; and that said judgment has become final; and from the evidence it appears to have been satisfied.

Plaintiff alleges that his physical condition has not improved, but has grown worse; and that he is now and has been during the entire period totally and continuously disabled and prevented from engaging in any and every occupation or employment for compensation, gain or profit, and will be during the balance of his life.

The amended answer admits the issuance of the policy and the institution of the action on January 25, 1936, being the first action on said policy, and denies that the plaintiff is suffering from any disability which totally disables him and prevents him from performing any and every kind of duty pertaining to his occupation, and denies that during the period sued for the plaintiff was totally and continuously disabled and prevented from engaging in any and every occupation or employment for compensation, gain or profit. Further answering, defendant alleges, in substance, that since December 16, 1936, the condition of plaintiff's left hernia has changed for the better, and that during the time sued for herein plaintiff could have had his hernia cured by simple operation which would not endanger plaintiff's life or health, and that he wilfully and unreasonably refuses so to do.

Cause was tried to a jury, which resulted in a verdict for plaintiff for $7,851.60; judgment was entered thereon and for costs, including a fee for plaintiff's attorneys which was taxed at $1,000. Defendant has appealed.

Appellant in its brief assigns 34 alleged errors, but errors in giving of court's instructions numbered 3 and 5 are most strongly stressed. By instruction No. 3 the jury are told:

"The words 'totally and continuously disabled' do not mean that the insured must be rendered absolutely and totally unable to perform every duty of his occupation or employment for which he was fitted in order to recover. It is

sufficient in that respect if the insured is disabled by bodily disease from performing one or more of the necessary acts of his occupation or the employment for which he is fitted."

By instruction No. 5 the jury are told:

"On the other hand, if you find from a preponderance of the evidence that plaintiff is disabled by reason of his bodily condition, as shown by the evidence, from performing one or more of the necessary acts of his occupation or the employment for which he is fitted, then the plaintiff would be entitled to recover."

These two instructions are discussed together by appellant in its brief and will be likewise considered here. In both these instructions the appellant's criticism is directed to the clause found in the last sentence of each instruction, that is, "from performing one or more of the necessary acts of his occupation or the employment for which he is fitted." It is urged by appellant that, when the court used the words "one or more" in said instructions, it stated to the jury that, if the plaintiff was prevented from performing one act of his occupation or the employment for which he is fitted, he was totally and continuously disabled and prevented from engaging in any and every occupation or employment for compensation, gain or profit.

This identical question was considered by this court in *Miceli v. Equitable Life Assurance Society*, 138 Neb. 367, 293 N. W. 112, and decided adversely to appellant's contention. On motion for a rehearing in that case, in which counsel for appellants herein appeared *amici curiæ*, the question was again considered and there was a further opinion, wherein appears:

"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 substantial 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." *Miceli v. Equitable Life Assurance Society*, 138 Neb. 374, 294 N. W. 659.

Questions of like import have been before this court many times, and though language used varies in form, the holding has been uniformly in accord with the views expressed in *Miceli v. Equitable Life Assurance Society, supra.* See *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N. W. 397; *From v. General American Life Ins. Co.*, 132 Neb. 731, 273 N. W. 36; *Gowe v. Mutual Life Ins. Co.*, 139 Neb. 1, 296 N. W. 163; *Oswald v. Equitable Life Assurance Society*, 128 Neb. 173, 258 N. W. 41; *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850; *Reinsch v. Travelers Ins. Co.*, 133 Neb. 249, 274 N. W. 572.

Appellant directs attention to distinction made in the provision of the policy involved in first suit for recovery of initial monthly indemnity during period of first twelve months, when it was only essential that the insured should be prevented from performing "any and every kind of duty pertaining to his occupation," while under the provisions now involved it was essential that he be prevented from engaging in "any and every occupation or employment for compensation, gain or profit." This distinction appears not to have been overlooked on the trial of this case. Counsel recognized this distinction by the issues presented by the pleadings, and the trial court instructed the jury in the instant case, under the provisions of the policy on which suit was based, construing such provisions in harmony with the decisions of the court heretofore referred to.

It is stated in brief of appellant: "It is apparent that the

construction of the court entirely rewrites the policy." And it is urged that parties have a right to make contracts, and that where there is no uncertainty as to the meaning of an insurance contract, and the same is legal, it will be enforced as made—citing *Shambaugh v. Great Northern Life Ins. Co.*, 131 Neb. 415, 268 N. W. 288. That decision, when considered in the light of the facts there involved, is not authority in the instant case. There it was simply held that the disability of plaintiff did not fall within the terms of the policy. Provisions of an insurance policy such as involved in the instant case had been construed by this court prior to the time policy involved herein was executed. Such construction became a part of the contract. The policy sued on is dated February 5, 1935; the decision in *Hamblin v. Equitable Life Assurance Society, supra,* was announced May 12, 1933. "It is settled that the laws which subsist at the time of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to and incorporated therein. This principle embraces alike those which affect its validity, construction, discharge, and enforcement." *McWilliams v. Griffin,* 132 Neb. 753, 273 N. W. 209.

The further contention is made that construction of provisions of policy, by instructions 3 and 5 given the jury, entirely eliminates partial disability and makes partial disability total disability, and it is suggested such error was called to the court's attention by requested instruction. Nine only of the 24 requested instructions are set out in brief of appellant. Several of these purport to define in varying language the expression "total disability," in terms inconsistent with the construction adopted by the decisions of this court heretofore cited. Requested instruction No. 5 refers to the partial disability clause of the policy, defining it in words of policy; then this instruction, as well as a number of others, would have the court inform the jury, in effect, that, if it was found that plaintiff was partially disabled but not totally disabled, the verdict should be for the defendant. This is the effect of what the court did advise

the jury by instructions given. In none of the tendered instructions is the court requested to advise the jury that, if plaintiff was found to have been only partially disabled, he might recover partial liability benefits under the policy. No issue as to partial disability was presented by the pleadings. There was no occasion for the court to define that term. Plaintiff set out in his petition a clause of the policy on which he relied; alleged his total disability, and that it had existed during the entire period for which he was seeking to recover. The defendant did not, by its answer, raise an issue of partial disability. It is true the copy of policy which is attached to the petition contains the provision:

"(2) The Company will pay indemnity at the rate of one-half of the amount per month then being paid in accordance with paragraph (1) of this Part B, for any period or periods throughout which disability described above is not total, but consists of continuous inability to prosecute important daily business duties, provided that in each instance the period of such partial disability immediately succeeds a period of total disability for which indemnity is payable under the provisions of paragraph (1) of this Part B, and provided further that indemnity for such period or periods of partial disability will not be paid for more than a total of six months during any one period of disability."

There is no allegation in any of the pleadings making an issue thereunder or seeking to apply such provision to the facts in this case. Under the pleadings and evidence, plaintiff's entire case rested upon his having proved total disability. The court instructed the jury that the plaintiff could not recover unless total disability, as defined therein, was established. That, under the issues and evidence, was sufficient.

A number of requested instructions included in assignments of error, but not set out or commented upon, relate to the burden of proof. That subject appears to have been amply covered by the instructions given.

Error is assigned in giving instruction No. 6 to the jury, by which they were advised that the question of whether

the plaintiff should submit to an operation has been settled by the verdict and judgment in the former trial. The record in this case discloses that the issue covered by the instruction just referred to was directly raised in the former action between the same parties, on the same policy; the issue was presented by the pleadings in that case. It was submitted to the jury by the instruction of the court therein, and the verdict and judgment thereon determined that issue. There is no evidence in this case that there has been a change in plaintiff's physical condition since the former trial justifying the resubmission of that issue to another jury. Under the circumstances the former judgment is conclusive as to that question. *Lincoln Nat. Bank & Trust Co. v. Grainger*, 129 Neb. 451, 262 N. W. 11.

Instruction No. 6 having been properly given the jury, it follows that the court was correct in refusing to give requested instructions 9, 10 and 11 which asked the submission of the same question in this case.

Error is assigned in refusing to permit Dr. Brown, called as an expert witness, to give his opinion as to chances of success in case plaintiff would submit to an operation. The court having properly withdrawn that question from the consideration of the jury, there being no sufficient evidence of any change in the condition of plaintiff since former trial, there was no error in refusing to admit the proffered testimony.

Alleged misconduct on the part of the plaintiff's counsel in closing argument is assigned as error. The remarks objected to relate to testimony of a doctor on trial of former case on the same policy, with reference to an operation. If the remarks had related to a question for determination of the jury in the instant case, the remarks might have been prejudicial. Appellee's counsel suggest such remarks were made in response to remarks made by appellant's counsel during the argument. What the remarks of the appellant's counsel may have been, the record does not disclose, but from statement made by trial judge during the colloquy following the remarks complained of, it is apparent that appellant's

counsel had made some reference to the subject. Further, the question referred to was by the court's instructions withdrawn from consideration of the jury on this trial, and the jury were so advised at that time. Under the circumstances we conclude that the remarks objected to were not prejudicial.

Affidavits of Edward Devlin and Henry H. Childress were offered in evidence in support of motion for new trial on account of newly discovered evidence. The former was present and as a part of the foundation for admission of films in evidence he testified as to identity of person whose picture appeared in the film. According to affidavit of Henry H. Childress, he was also present at the trial, though he did not testify. The matter for which his testimony was desired was with reference to the same subject as that of the witness Devlin. The proposed newly discovered evidence would have been largely cumulative in character. There appears no reasonable probability that such evidence, if introduced, would have changed the result in this case. Application for new trial on the ground of newly discovered evidence is addressed to the sound judicial discretion of the trial court, and trial court may properly refuse such motion unless it appears that such evidence, if it had been offered and admitted on the trial, would probably have produced a different result. *Morrill County v. Bliss,* 125 Neb. 573, 251 N. W. 106; *Campbell v. Slater,* 127 Neb. 231, 254 N. W. 897.

Instruction No. 10 criticized, informed the jury the exact amount plaintiff should recover, including interest, in the event the jury found for the plaintiff. Under the issues and evidence and the instructions of the court, if the verdict was for the plaintiff, the plaintiff was entitled to recover the amount stated in the instruction, and the giving of that instruction, under such circumstances, was proper.

Appellant attacks the sufficiency of the evidence to sustain the verdict and finally contends that the verdict was so clearly wrong as to indicate it was the result of passion and prejudice. It appears that defendant employed an investigator and surveillant after the trial of the first case on

the policy involved herein, to investigate and observe the activities of plaintiff; that he conducted surveillance and took moving pictures of plaintiff on a number of different occasions; and, on trial, in addition to producing films which were offered in evidence and shown to the jury, he testified in detail and at length as to the result of his surveillance. Many of the facts testified to by this witness were not denied by the plaintiff. He is shown by the testimony of the witness, Devlin, to have driven a car, done or assisted in family marketing at times, worked on and around his car, gone on an automobile trip and probably, on at least one occasion, changed a tire. On the other hand, there was evidence on behalf of the plaintiff tending to prove that plaintiff is afflicted with a left inguinal hernia; that it is irreducible and incarcerated; that there are adhesions; that at times he becomes nauseated and vomits, suffers frequent headaches and dizzy spells, and when on his feet has constant dull pain and drawing sensation in area of groin, which makes him nervous and irritable; that he does not have normal control of bowels and bladder, tires frequently and lies down; and that his condition is becoming progressively worse.

It is evident that a condition of total helplessness on the part of the plaintiff did not exist, but such a condition is not essential to a recovery. While the evidence as to the extent of plaintiff's disability is in sharp conflict, yet it is apparent that the character and extent of plaintiff's disability and the effect upon him was such that it might fairly be inferred therefrom that the plaintiff, during the period covered by this suit, was totally and continuously disabled and prevented from engaging in any and every occupation or employment for compensation, gain or profit, within the meaning of the insurance policy. The case was properly submitted to the jury and verdict of the jury based thereon should not be disturbed.

Appellant assigns error in the amount of attorneys' fees allowed by the trial court, but the matter is not further discussed. Considering the record in the case and the

amount involved, we conclude that the sum allowed was fairly within the discretion of that court.

All assignments of error have been examined and no prejudicial error appears. Appellee is allowed a fee of $300 for services of his attorneys in this court. Judgment of trial court is

AFFIRMED.

RAY PARKS, APPELLEE V. WILLIAM W. METZ ET AL., APPELLANTS.
299 N. W. 643

FILED JULY 25, 1941. No. 31076.

1. Trial. "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163.
2. Negligence. Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are for the determination of the jury.
3. Trial. Evidence examined, and *held* sufficient to require the submission to the jury of the questions of negligence and of comparative and contributory negligence.
4. ———. It is not error for the trial court to refuse an instruction tendered by defendants, where the law applicable to the case has been given by the court in its instructions.

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

Lloyd E. Peterson, for appellants.

Clarence G. Miles and *Thomas E. Dunbar, contra.*

Heard before PAINE, CARTER and MESSMORE, JJ., and ELDRED and TEWELL, District Judges.

ELDRED, District Judge.

This is an automobile damage suit. Plaintiff, appellee, is seeking to recover for personal injuries and property damage arising out of a collision between an automobile owned and driven by plaintiff and a Studebaker one-ton truck owned by the defendants William W. Metz, Frank B. Chapin and William A. Williams, doing business as Greene's Ice Cream Factory, and driven by the defendant Kenneth Conaway, at an intersection about one mile west of Avoca, on state highway No. 50, an arterial highway extending north and south, and a county highway extending east and west, and having stop signs. Defendants filed cross-petition for property damage to their truck. On trial there was a verdict and judgment in favor of the plaintiff and against defendants. Defendants have appealed. Appellants' first assignment of errors relied upon for reversal is: "The court erred in failing to direct a verdict in favor of the defendants at the close of plaintiff's case;" and, second, "The court erred in failing to direct a verdict at the close of all the evidence." These assignments will be considered together.

The specific acts of alleged negligence charged by plaintiff against defendants in his petition, and submitted by the court to the jury, in substance, are: That the driver of said truck was not maintaining a proper lookout for those crossing said intersection; that he was driving said truck at a high and excessive rate of speed under the circumstances; and that, after seeing plaintiff in said intersection, failed and neglected to slacken the speed of said truck, but drove the said truck at high speed directly toward and against plaintiff's automobile.

The specific acts of alleged negligence charged by defendants against plaintiff, and submitted by the court to the jury, in substance are: In failing to bring his automobile to a stop and allowing traffic upon said arterial highway to proceed without obstruction; in failing to give the defendant Conaway warning or notice of his approach; in disregarding the condition of the highway; and in failing to keep a proper

lookout for traffic approaching and entering said intersection from the north, and to observe the truck driven by defendant Conaway in time to avoid a collision therewith; or if he saw the approach of said car of defendant in time to avoid collision therewith, then in failing to avoid said collision.

The evidence pertinent to cause of collision discloses that state highway No. 50 is an arterial highway with a graveled surface and well maintained, extending north and south a short distance west of Avoca. On the date of the collision involved herein, a county highway with graveled surface and extending east and west intersected highway No. 50 about one mile west of Avoca. This county highway has stop signs on both sides where it intersects the arterial highway No. 50. On September 15, 1939, at about 3 o'clock p. m., the plaintiff, a man 55 years of age, was traveling west from Avoca on said county highway, driving his 1933 Terraplane four-door sedan. The refrigerator truck of the defendants Metz, Chapin and Williams, weighing 5,200 pounds without load, was at the same time being driven by defendant Kenneth Conaway, 24 years of age, south on highway No. 50, and was carrying about one-half load. The day was clear; the collision occurred at the intersection of said roads, the point of contact being about the center of the east and west road, and about three feet east of the west line of the traveled portion of the north and south road. Both drivers had been over the road at place of collision many times before. After collision plaintiff's car was in ditch at southwest corner of intersection, lying on right side, front end facing about west; the defendants' truck was about a quarter of a mile south at bridge at foot of hill.

Plaintiff testified that he was a salesman of hog and poultry minerals and did culling of poultry. On the afternoon of September 15, 1939, at about 3 o'clock, he was going from Avoca to one Moore's, about one and one-half miles west of Avoca, traveling in a 1933 four-door Terraplane, on graveled highway to highway No. 50 one mile. "I knew there was a stop button there and there was a hill, and

when I went down there to the stop button, I stopped, * * * and then started up slow, because there was a ridge where the maintainer had been by, and started in low and looked up the hill to the north; looked south, and couldn't see any car coming and I got about half-way across and I heard a roar and I looked up and here was a big white truck right on me and when it hit me it seemed to just raise me right off the ground and it came down on the same side that it hit me; came down on the right side. * * * A. Well, I stopped at the stop button and I couldn't say whether I was by it or just even with it." When started up after stopping, started in low; was alone that day; had driven cars since 1914; able to judge speed of car very closely; entered intersection at about five or six miles an hour. When he first knew of the approach of the truck which struck him, he was about the center of the intersection or a little past. Proceeded directly west on right side, or north side of cross-road; on north side of east and west highway. "When he hit me it raised the car right off the wheels; it seemed to go right up in the air and it went in the ditch, and when I got squared around I was down in the bottom on the right door and then I tried to get up two or three times and finally I got up and stood with my head and shoulders out through the other door. I couldn't hardly get up I hurt so through my chest and my arm. I could only use one hand to get stood up. My head was cut and there was blood all over me. I could only see out of one eye; the blood was running over my right eye and I finally got stood up through the door and pretty soon a young man came along there and tried to get me out." Car was on right side. "The Court: How far away was the truck when you first saw it? A. Well, I would say a couple hundred feet. The Court: Did you observe its approach from that distance up to the time it hit you? A. I heard it roar and I looked up and it seemed to be coming right at me, I would judge, a couple of hundred feet away. The Court: You saw the truck two hundred feet away? A. I would imagine about that. The Court: What did you do then? A. Well, I naturally glanced ahead to see if I could

get away. The Court: How close was it to you when you saw it again? A. It was right on me and I was up in the air. The Court: It hit you? A. It hit me. Q. Do you know, Mr. Parks, whether or not the truck turned in its course from a straight north and south direction; just answer that 'yes' or 'no'? A. Yes. * * * The Court: You say you know whether the truck approaching you changed its course. If so, which way did it turn, approaching you? A. It headed right towards me. The Court: It never turned then? A. Kind of slaunch-ways. The Court: What do you mean by 'slaunch-ways?' A. I just don't know how to explain it. Q. Which way did the truck then seem to turn from the time you first saw it? * * * A. It came fully at me then. * * * Q. You say that you stopped at the stop sign? A. Yes, sir. Q. And from the stop sign you could see both ways? * * * A. Yes, on the highway No. 50 you can see south a long ways and north you can't see so far. * * * Q. Well, where you stopped how far north can you see? A. Well, I would say three or four hundred feet. Q. You can see to the top of the hill? A. No, sir. Q. You can see to the top of the hill from the edge of the road, can't you? A. Yes, sir. Q. You didn't stop at the edge of the road? A. I went slow at the edge of the road—let it roll down there. Q. Before you went into that intersection you could see to the top of the hill and there was no car coming? A. No, sir; you can't see to the top of the hill. Q. You can't? A. No. sir. Q. Because of the obstruction at the corner? A. Yes, sir. Q. So you stopped at a place where a view of the highway to the north was obstructed? A. To the top of the hill I couldn't see; no. Q. Did you at any time bring your car up to the edge of the road and stop it where you could see in both directions as far as the road extends to the north and south? A. Yes. Q. Where did you stop then? A. No; I didn't stop then. It rolled up there. I let it roll up there and looked both ways. I could see clear to the top of the hill from there, probably five or six hundred feet. * * * Q. And there wasn't any truck in sight then? * * * Q. As far as you could see back, anyhow six hundred feet, there wasn't any car coming? A.

No; as far as I could see up the hill there was no car coming. Q. Then you pulled directly onto the intersection? A. Yes, sir. Q. And that instant you were hit? A. No, sir. Q. Where were you hit? A. I got past the middle when I heard the roar and I was past the middle when it hit. Q. How far past the middle? A. I couldn't say; a few feet. Q. You were driving five miles an hour? A. I was in low, driving five to six miles an hour. Q. You hadn't shifted your gears yet? A. No, sir. Q. You never stopped after you stopped at the stop sign though? that is, you didn't make two stops? A. No; I didn't make two stops."

Allen Paap had been over road many times. "Q. What would you say with reference to obstruction of view? A. Well, there isn't a very good view. It isn't very well cleared and there is more or less of a little embankment there. Q. Embankment and high weeds, were there at that time? A. That is the way I looked at it; yes. Q. Any brush there? A. I wouldn't say as to brush there. There had been hedge there, but the hedge was cleared." It is about 750 to 800 feet from the intersection to the top of the hill north. It is about 30 or 35 feet from where the plaintiff's car was lying in ditch to the center of the intersection.

H. H. Caswell, of the state safety patrol, who with Patrolman Nelson investigated accident, was called by defendants. Arrived there at around 3:45 p. m. "The first thing we did was try to determine what had taken place as far as causing the accident was concerned and tried to find out where the impact of the accident was; that is, the spot in the intersection where the cars came together. * * * Well, we could see skid marks on the gravel road and mud that had fallen from the cars. * * * That was in the west side of the intersection. Q. At what point? * * * A. Well, in drawing a line, we measured the width of the traveled portion of the north and south road. We measured with a fifty-foot steel tape, twenty-one feet of traveled portion. Drawing a line directly through the east-west road; that is, along the west side of the north and south road through the intersection, the point of impact was three feet from where this line

would be; three feet east of this line. * * * Drawing a line, if it wasn't for the intersection, I mean, the east and west road, it would be three feet from the west edge of the road. The Court: Of the traveled portion? A. That is right. The Court: Of the west edge of fifty? A. Of fifty, the north and south road." Point of contact almost in center of the east and west road. Examined the truck; the left front wheel brake cable was torn loose from the drum. There was a gravel ridge along the west side of the highway No. 50. Plaintiff's car 35 feet south of stop sign on the west side of the road, 42 or 43 feet from where skidding started. Skidding started at the west edge of the intersection, west edge of north and south road and approximate center of east and west road—of the traveled portion of highway No. 50. Truck was 1,500 feet from intersection. Highway directly south is almost level for 100 yards and then downhill.

Ernest Klein, called by defendants, worked on defendants' truck. Both hydraulic brakes and mechanical brakes could not be effectively operated. Left front headlamp was damaged. "Q. Which side of this truck was damaged the most, the right or left? A. There wasn't a lot of difference. I think the blow came mostly on the left side."

Defendants called Charles A. Shannon, a civil engineer. Top of hill to center of intersection, elevation is 32 feet lower; from center of intersection to bridge, elevation is 45 feet lower and distance is 1,480 feet. Top of hill to bridge, total drop is 77 feet. Total distance from point on top of hill from which measurement was taken to intersection, 1,020 feet. From top of highest point of hill to intersection, distance is 850 feet. Little less than 4 per cent. grade from top of hill to intersection.

Kenneth Conaway, defendant, called as a witness by defendants: Truck is refrigerated truck, Studebaker, one-ton capacity. At time of accident one-half loaded. Was driving from 40 to 45 miles an hour approaching intersection. Truck was in perfect condition. "I was going south from U. S. 34 there, and I wasn't driving fast that day

on account of it was always getting hot, and I started down the hill there and I couldn't see any one, and about thirty feet from the intersection, why a car drove into the intersection about fifteen miles an hour and I put on my brakes, but that is all the good it did, it drove in so quick I hit him and my hood flew up over the windshield and I couldn't only see out through just a crack underneath the bottom of the windshield where the hood wasn't clear covering it, and it started for the ditch and I had a hard time keeping it in the road, from going over in the ditch, and then I tried to put on my brakes and they were shot, the hydraulics were, and then the hand brake, it was loose, the frame had been bent, and it was going about two or three miles an hour, just creeping along, and I couldn't do nothing to stop it. I had a hard time keeping it in the road. I didn't even get clear across the bridge at the bottom of the hill. A road grader patrolman came along and pushed me across the bridge afterwards. I put out my flags. Q. As you drove into this intersection and this car came in front of you, what did the driver do, if anything? A. Well, he never looked until right before I hit him. He was looking straight ahead and he never seen me until right before I hit him. Q. You didn't see him turn his head to the right or left? A. No. Q. Until just before the collision? A. Yes, sir. Q. And then what did he do? Did he look up then just before the collision? A. Yes; he looked right up before the collision. Q. What did you say you estimated his speed to be? A. About fifteen miles an hour. Q. What do you estimate your speed to be at the time just before the impact took place? A. About forty miles, I should judge. Q. Did you apply your brakes? A. Yes; but notwithstanding I couldn't keep from hitting him. Q. You first saw him how far away? A. About thirty feet. Q. Kenneth, with reference to this intersection, did you examine that intersection that afternoon; that is, the northeast corner? A. Yes, sir. Q. What was indicated there, what did you see? A. Well, you couldn't see any one coming from the side roads. A person has got to pull out there to the edge of the highway to see them, and he didn't

do that." Was driving on right side of road immediately before the accident, to the west. No roar in automobile that day. Speed when hit plaintiff's car was little over forty miles.

William A. Williams, defendant: "The stop sign is approximately five feet, I would say, east of the north and south fence line. To see to the top of the hill I had to drive my car until the rear bumper was even with the stop sign, which would put the length of my car west of the stop sign."

On this evidence bearing upon the question of negligence and contributory and comparative negligence the trial court submitted the case to the jury. Defendants' principal argument is that the evidence established that the plaintiff was guilty of more than slight negligence, and that the question was, therefore, one of law for the court. There is no dispute as to that rule, if applicable under the facts in this case. That question must be considered in the light of the rule:

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." *Moncrief v. Interstate Transit Lines,* 129 Neb. 168, 261 N. W. 163.

As to what actually occurred at and immediately preceding the collision, we have no direct evidence except the testimony of the drivers of the two vehicles. Both drivers were familiar with the intersection. It would appear from plaintiff's testimony that he stopped at stop sign; he started in low and looked up the hill to the north, looked south, and could not see any car coming; could not say "whether I was by it or just even with it." That from where he stopped he could see north 300 to 400 feet; that he went slow to the edge of the road; let it roll up then and looked both ways; could see clear to the top of the hill from there, probably 500 or

600 feet, and there was no car coming. Continued directly west across highway with car still in low and driving 5 or 6 miles an hour. That he first saw the truck when about 200 feet from him. That it headed right towards him "kind of slaunch-ways;" it came fully at him. That plaintiff nearly succeeded in clearing the crossing is indicated by the fact that the place of contact was about 3 feet east of the west line of the traveled portion of highway No. 50. That defendants' truck evidently veered a little to the right before striking plaintiff's car would appear from the fact that it propelled plaintiff's car in a southwesterly direction and from the fact that force of contact was on left front of the defendants' truck. If plaintiff was going as slow as he claims, 5 or 6 miles an hour, or even as slow as defendant claims, 15 miles an hour, the truck driver might have seen plaintiff's car long before he claims he did, and could have diverted his truck so as to have passed behind plaintiff's car, had he been keeping a proper lookout. The force of the contact of the defendants' truck and the distance it propelled plaintiff's car, and the distance defendants' truck traveled after the collision, the road being almost level for first 100 yards, is a circumstance indicating something of the speed of the truck at the time of the contact.

Space will not permit a complete analysis of the evidence in this case. The evidence is conflicting, and from the facts and circumstances proved, we conclude that reasonable minds might draw different conclusions concerning any negligence or lack of negligence, as well as comparative and contributory negligence, and that the trial court did not err in submitting such issues to the jury. *McDonald v. Wright,* 125 Neb. 871, 252 N. W. 411.

The only remaining assignment of error is the refusal of the trial court to give instruction No. 2, requested by the defendants. By the second paragraph of the requested instruction the court was asked to advise the jury, "That an automobile approaching an intersection from the left only has the right of way where it arrives at the intersection so far in advance of the car on its right that a reasonably pru-

dent person would be justified in believing that he could clear the intersection before the other car arrived there." This request does not state the rule in this state. The rule would seem to be that a vehicle reaching and entering an intersection first shall have the right of way. *Schrage v. Miller*, 123 Neb. 266, 242 N. W. 649; Comp. St. 1929, sec. 39-1115; Comp. St. Supp. 1939, sec. 39-1148, subd. (b).

The first paragraph of the requested instruction sets out rule,—"Where two vehicles approach an intersection * * * at approximately the same time, the vehicle approaching from the right shall have the right of way." That provision of the statute is applicable where intersection is not protected by "stop signs." Under the evidence in this case such instruction was not pertinent to question involved and was not required. The trial court did, on its own motion, give an instruction under the provisions of section 39-1036, Comp. St. Supp. 1939: "All motor vehicles entering or crossing state highways on which stop signs are erected shall come to a full stop as near the right of way line as possible, before entering onto such state highway, and, regardless of direction, shall give the right of way to vehicles upon said highway." This instruction was applicable under the issues in this case, and fully protected the interests of the defendants. There was no error in the refusal of the requested instruction.

Judgment of the trial court

AFFIRMED.

IN RE ESTATE OF WILLIAM MARLIN.
ESTATE OF WILLIAM MARLIN, APPELLEE, V. CLIFFORD W. MARLIN, APPELLANT.
299 N. W. 626

FILED JULY 25, 1941. No. 31047.

1. **Trusts.** Where a trustee sees fit to advance funds which are applied strictly within and to the purposes of the trust and makes no claim to a right of reimbursement except if, as, and when funds

may come into his hands as trustee, and no damage results to the beneficiaries, he will not be required to account for reimbursements so made.

2. ———. One standing in a trust capacity, who takes possession of and uses the trust property for his own benefit, is chargeable with and will be required to strictly account for the fair and reasonable rental value thereof.

3. ———. Where a trustee with power to sell to produce funds for the trust purpose elects to forego that power and advances funds which are applied to the trust purpose or to preserve the trust *res*, he will not be charged with amounts of reimbursements, where no interest is charged or other damage or loss is shown by the beneficiaries of the trust.

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

William Morrow, for appellant.

Jack L. Raymond, contra.

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

ELLIS, District Judge.

Clifford W. Marlin, trustee under his father's will, filed his final report showing cash on hand in the sum of $5,743.91. To this report four of the heirs filed objections containing 14 specifications of breach of trust. Upon hearing the county court found that the trustee should be charged with the sum of $3,209.13 in addition to the amount as shown by his report. This amount was made up of a surcharge of $1,641.90 for crop rentals not reported and accounted for by the trustee, a surcharge of $550 for pasture rental not reported and accounted for, and a surcharge of $1,017.23 representing advances made by the trustee to pay taxes and similar charges for which the trustee had reimbursed himself.

The trustee appealed to the district court and after a trial in that court lasting four days and reflected in a bill of exceptions of 445 pages the court found that the trustee should be charged with the sum of $8,601.59 in addition to the amount as shown by his report and entered judgment accordingly. From that judgment the trustee has appealed

to this court and will hereinafter be referred to as the trustee.

William Marlin died November 4, 1922, leaving a widow and ten children. He left a will, the pertinent provisions of which are as follows:

"I direct that my said executor and trustee shall keep my estate safely and conservatively invested so as to yield the best possible income consistent with careful management and I direct that all the profits, interest and income of my estate shall be paid over by my executor and trustee to my wife, Amanda Marlin, as long as she may live and that the receipt of my wife, Amanda Marlin, for such payments shall be full and sufficient acknowledgment and discharge of my said executor and trustee.

"I further will and direct that my wife, Amanda Marlin, be permitted to occupy the family home and to have the use of all the furniture and appurtenances thereunto belonging as long as she may live, and,

"I further will and direct that in the event that the income from my estate be insufficient to provide a suitable living for my wife, Amanda Marlin, that my executor and trustee shall first collect all outstanding obligations due me and shall pay a sufficient portion of the same to my wife, Amanda Marlin, each year, together with the income from my estate to provide her with a suitable living and after the proceeds of said obligations due me have been exhausted, I direct my trustee to sell a sufficient amount of my real estate and to pay a sufficient portion of it each year, which together with the income will provide a suitable living for my wife (by a suitable living I mean as good a living as she is now enjoying), and I further direct that at the death of my wife, Amanda Marlin, that my trustee convey the residue of my estate to my children * * * share and share alike.

"This provision for my wife is to be in lieu of all right of dower or other interest in my estate. I authorize and empower my executor and trustee, or his successor in trust, to sell and dispose of all, or any, of the real estate or personal estate of which I may die seized or possessed at public or

private sale at such time or on such terms and conditions as he or his successor shall deem meet or proper for the purpose of providing funds to be used in providing a suitable living for my wife, Amanda Marlin, and to execute, acknowledge, and deliver all papers, writings, deeds of conveyance and transfers thereof."

Pursuant to the provisions of the will, the trustee entered upon the discharge of his duties and continued to do so until January 9, 1939, when he filed his final report in the county court. Amanda Marlin, the widow, died in March, 1936.

None of the specifications contained in the objections will be discussed herein except those upon which the court found in favor of the objectors and charged the trustee with additional liability and the latter will be discussed separately.

In a general way it may be said that the records kept by the trustee are sorely deficient in detail and therefore a most unsatisfactory aid to the court or any one else in the situation before us, it being apparent that because of the lapse of years memory is a poor reed upon which to depend for supporting details which ought to be available upon the accounting of any fiduciary. It may also be said that the trustee showed too little inclination to amplify his meager records, but chose rather to take a categorical position that the report of his stewardship was correct and those interested should take it as made.

We have not been favored by the parties with either argument or authority as to the burden of proof in the case. It may be well at this time to set out our view that the law on this point is as set forth in the following: "The law seems to be that, upon an accounting, the affirmative of establishing more assets than are acknowledged by the inventory or account of a personal representative is with the party objecting, but, where the assets are shown or admitted, the burden is upon the personal representative to account for their proper disposition." *In re Estate of Mall,* 80 Neb. 233, 114 N. W. 156.

Among the assets of the father's estate which came into the hands of the trustee was a promissory note of one George

Helzer which was secured by a real estate mortgage. This note was in the original principal amount of $3,000 and became due in 1922 before the father's death. The trustee's report shows that on March 12, 1923, he received as a payment on this note the sum of $882.20 and that on March 16, 1925, he received a further sum on this note of $604.20. On the latter date he executed a release of the mortgage. The objectors charged the trustee had received a further sum in excess of $1,700 on this item and had failed to account for the same. The evidence offered by the objectors to support this allegation was the testimony of Jesse Marlin that he had a conversation with his mother in the fall of 1925 in which his mother said, "Well, Jesse, Helzer paid your pa's note today," and that he asked her how much it was and according to his recollection she said $1,735.

Dora Rosenfelt, a sister of the trustee, also testified that she had a conversation with her mother in the fall of 1925 and that her mother told her, "Dora, Helzer paid for my note today," and that she asked her mother how much it was and her mother said 17 hundred and a few dollars, the amount of the odd dollars not being remembered by the witness.

The foregoing testimony was admitted by the trial court over the objection that it was hearsay, it not being shown that the trustee was present at the time of the conversation.

While it is not of great importance in passing upon the admissibility of this evidence, it should be noted that the statements of the mother make no mention of the trustee, do not purport to be repetitions of what he had told her, or otherwise assert that he had received the money. It does not purport to disclose an admission or statement by the trustee that he had received the money.

We think the objection was well taken and that this evidence ought to have been excluded.

In support of their contention that this evidence was properly received the appellees cite the following from 2 Wigmore, Evidence (2d ed.) sec. 1081: "When by the hypothesis of the party himself his title as now claimed *is identical* with that of any other person, * * * as a prior

holder, *the statements of that other person,* made during the time of his supposed title, are receivable against the party as admissions." (Italics ours.) It seems to us that the exception to the hearsay rule referred to by Wigmore has no application to the situation before us.

The rule which the objectors seek to apply is an exception to the "hearsay" rule justified on the theory that the admission was against the interest of the declarant (in this case Amanda Marlin) and that there is such privity between the declarant and the party against whom it is offered as to make the latter chargeable with it. By privity is meant a succession in rights. There must also and necessarily be involved a basis for assumption that the declarant had knowledge of the facts declared. The most frequent applications of the exception are in cases of admissions against their interests made by grantors or assignors while yet owners, where the party to the action is the grantee or assignee. In the case before us the alleged statement of Amanda Marlin was not an admission against her interest, and there was not that privity of estate or responsibility between her and the trustee which is the basis of the particular exception to the hearsay rule. The case of *Johnson v. Petersen,* 101 Neb. 504, 163 N. W. 869, illustrates the correct application of the exception.

In our view that this evidence was improperly admitted, the only evidence left to support the allegation of the objectors is that of Ben Marlin, a brother of the trustee and one of the objectors, who testified that in the fall of 1925 he had a conversation with the trustee and that the trustee in the course of that conversation told him that Helzer had finished paying off his mortgage and "the way I recollect it, it was $1,785." Ben also testified that his brother told him that the mortgage was paid off just prior to the conversation.

Against this evidence the trustee denied having such a conversation with his brother Ben, testified that the final settlement of the mortgage indebtedness was made through a local bank, that he received from the local bank a duplicate

deposit slip for the amount paid by Helzer, and that he executed a release of the mortgage on the date of the settlement, which was later filed. He further testified that the two amounts as shown by his report represented all the money he had received on the Helzer note and that he did not know how much had been paid on the note during his father's lifetime. This deposit slip was offered in evidence, but is missing from the bill of exceptions. The cashier of the bank where the settlement was made was called as a witness and identified the deposit slip as having been made by him, but he had no recollection otherwise about the transaction.

The record shows a statement by counsel for the objectors that they had subpœnaed Helzer, that he was not present and upon inquiry by the court that they did not know whether he would be available the next day. He did not appear as a witness.

On the basis of this evidence the trial court made a finding that the trustee should be charged with the sum of $1,513.60 as received on the Helzer note in addition to the amounts admitted in his report. It appears that this amount does not reflect the evidence of the objectors, but must have been arrived at by simply deducting the total of the two payments reported by the trustee from the original principal amount of the mortgage. To this amount was added interest at the rate of 6 per cent. per annum in the amount of $1,362.24, making a total surcharge against the trustee on account of this item of $2,875.84.

It thus appears that the evidence upon which the court is asked to make this surcharge against the trustee is most unsatisfactory and especially in view of the failure of either of the parties to procure the attendance or evidence of the debtor Helzer, whose testimony, it would seem, would be of great benefit and especially to the trier of the facts. The record shows without dispute that the release of this mortgage executed by the trustee was dated March 16, 1925, and filed for record a few days after that. It seems so unlikely that the trustee would have released the mortgage

before the debt was paid in full and therefore that Ben Marlin's testimony that the trustee told him he had collected an amount of over $1,700 some six months later is highly improbable. Incidentally the record shows that Ben Marlin did not pay his debt to the estate until 1937 and then only after the trustee had placed it in the hands of an attorney for collection. It is quite clear that his feeling toward his brother, the trustee, was not good. In view of the fact that the objectors had the burden of proof, upon consideration of the evidence bearing on this item *de novo* we conclude that the objectors did not sustain that burden of proof and that the trial court erred in the surcharge of this item against the trustee.

Among the other items of property belonging to the estate was a farm consisting of approximately 158 acres. Fifty-eight acres of this farm had the benefit of irrigation. Approximately 30 acres of dry land were tillable and the balance of approximately 70 acres consisted of dry pasture land. During all the period of his trusteeship, until this land was sold by agreement of the parties in 1937, the trustee farmed this land as a tenant of himself.

Among the objections was a specification that he had failed to pay and account for any rent on the 70 acres of dry pasture land. The dispute between the parties on this issue consisted of a dispute as to whether or not it was the custom in that community for a tenant of a farm of the character of this one to pay any rent for such dry pasture land, and, secondly, the rental value of these 70 acres for pasture purposes.

Much evidence was introduced by both sides on the two points in dispute and it would serve no good purpose to attempt to summarize that evidence. The issue between the parties on this item was purely one of fact, there being no question but what the trustee was bound to account strictly for the fair and reasonable value of the use by him of this part of the trust property. We have likewise considered this issue *de novo*, but we have also considered the fact that the trial court had the benefit of seeing and hearing the wit-

nesses and we conclude that the finding of the trial court ought not be disturbed. The trustee, therefore, was properly chargeable with an additional sum of $750 on account of pasture rent.

The objectors further alleged that the trustee had not completely and faithfully accounted to the trust for the landlord's share of crops raised on the tillable dry land and the irrigated acres. The evidence on this item in behalf of the objectors was furnished chiefly by the brother, Ben Marlin, who lived close by this farm and during the years not only had an opportunity to observe the crops growing thereon by reason of his close residence but also exchanged work with his brother in their farming operations.

Here again much evidence was intrduced pro and con and the question was purely one of fact. As indicated earlier herein, the trustee's records were most unsatisfactory and did not show in many cases the quantity or the price or the buyer of the crops raised on this land, which were sold to strangers, and in many cases he purchased the landlord's share of the crops from himself without any more satisfactory record of such transactions. We conclude that the trial court's findings that there was due from the trustee on this item the additional sum of $1,330.42 should not be disturbed. If there is any difference in the degree of care and accuracy with which a trustee should record and account for his handling of the trust property, which we do not concede, the higher degree of care and accuracy should be exercised in the case where the trustee is using the trust *res* for his own benefit and profit. If it could be said upon perfect proof of the actual transactions of the trustee in his use and rental of this farm that he has been charged with too much, he can have no one to blame but himself.

It appears that the widow was 65 years of age at the time of the death of her husband; that she was then living in a residence property in town and that prior thereto an unmarried daughter, Cora Marlin, had made her home with her father and mother. She continued to live with her mother after her father's death until the death of her mother,

at which time the mother was 79 years of age. At various times during the years that elapsed between the father's death and the mother's death the trustee was temporarily short of cash money to furnish to the mother for her living expenses. When such a shortage first occurred it was agreed between the mother, the trustee and his sister Cora that the latter should advance funds to provide for the mother's maintenance and that the trustee would reimburse her for such funds so advanced. On two different occasions the trustee, in recognition of the advancements made by the sister, gave her promissory notes signed by him as trustee, and after the last note was given, during the period from that time until the mother's death, the sister advanced further sums so that the aggregate of her advancements amounted to $2,627.70. In his final report the trustee credited himself by way of reimbursement for these advancements which had been made by the sister and which had been repaid by the trustee. The trial court found that a surcharge should be made against the trustee for the amount of this reimbursement.

To this credit by way of reimbursement objection was made on two grounds. The first is that in effect it amounts to maintenance of the sister out of trust funds and therefore was beyond the purpose of the trust and an unauthorized application of said funds by the trustee. The objectors further contend that in any event the sister Cora should have been charged with the fair and reasonable value of the food, lodging and other accommodations which she received while living in her mother's household.

The sister testified (and there was no evidence to the contrary) that during all of the time she lived with her mother she paid part of the grocery bill and on other items of the household expenses or made equivalent contributions to that common expense—all under an agreeable arrangement between her and her mother. She also testified that she performed services in connection with the operation and maintenance of the home such as tending the furnace and like tasks.

The record shows incidentally that William and Amanda Marlin were husband and wife for more than 45 years, during which they raised a family of ten children, and we may assume acquired the estate involved here. William Marlin made clear in his will his intention that the estate should be dedicated to the comfort and enjoyment of the one who had been his companion and helpmate through those years. We think he likewise negatived any idea that so far as her living and maintenance were concerned she should be confined to a budgetary strait jacket improvised by the remaindermen backed by the courts, but rather made it clear that she might maintain herself according to her own inclinations and in the way that would contribute most to her own comfort and pleasure. She, and not the remaindermen, was the prime beneficiary of this trust.

To contend that the testator's evident affectionate purpose did not include the comfort and pleasure, to say nothing of the material benefits, which Amanda Marlin would find in the companionship of one of her own flesh and blood, an unmarried daughter, and that she could not have that comfort and pleasure unless some one accounted to the remaindermen for its cost, has little appeal to a court of conscience. We find nothing in the will or the facts in conflict with our natural inclinations. What we have said disposes of the first basis for objection to this item.

It also appears that at various times during the operation of the trust, when there was a shortage of cash funds, the trustee advanced his own funds in the sum of $1,017.23, all of which was used by him to pay general taxes and charges assessed in connection with irrigation benefits to the farm involved, and that in his report he credited himself for reimbursement of this amount. The objections challenged this item.

It should be here noted that no interest was charged in connection with this item or the advancements made to Amanda Marlin through Cora Marlin. The credits in both cases claimed by the trustee were limited to reimbursement of the actual principal amounts. Both the county court and

the district court sustained the objection to this item and ordered the trustee to account for the same. It may also be desirable to state that at the time these advancements were made the only assets of the estate, other than the real estate, consisted of debts owing to the estate by some of the children who were also remaindermen.

In connection with both the advancements made through Cora Marlin for the widow's benefit and the advancements made by the trustee in payment of taxes and irrigation charges, the objectors urge that the power of sale granted by the will was an exclusive and mandatory method by which the trustee could acquire necessary cash funds beyond those produced by way of income. While the will in question makes clear the intention of the testator that the widow shall not be dependent on the income of the estate alone for her support and empowers the sale of the corpus of the estate, it does not eliminate discretion on the part of the trustee as to the exercise of the power of sale. In paragraph 4, which more directly deals with the exercise of the power as distinguished from the testator's purpose covered in the preceding part, we find that it authorizes and empowers sale "at public or private sale at such time or on such terms and conditions as he * * * *shall deem meet or proper* for the purpose of providing funds." (Italics ours.)

The objectors cite several cases, among them *Arlington State Bank v. Paulsen,* 57 Neb. 717, 78 N. W. 303, all of which cases are included in the note in 92 A. L. R. beginning on page 882. As disclosed by an examination of the Nebraska case cited and as indicated by the annotator in A. L. R., the cases cited involved directly and turned on the precise question of the power and authority of a trustee to mortgage under a power of sale of a nature similar to that contained in the will of William Marlin.

It seems obvious that such cases can have no application to the situation before us, since no attempt was made by the trustee to mortgage or otherwise create a lien on the trust *res.* The reason most frequently given in the cases cited for denying the power to mortgage under a power of sale is the

resulting risk of loss of the property for only a small part of its value with the following loss to the beneficiaries of the trust. Neither such risk nor result appears in the case before us. The only risk appearing here is the risk assumed by the trustee personally that subsequent income experience would permit reimbursement.

The trustee in this case did not attempt to mortgage or otherwise pledge the assets of the estate for his reimbursement and did not assert or claim any lien on those assets. It appears to have been a simple transaction by which the trustee from time to time advanced funds which were applied strictly to the purpose of the trust or in preservation of the assets and for which he reimbursed himself with funds later coming into his hands in the normal operation of the trust. There is no dispute of the amounts. There is utterly no evidence or suggestion of damage or detriment to the remaindermen even by way of an interest charge.

So far as the advancements to pay taxes are concerned, no other result is shown or suggested save the conservation of the real estate assets for the benefit of the very persons who are now objecting thereto. In this connection we quote the following from 26 R. C. L. 1321, sec. 181: "It is the positive duty of a trustee to pay the taxes accruing against the corpus of the trust estate; and, if he has no funds of the estate in his hands, he may advance the necessary amount out of his own means. Such an advance becomes a charge on the property." We do not think this rule is affected by a power of sale in the trustee and especially where, as in this case, no damage is shown.

A very similar situation was involved in the case of *Smith v. Greeley*, 67 N. H. 377, 30 Atl. 413. In this case the testator had left real estate to the plaintiff as trustee with power of sale and direction to pay the income therefrom and, if necessary, such portion of the principal as he might deem best for the support and maintenance of a son. The trustee advanced considerable money and it also appeared that a stranger loaned the son money for his support. The action was by the trustee for directions. While the will was not identical

in its provisions with the will here involved, the court held that the trustee was entitled to reimburse himself, and that, if the loans by the stranger were made at the request of the trustee, they stood on the same footing as the advancements by the trustee.

We do not find it necessary to go farther than to hold, and we do hold, that in the situation before us the trustee was entitled to reimburse himself for the advancements made through Cora Marlin to the widow and for the advancements made in payments of taxes.

We therefore conclude that the judgment of the district court should be modified by eliminating therefrom the surcharges imposed except as to the surcharge in the sum of $750 on account of pasture rent and the surcharge in the sum of $1,330.42 on account of crop rent. Judgment should be entered accordingly in the district court.

In view of the fact that the trustee has been compelled to defend himself in both the district court and this court against surcharges, which it is now determined were erroneously made against him, he should not be required to pay all the costs, but we will leave this matter to the discretion of the district court.

AFFIRMED AS MODIFIED.

CLAUDE O. DRAKE ET AL., APPELLANTS, V. MARY MORROW: S. D. RALSTON, INTERVENER, APPELLEE: LEWIS POLLAT ET AL., APPELLANTS.

299 N. W. 545

FILED JULY 25, 1941. No. 31082.

1. **Partition.** A court acquiring jurisdiction of property for partition acquires complete jurisdiction of the property and affords complete justice to all parties in that action with respect to the subject-matter.
2. **Judgment.** A confirmation of a partition sale disposes of all the interests of every one in the suit to the purchaser from the moment the confirmation is pronounced by relation back to the date of the sale by the referee. After confirmation, there is no

title or interest of any party to such proceedings that can be subsequently quieted in collateral proceedings.

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

Hoagland, Carr & Hoagland, for appellants.

Shuman & Overcash, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

FALLOON, District Judge.

This is a partition suit instituted in Dawson county on April 18, 1934. A decree in partition was entered on December 6, 1934, in which one of the plaintiffs, Claude O. Drake, now an appellant in this court, was found to own a 2/11 interest in certain real estate, and a referee was appointed. On December 20, 1934, one Ralston, now appellee and cross-appellant, intervened in this suit by virtue of a judgment on a note obtained in Lincoln county, in which a writ of attachment was issued to the sheriff of Dawson county, and levied upon said 2/11 interest of Claude O. Drake, which was claimed by Ralston to be the property of Lewis Pollat and Anna S. Drake, the defendants in the note case. An injunction suit, No. 8529, was filed in Dawson county on February 15, 1935, against Ralston and the then sheriff of Dawson county to restrain said defendants from selling the 2/11 interest above mentioned which had been attached, and later on January 17, 1936, in the afternoon, through default, the restraining order was made permanent and title quieted on said 2/11 interest in Claude O. Drake.

The issues raised by the intervention petition of Ralston and the answer thereto of Claude O. Drake were decided by the court below on May 21, 1940, in the partition suit, in which the trial court found generally for the intervener, found specifically that the injunction judgment in case No. 8529 in the Dawson county district court is in this action no bar to the relief prayed for by the intervener, that the deed given by Lewis Pollat and wife to Anna S. Drake, dated

March 28, 1932, was given for a valid consideration paid by Claude O. Drake and conveyed an undivided 1/11 interest in the land involved to Anna S. Drake in trust for Claude O. Drake, and caused such interest of Lewis Pollat to be not subject to intervener's claim. The trial court further found that the deed of Anna S. Drake under date of December 7, 1932, is void as to the creditors of Anna S. Drake so far as the interest of Anna S. Drake is concerned, but that said deed operated to convey to Claude O. Drake the interest in said land that Anna S. Drake so held in trust for him. The trial court then directed that the sum of $1,711.74, impounded funds from sale of this 2/11 interest conveyed by the said deed of December 7, 1932, be divided and one-half paid to Ralston, intervener, to be applied on his judgment against Anna S. Drake, and the other half, less costs of intervention, be paid to Claude O. Drake. Claude O. Drake gave notice of appeal and filed supersedeas bond. Motion for a new trial was filed by the intervener, Ralston, and was overruled. Plaintiffs appealed and intervener cross-appealed.

The appellant, Claude O. Drake, claims the 1/11 interest which was set over to the intervener, while the cross-appellee, Ralston, claims the 1/11 interest which Claude O. Drake obtained by the decree of the lower court. These are the issues involved in this suit.

This case was tried below before Honorable J. L. Tewell, district judge, who rightfully heard it. All the contentions regarding his right to hear the case are entirely without merit and do not warrant any further discussion in this opinion.

Various phases of this case involving the same 2/11 interest in the real estate, which is the subject of this controversy, have been before this court in *Stockmens State Bank v. Pollat,* 130 Neb. 244, 264 N. W. 875, and *Drake v. Ralston,* 137 Neb. 72, 288 N. W. 377. These cases have been finally concluded and are involved only incidentally in this suit.

Ralston had a right to intervene in the partition suit and set up his interests under the statute, but even inde-

pendent of any statutory provisions, this right could not be denied him. The partition suit was commenced in April, 1934, the petition of intervention filed therein on December 20, 1934, and the injunction suit started on February 15, 1935. In the partition proceedings, the district court acquired exclusive and complete jurisdiction over the real estate involved, and the issues raised by the intervention proceedings. It is fundamental that an equity court, having taken jurisdiction over certain property, will retain that jurisdiction for the purpose of administering complete relief with respect thereto.

"A court of equity which has obtained jurisdiction for any purpose will retain jurisdiction for the purpose of administering complete relief with respect to the subject-matter." *Parsons Construction Co. v. Gifford,* 129 Neb. 617, 262 N. W. 508.

The referee in the partition suit was directed to sell, and did sell, the real estate involved therein on October 23, 1935. Motion to confirm the sale and approve the report of the referee was made, to which objections were made on behalf of Claude O. Drake and Anna S. Drake. On the morning of January 17, 1936, the sale was confirmed and deed ordered made, and the share of Claude O. Drake was ordered impounded with the clerk of the court until further order and until the intervening claim of Ralston was determined. Later, on January 21, 1936, an order of distribution was made in which the share of Claude O. Drake was ordered impounded until further order of court. The record does not show any strenuous objections being made to any of the above proceedings. No appeals were taken from the order of confirmation or the order of distribution and they therefore became conclusive on all parties to the suit, and cannot now be successfully attacked.

It is so well settled, in this state, that a partition sale is a judicial sale, that no authorities need be cited. Where a sale is confirmed, the interest of any one in the proceedings is disposed of, for it is not the land that is sold, but the interest of all the parties. The decree of confirmation

takes effect from the time that the court announces it from the bench and this confirmation relates back to the date of the actual sale.

The default judgment in the injunction suit was taken on the afternoon of January 17, 1936. At that time there was no title in any of the parties to that suit that could be quieted, such title having been sold at judicial sale in the partition suit.

As was said in *Conrad v. Kaup*, 137 Neb. 900, 291 N. W. 687: "The relief ordinarily granted in equity is such as the nature of the case, the law, and the facts demand, not at the beginning of the litigation, but at the time the decree is entered."

Again, in *First Trust Co. v. Airedale Ranch & Cattle Co.*, 136 Neb. 521, 286 N. W. 766, this court said: "Differing from the rule in actions on the law side of the court, which limits the judgment to the facts as they existed at the commencement of the action, when the action is in equity, relief will be administered as the nature of the case and the facts, as they exist at the close of the litigation, demand."

After the judgment of confirmation in the partition suit, there was no title that could be quieted in the injunction proceedings and therefore the only judgment of any effect was the order making the restraining order permanent. The rule of *res adjudicata* could not apply to the order impounding the funds. The issues raised in the partition litigation, by the intervener, were not determined by the default, injunction decree. In other words, the judgment confirming the sale and impounding the money share of Claude O. Drake were final orders that could not be collaterally attacked. The *res adjudicata* rule may apply to subsequent judgments, but cannot apply to those already obtained.

The effort to vacate the injunction decree decided nothing except that the evidence was insufficient to establish that any fraud was practiced. The merits of the case tried were not involved and therefore the principle of *res adjudicata* would not apply. To apply, the issues and parties must be identical.

The only question of any real merit in this case is whether Lewis Pollat and his sister, Anna S. Drake, did by fraudulent means seek to defeat the rights of their joint creditor, Ralston. The evidence has been therefore painstakingly read and the authorities checked.

The undisputed evidence shows that Lewis Pollat obtained a loan from the Stockmens State Bank, and the original note evidencing such transaction was dated on September 10, 1930, for the sum of $2,500, due in six months, and signed by both Lewis Pollat and his sister, Mrs. Claude (Anna S.) Drake, in which both pledged their separate estate. Renewal notes were later signed by both parties with the same pledge. The last was for $1,900, payments having reduced it to that amount, and was dated April 16, 1932, due in 60 days. This obligation was reduced to judgment against both signers and is now the judgment of Ralston, which was set up as the basis for the intervention proceedings. Property statements were made by both obligors in which the interest of each signer in the disputed property was set up, and there is no doubt but that this property was used by both these parties so they could obtain the proper credit to negotiate this loan. The property statement, dated September 10, 1931, was signed by both, and each listed his interest in this farm and placed a value on each share at $2,000. Another property statement of Anna S. Drake was given to the bank on April 18, 1931, in which she swore she had no liabilities of any kind, and valued her interest in this real estate as $2,800. She further promised the said bank that she would notify it "immediately in writing of any materially unfavorable change in my financial condition." The evidence also shows that on March 28, 1932, Lewis Pollat deeded his interest in this farm land, inherited from his mother, to his sister, Anna S. Drake, for a stated consideration of $1,000. On December 7, 1932, Anna S. Drake for a stated consideration of $1,000 and other valuable consideration, quitclaimed all her interest in the same property to her husband, Claude O. Drake. In other words, she deeded the interest she already had from the es-

tate, as well as the interest acquired from her brother, Lewis Pollat. These two deeds were placed on record on December 9, 1932, about the same time. The reasons for withholding the first deed from Lewis Pollat from record for nearly nine months, or for placing same in the name of Anna S. Drake, were rather vague, but the preponderance of the evidence shows that approximately $1,000 was paid therefor by Claude O. Drake some two weeks before. This transaction is not contradicted and the circumstances and natural inference that could be drawn from all such are not sufficient to overcome the conclusion that it was made in good faith. The consideration stated in the quitclaim deed was not paid at the time nor did any pass, although it was claimed that it was made because of some medical expenses of the wife which she wanted to repay her husband.

That transactions between relatives are looked upon with suspicion by the courts in such cases and the burden is upon those asserting good faith to prove it require the citation of no authorities. Likewise, there is no doubt but that the property involved in these conveyances was listed by the joint note signers to obtain credit necessary for the loan, nor is there any doubt that a debtor, even though insolvent, may, if done in good faith, deed his property to secure a new or future consideration. A debtor even has a right to prefer one creditor over another, if such preference is honestly made. Silence does not always prove guilt.

While the evidence is somewhat vague and uncertain, it still points to the conclusion that the trial judge was right in holding that the Lewis Pollat share was properly conveyed to Claude O. Drake and the Anna S. Drake share properly subjected to intervener's attachment. The trial court, in the partition proceedings, having obtained jurisdiction, retained it to administer all the relief that it was possible to give, so as to bring this litigation finally to a close. Equity courts are not restricted only to adjustment of the rights of the parties as they existed at the commencement of a suit, but all relief appropriate as events occur during the pendency of the suit may be given. An equity court may

separate the two interests given in the quitclaim deed and properly find that the Lewis Pollat interest was held in trust for Claude O. Drake while the other remaining interest should be set aside and held for the benefit of the intervener.

The judgment is therefore affirmed, with the appellant, Claude O. Drake, and the intervener, Ralston, appellee and cross-appellant, each paying their own costs in this court.

AFFIRMED.

GUY L. CLEMENTS, SUCCESSOR-TRUSTEE, ET AL., APPELLEES, v. VELORA V. JORGENSON DOAK ET AL., APPELLANTS: FRANCIS G. DICKSON ET AL., APPELLEES.

299 N. W. 505

FILED JULY 25, 1941. No. 31116.

1. **Mortgages.** An unrecorded deed is void as to mortgagees whose mortgages are placed of record first and who are without knowledge of the unrecorded deed.
2. ———. An unrecorded deed void as to a mortgagee has no validity as to such mortgagee though later recorded.
3. **Husband and Wife.** A married woman who permits her husband to mortgage her property or permits her property to remain in the name of her husband is estopped to claim that her husband is not the owner, in an action by one who, without knowledge, relied on such apparent fact.
4. **Descent and Distribution.** An heir acquires through inheritance no greater right or title than the ancestor from whom the claimed property descends.
5. **Mortgages.** The rule *caveat emptor* does not give validity to a void deed.
6. ———. The buyer at a foreclosure sale acquires all the legal and equitable title of the parties to the suit.
7. ———. A mortgage foreclosure is not a suit to quiet title. Only the mortgagor, the mortgagee, and those who have acquired any interest from either of them subsequent to the mortgage are necessary parties.
8. **Cases Distinguished.** *Kerr v. McCreary*, 84 Neb. 315, 120 N. W. 1117, *Currier v. Teske*, 82 Neb. 315, 117 N. W. 712, 84 Neb. 60, 120 N. W. 1015, 93 Neb. 7, 139 N. W. 622, and 98 Neb. 660, 154 N. W. 234, distinguished.
9. **Mortgages.** A mortgagee is a "purchaser" under the recording act. Comp. St. 1929, sec. 76-218.

10. **Vendor and Purchaser.** Occupancy of property by both husband and wife does not import notice of ownership by the wife or that she claims any title other than spouse when the record title is in the husband.

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

Clark Jeary, Loren H. Laughlin and *Guy C. Chambers,* for appellants.

Ginsburg & Ginsburg, contra.

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

THOMSEN, District Judge.

The right of an heir to property conveyed by her father to her mother, the latter now deceased, is involved in this case. On foreclosure of a mortgage, after the mother's death, the heir was not made a party.

In 1915 Arthur N. Fetterley conveyed by deed to his wife, Grace M. Fetterley, 160 acres of farm land in Lancaster county, Nebraska, of which he was then the owner. This deed was not recorded until March 26, 1927. In 1926 Arthur N. Fetterley made application to Conservative Mortgage Company, Trustee, for a loan on such property. During negotiations for the loan the wife was present. The loan was granted April 30, 1926. The mortgages given on that date were signed by Fetterley and the wife.

In five different transactions, all mortgages given by Fetterley and his wife from 1915 to 1923, the deed to the wife was forgotten or ignored. Fetterley claimed to be the owner. In composition and bankruptcy proceedings in the federal court in 1935, Fetterley listed the property as his and claimed to be the owner. In signing various bonds and agreements supplemental to the Conservative's mortgage, neither the husband nor wife mentioned any change of ownership. In a letter to attorneys as late as March 20, 1939, Arthur N. Fetterley stated he was the only one who could give a deed to the property; and in the deposition taken in

this case he admits he claimed ownership at all times mentioned.

Mrs. Fetterley died October 28, 1928, leaving her husband and daughter, Velora V. Jorgenson Doak, as her sole heirs. In the petition for administration filed October 23, 1934, this property is not listed among the assets. Another quarter is described which Fetterley claims to have been a mistake—that perhaps it was thought to be property which his daughter had inherited from his mother-in-law. Until the present suit was brought, Mrs. Doak never claimed any interest in the property now in litigation.

Because of default in payment, foreclosure was begun October 13, 1933, and completed January 20, 1938. On the latter date a sheriff's deed was issued to the mortgagee, Conservative Mortgage Company, Trustee, the purchaser, and the latter took possession. The consideration stated is $14,920. The reasonable value of the property was then, according to the testimony, $8,000. On March 1, 1939, Conservative mortgaged the property for $1,900 to the American Exchange Bank of Elmwood, Nebraska, in order to pay taxes and avoid tax lien foreclosure.

This is an action to quiet title. The principal defendant is Velora V. Jorgenson Doak who claims to have inherited a one-half interest by reason of the deed made by her father to her mother in 1915. She was omitted as a defendant in the foreclosure action. Concededly, the father, Arthur N. Fetterley, has no interest.

Numerous questions are presented, but only those necessary for a decision will be mentioned.

The defendant Doak contends that the deed from her father to her mother conveyed the legal title; that since the mother was dead at the time of the foreclosure, she, the daughter, should then have been made a party; that the sale on foreclosure disposed of merely her father's rights and interests; that her rights have not been lost through such action, and, therefore, a suit to quiet title cannot be maintained against her.

The deed from the father to the mother was not recorded

until about one year after the mortgages signed by both were given and recorded. The evidence shows without apparent dispute that the mortgagee believed the title to be in Arthur N. Fetterley and knew nothing to the contrary. Incidentally, it seems that the purpose of the deed originally was a testamentary disposition of the property in the event of the husband's death and probably never intended to be recorded unless he predeceased her; but we are assuming, to make the best possible case for the defendant Doak, that the deed was intended as a present conveyance.

An unrecorded deed is void as to mortgagees whose mortgages are placed of record first and who are without knowledge of the unrecorded deed. Comp. St. 1929, sec. 76-218; *Dorr v. Meyer,* 51 Neb. 94, 70 N. W. 543; *Smith v. White,* 62 Neb. 56, 86 N. W. 930; *McCarthy v. Benedict,* 90 Neb. 386, 133 N. W. 410; *McParland v. Peters,* 87 Neb. 829, 128 N. W. 523; *Richards v. Smith,* 88 Neb. 444, 129 N. W. 983; *Storz v. Clarke,* 117 Neb. 488, 221 N. W. 101; 26 A. L. R. 1552, 1553. However, this defendant contends that the deed had validity after it was recorded and that the mortgagee was bound to recognize it. We do not think so for two reasons:

First, the statute makes the deed void as to the mortgagee and when once void it could not then be restored to life by recording. So far as the mortgagee is concerned he is entitled totally to ignore it. The statute was intended to discourage secret conveyances and to make them as ineffectual as if they did not exist so far as innocent purchasers may be concerned. No harm to the mortgagor results from such rule. It is assumed that it is his intention, when borrowing, to repay the debt. If he does so, his secret conveyance is as valid between the parties as he intended it to be; but if he does not pay, then neither he nor his grantee can complain, since both permitted the world to assume that the title was in the one in whom it appeared of record and on the strength of which credit would have been extended.

Second, Mrs. Fetterley remained silent throughout the negotiations, when the loan was closed, and when the mort-

gages were signed. If she did not then intend that the mortgagee should believe that her husband was the title owner it was her duty to speak. By her silence she would be estopped in any action by the mortgagee from asserting that the title was not in her husband. A married woman who permits her husband to mortgage her property or permits her property to remain in the name of her husband is estopped to claim that her husband is not the owner. 4 Tiffany, Real Property (3d ed.) sec. 1235; *Holland v. Jones,* 48 S. Car. 267, 26 S. E. 606; *Duckwall v. Kisner,* 136 Ind. 99, 35 N. E. 697; *Pierce v. Hower,* 142 Ind. 626, 42 N. E. 223; *Neslor v. Grove,* 90 N. J. Eq. 554, 107 Atl. 281; *Lazzell v. Keenan,* 77 W. Va. 180, 87 S. E. 80; *Stearns v. Thompson,* 134 Me. 352, 186 Atl. 800; *Roy v. McPherson,* 11 Neb. 197, 7 N. W. 873; and see exhaustive annotations at 50 A. L. R. 668, 956 *et seq.,* on estoppel of married woman to disclose interest in property conveyed or mortgaged, and 76 A. L. R. 1501.

Of course, Mrs. Doak's interests and rights could rise no higher than that of her mother. *Jorgensen v. Crandell,* 134 Neb. 33, 277 N. W. 785. If Mrs. Fetterley were living, the only right as against the mortgagee which she might assert would be that of spouse. That, however, is a right which exists only during her lifetime and ceases with her death. Thus, upon the death of Mrs. Fetterley, to the defendant, Mrs. Doak, no inheritable right would remain, as against an action by the mortgagee.

This defendant further contends that the purchaser at a foreclosure sale is subject to the rule of *caveat emptor* and what may be of record binds him. Such rule has its limitations. The rule does not establish the validity of every recorded instrument; it does not make valid a deed which as to one of the parties to the suit is void. The buyer at a foreclosure sale acquires the title of the parties to the suit. He acquires also all the equitable rights which such parties had, and if through such he can establish that a recorded deed is void or totally ineffectual, he is not barred from doing so.

"The purchaser of real estate at judicial sale under the foreclosure of a mortgage buys at his peril, but he acquires all of the interest of the mortgagor and the mortgagee in the mortgaged premises. He acquires that interest as effectually as he would have done by deed from the parties, and he may protect himself under their rights." *Bannard v. Duncan,* 79 Neb. 189, 112 N. W. 353. See Comp. St. 1929, sec. 20-2147.

"A foreclosure sale of lands and tenements, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all the parties to the action." *Hart v. Beardsley,* 67 Neb. 145, 93 N. W. 423; *Arterburn v. Beard,* 86 Neb. 733, 126 N. W. 379. The same principle is announced in *Young v. Brand,* 15 Neb. 601, 19 N. W. 494; *Milligan v. Gallen,* 64 Neb. 561, 90 N. W. 541; *Criswell v. McKnight,* 120 Neb. 317, 232 N. W. 586, and in the annotation appearing in 73 A. L. R. 630, and *Bristol Lumber Co. v. Dery,* 114 Conn. 88, 157 Atl. 640.

Here the mortgagee was the purchaser at its own foreclosure sale; but in any event it was entitled to the same equities and defenses which it had and could theretofore have asserted.

It is claimed that the defendant Doak has never "had her day in court" and that the statute respecting recording requires that an unrecorded deed "be adjudged" void. It is sufficient answer to say that she now has her day in court and that the conveyance from her father to her mother is now adjudged to be void. Moreover, a mortgage foreclosure is not a suit to quiet title. In a foreclosure case only the mortgagee, the mortgagor, and those who have acquired any interest from either of them subsequent to the mortgage are necessary parties. *Joslin v. Williams,* 61 Neb. 859, 86 N. W. 473; *Seattle Trust Co. v. Cameron,* 100 Wash. 92, 170 Pac. 379. The interest acquired by Mrs. Doak's mother preceded the mortgage, and, under the conditions, the conveyance was absolutely void as to the mortgagee. She was not a necessary party defendant. Therefore, Mrs. Doak was not necessary to that action.

Three cases cited by this defendant require notice and are distinguishable. In *Kerr v. McCreary*, 84 Neb. 315, 120 N. W. 1117, the husband alone signed the purchase money mortgage. Thereafter he conveyed to a third person who in turn conveyed to the wife. The deeds all given subsequent to the mortgage were recorded. The recording act was not involved; neither was any estoppel mentioned. The wife, though living, was not made a party to the foreclosure. She was lawfully the title owner. *Currier v. Teske*, 82 Neb. 315, 117 N. W. 712, 84 Neb. 60, 120 N. W. 1015, 93 Neb. 7, 139 N. W. 622, and 98 Neb. 660, 154 N. W. 234, has two factors vital to the present case lacking—estoppel and failure to record. The deed was executed before the mortgage, but apparently immediately recorded, and the mortgagee knew of the wife's title. *Goodwin v. Tyrrell*, 8 Ariz. 238, 71 Pac. 906, has close analogy to the instant case, but no question of estoppel is raised and the recording act is not involved. Sections 960 and 969 of the Revised Code of Arizona for 1928, a somewhat similar recording statute to ours declaring such conveyance void was not passed until 1901. All the events in the *Goodwin* case transpired before the passage of this act.

Other applicable rules of law may be mentioned. Section 76-218, Comp. St. 1929, grants immunity to "creditors and subsequent purchasers without notice whose deeds, mortgages and other instruments shall be first recorded." A mortgagee is a "purchaser" under this act. *Dorr v. Meyer*, 51 Neb. 94, 70 N. W. 543.

Occupancy of property by both husband and wife does not import notice of ownership by wife or that she claims any title other than as spouse when the record title is in the husband. *Storz v. Clarke*, 117 Neb. 488, 221 N. W. 101.

A purchaser with notice from an innocent purchaser without notice of a prior unrecorded conveyance is protected by the *bona fides* of his grantor. Annotations, 63 A. L. R. 1367, 1370; *Ford v. Axelson*, 74 Neb. 92, 103 N. W. 1039; *Garland v. Wells*, 15 Neb. 298, 18 N. W. 132; *Bristol Lumber Co. v. Dery*, 114 Conn. 88, 157 Atl. 640.

The district court held the deed given by Arthur N. Fetterley to Grace M. Fetterley to be void; that Velora V. Jorgenson Doak, her husband, Charles Doak, and her father, Arthur N. Fetterley, the appellants, have no interest in the property involved and quieted the title in Guy L. Clements, Successor-Trustee, appellee, subject only to the mortgage of the American Exchange Bank of Elmwood, Nebraska. We find the decree of the district court in all respects correct and the same is

AFFIRMED.

IN RE ESTATE OF HATTIE M. CAMP.
G. E. HAGER, SUCCESSOR-TRUSTEE, APPELLANT, V. CONTINENTAL NATIONAL BANK, APPELLEE.

299 N. W. 528

FILED JULY 25, 1941. No. 31151.

1. **Trusts.** The failure of a testamentary trustee to give required statutory bond to the county court was not a bar to vesting of title to trust property in trustee upon testator's death and for twenty days after receiving notice that bond was required, but amounted only to a declination of trust at the end of the twenty-day period. *Smith v. Rizzuto*, 133 Neb. 655, 276 N. W. 406; Comp. St. Supp. 1939, secs. 30-1801, 30-1802.
2. ———. When a trustee resigns and there is no provision in the will for perpetuating the trust, then, upon notice to all persons interested, a trustee may be appointed by the county court, and "every trustee so appointed by the court shall be bound by the provisions of this chapter in the same manner and to the same extent as though appointed by will, and the estate so given in trust shall vest in such trustee in like manner, to all intents and purposes, as the same vested in the original trustee named in such will, and he may demand, sue for and recover from any other person holding the same any and all property belonging to such trust estate." Comp. St. Supp. 1939, sec. 30-1803.
3. ———. When the trustee of a testamentary trust, which contains no provision for its perpetuation, files its final report together with its resignation, and notice thereof as required by statute is given to the sole beneficiary, who is *sui juris*, by her written waiver of such notice, together with her request asking

that the court approve the report, accept the resignation and appoint a successor-trustee; and when the county court thereupon aproves the report, accepts the resignation and appoints a successor-trustee who fails to provide the bond required by order of the court, and when, within twenty days after such appointment the trustee transfers and turns over all the assets of the trust to his successor appointed by the court, under the provisions of our statute the successor-trustee so appointed was the trustee and entitled to receive the assets of the trust.

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

G. E. Hager, for appellant.

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

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

WENKE, District Judge.

This is an appeal from an order of the district court for Lancaster county dismissing the appeal of plaintiff, G. E. Hager, successor-trustee and appellant herein, from an order of the county court of Lancaster county finding generally against appellant and in favor of the defendant, Continental National Bank of Lincoln, Nebraska, appellee herein.

This action originated in the county court of Lancaster county in the estate of Hattie M. Camp, deceased, by petition of Mable F. Stoughton, sole beneficiary of a trust created by the deceased in her behalf, asking for an accounting by both C. O. Schlytern and appellee of the assets of the trust and for the appointment of G. E. Hager as successor-trustee. On February 10, 1940, G. E. Hager was appointed successor-trustee and the matter continued in his name as such. On April 15, 1940, the county court found generally for appellee and against the appellant, and from this order the appellant appealed to the district court for Lancaster county, and it is from an order dismissing this appeal that the action is brought to this court.

The facts of this case are not in any material sense in controversy. Hattie M. Camp died and created a testa-

mentary trust in favor of Mable F. Stoughton, her daughter, and the Lincoln Trust Company was named trustee. Subsequently the appellee became successor-trustee and continued as such until January 19, 1935. On November 21, 1934, Mable F. Stoughton, the sole beneficiary, and who was under no legal disability, after discussing the matter with her husband, who was personally acquainted with C. O. Schlytern, filed her application in the county court of Lancaster county in the estate of Hattie M. Camp, deceased, asking that C. O. Schlytern be appointed as successor-trustee, and praying that appellee be required to file its final account and for an order directing the appellee to turn over to the successor-trustee all of the funds and property belonging to said trust. On November 30, 1934, appellee filed its final account and resignation, and on December 21, 1934, the sole beneficiary having filed written waiver of notice of hearing on the final report and resignation of the appellee and asking for an approval thereof, the matter was heard, and subsequently, on January 19, 1935, the county court entered its order approving the final report, accepting the resignation, appointing C. O. Schlytern successor-trustee, fixing his bond in the sum of $4,000, and directing the appellee to transfer and deliver to the said C. O. Schlytern all of the assets of the trust, and that on filing the receipt therefor the appellee be discharged. On January 29, 1935, pursuant to this order, appellee turned over all of the assets of said trust as shown in the report, and C. O. Schlytern's receipt therefor as successor-trustee was filed in said matter with the county court. No bond was ever filed by the said C. O. Schlytern as directed by the county court on January 19, 1935.

The question presented by this appeal is whether or not the appellee is liable to the beneficiary of the trust for any loss in the assets thereof which it turned over to C. O. Schlytern because of Schlytern's failure to give a bond as directed by the county court.

A determination of the question here involved requires a construction of article 18, ch. 30, Comp. St. Supp. 1939, secs. 30-1801 to 30-1803, inclusive. In the case of *Smith*

v. Rizzuto, 133 Neb. 655, 276 N. W. 406, in discussing this statute with reference to testamentary trustees, our court has said: "Appellee contends that the provisions of section 30-1801, Comp. St. Supp. 1935, requiring all testamentary trustees to give bond to the county court having jurisdiction of the probate of the will which created the trust, must be complied with before he can be trustee and title to the trust property vest in him. A reading of section 30-1802, Comp. St. Supp. 1935, convinces us that such was not the intention of the legislature. This section reads: 'Any person appointed trustee by any will who shall refuse to give the bond herein required or neglect to do so for twenty days after receiving notice that such bond is required shall be deemed to have declined such trust.' It is evident that the failure to furnish bond does not prevent the trustee from becoming such upon the death of the testator. A failure to comply with the statute amounts only to a declination of the trust which presupposes the existence of the trustee prior thereto. We necessarily conclude that defendant was, on the date of the injury complained of, the testamentary trustee of the estate of A. R. Rizzuto and that title to the real estate included in the trust vested in defendant immediately upon the death of the testator."

Section 30-1803, being part of the same act, is as follows: "If any trustee appointed in any will not containing a provision for perpetuating the trust shall refuse to accept the same, or shall resign, be removed or die, or if a trust be created by the will and no trustee be therein named to execute such trust a trustee may be appointed by the county court, after notice to the persons interested in such trust estate. Every trustee so appointed by the court shall be bound by the provisions of this chapter in the same manner and to the same extent as though appointed by will, and the estate so given in trust shall vest in such trustee in like manner, to all intents and purposes, as the same vested in the original trustee named in such will, and he may demand, sue for and recover from any other person holding the same any and all property belonging to such trust estate."

There being no provision in the testamentary instruments here involved for perpetuating the trust and the trustee having resigned, and notice thereof and hearing thereon having been waived by the sole beneficiary who was under no legal disability, and a successor appointed, then, by the provisions of the statute, section 30-1803: "Every trustee so appointed by the court shall be bound by the provisions of this chapter in the same manner and to the same extent as though appointed by will, and the estate so given in trust shall vest in such trustee in like manner, to all intents and purposes, as the same vested in the original trustee named in such will, and he may demand, sue for and recover from any other person holding the same any and all property belonging to such trust estate." As said in the case of *Smith v. Rizzuto, supra,* "It is evident that the failure to furnish bond does not prevent the trustee from becoming such upon the death of the testator. A failure to comply with the statute amounts only to a declination of the trust which presupposes the existence of the trustee prior thereto." Since by the provisions of this statute a trustee appointed by the court is bound by the provisions of this chapter in the same manner and to the same extent as though appointed by will, we must therefore conclude that at the time the appellee turned over the assets to its successor, which was within the twenty-day period after his appointment, his successor was the trustee and entitled to the assets of the trust.

Under the facts herein, the appellee having turned over to its successor all of the assets of the trust at a time when, under the statute, such successor was the trustee and entitled thereto, it cannot be held liable therefor, and the judgment of the district court for Lancaster county is

AFFIRMED.

ROGER BRENNAN V. STATE OF NEBRASKA.
299 N. W. 525

FILED JULY 29, 1941. No. 31148.

1. **False Pretenses.** A representation, assurance or promise made in relation to a future transaction, however false and fraudulent it may be, does not constitute an element of the offense of obtaining money, goods, chattels or real property by false pretenses.
2. ———. Reliance by the owner of property upon a promise by the accused to do something in the future does not constitute a crime under the act.

ERROR to the district court for Morrill county: CLAIBOURNE G. PERRY, JUDGE. *Reversed and dismissed.*

A. J. Kinnersley and *Martin W. Dimery,* for plaintiff in error.

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

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

SIMMONS, C. J.

The defendant was charged with a violation of section 28-1207, Comp. St. 1929, which is as follows:

"Whoever by false pretense or pretenses shall obtain from any other person, corporation, association, or partnership, any money, goods, merchandise, credit or effects whatsoever with intent to cheat or defraud such person, corporation, association, or partnership of the same, or shall sell, lease or transfer any void or pretended patent right or certificate of stock in a pretended corporation and take the promissory note or other valuable thing of such purchaser, or shall fraudulently make and transfer any bill, bond, deed of sale, benefit or grant or other conveyance to defraud his creditors of their just demands, or shall obtain the signature or indorsement of any person to any promissory note, bank draft, bill of exchange, or any other instrument in writing, fraudulently or by misrepresentation, if the value of the property or promissory note or written instrument or credit, fraudulently obtained or conveyed as aforesaid, shall be thirty-

five dollars, or upwards, shall be imprisoned in penitentiary not more than five years nor less than one year; but if the value of the property be less than thirty-five dollars, the person so offending shall be fined in any sum not exceeding one hundred dollars or be imprisoned in the jail of the county not exceeding thirty days and be liable to the party injured in the amount of damage sustained."

The information charges that defendant, with a felonious intent to cheat and defraud one L. D. Ott, did pretend and represent to Ott that he, the defendant, was one of the owners of a certain promissory note in the sum of $110.43, given by Ott to one Vern M. Bottom in payment of a life insurance premium, and that he was authorized to collect said note and was entitled to receive part of the proceeds as such part owner, and that if said Ott would pay the face of the note he, the defendant, would cancel and surrender the same to said Ott; that, relying on said false pretenses, Ott drew and delivered two checks to defendant, totaling $110.43, upon a Bridgeport bank; that the defendant presented said checks for payment; that they were paid and the defendant received the payment of said sums; that said pretenses and representations were wholly false in that the note was owned and held by Bottom and was not the property of defendant; that he had no interest in said note; that he did not have said note and could not return and has not returned said note to Ott; all of which defendant well knew, and that defendant made said pretenses and representations with intent to cheat and defraud Ott.

The state's evidence in chief may be summarized as follows: The witness Ott testified as follows: On November 1, 1939, defendant and Bottom sold Ott an insurance policy; and a note, payable to Bottom on March 1, 1940, was given for the first year's premium. Mr. Bottom later called "about the payment of the note;" payment was not made; later the defendant called and Ott "paid him for the note." Ott asked defendant when he would receive the note, and defendant said, "he would send the money to Mr. Bottom and have him send the note down." Payment was made in

two checks; defendant "wanted it" that way; "he said he wanted $50 that day; he would send the other up to Mr. Bottom;" the checks were paid out of his account at the bank; Ott asked defendant for a receipt and one was given "as payment for note dated Nov. 1st, 1939, given to Roger Brennan and V. M. Bottom for insurance;" the note has not been returned to Ott, nor a refund made; Ott did not know that defendant "didn't have any interest in the note." When asked: "Did you believe that he was the owner or part-owner of the note and entitled to collect it?" Ott answered: "Well, I presumed so; yes." On cross-examination Ott testified that the defendant told him that "Bottom had the note," and that "he would secure it * * * and have it returned," and that he "relied upon that." He was then asked: "And that is all you did rely on, is that right?" Ott answered, "Yes."

Bottom testified that after the contract was delivered to Ott, November 19, 1939, he traded another commission to defendant for defendant's share of the commission in the Ott note, and that defendant did not have any interest in the Ott note after that date, nor have possession of the note, nor authority to collect it; and that he did not receive the checks nor the money from Ott; that defendant admitted to him that he had collected and used the money received from Ott; that later the defendant gave Bottom a post-dated check for the amount of the note which check was not paid; that he was holding Ott's note and that defendant had not paid him for the Ott note. On cross-examination he testified that he had an agent's agreement with defendant; that in a sale, such as they made to Ott, defendant was to have half of the commission; that he and defendant "both wrote the insurance," and each was entitled to half the commission on the Ott sale, and that by subsequent transactions he, Bottom, became entitled to all the proceeds of the Ott note. An official of the bank testified that the checks were paid from the Ott account.

The defendant, at the close of the state's case in chief, moved that the jury be dismissed and that he be discharged

for the reason, among others, that the state's evidence, if true, was insufficient to establish the commission of a crime under the statute. The trial court overruled the motion. This is presented as error requiring a reversal.

A review of the state's testimony, favorably construed, is that Ott "presumed" that defendant was at least part-owner of the note and entitled to collect it. This presumption is apparently based on the fact that defendant helped to sell the insurance to Ott and asked for the money. Ott did not testify that defendant told him he was entitled to the money, nor that defendant told him he was entitled to collect it. Ott did not know of defendant's lack of interest in the note, and apparently he made no inquiry about these matters. It is patent that defendant told Ott that Bottom had the note and that that statement was true. Defendant also told Ott "he would secure" the note and "have it returned to" Ott. That he did not do. Ott relied upon that statement and that is "all he did rely on."

This evidence is insufficient to establish the commission of the crime charged. "It is not sufficient that there is a false pretense; the owner of the property must rely on it." *Goldman v. State,* 128 Neb. 684, 260 N. W. 373. The only pretense made by the defendant, relied upon by Ott, was that the defendant would secure the note and have it returned to Ott. That obviously relates to an act which the defendant was to do in the future.

"It is a well-settled rule of the criminal law that the pretense or pretenses relied on to constitute the crime must relate to a past event or an existing fact; that any representation, or assurance, or promise, in relation to a future transaction, however false and fraudulent it may be, is not within the meaning of the statute." *Cook v. State,* 71 Neb. 243, 98 N. W. 810. See *Mason v. State,* 99 Neb. 221, 155 N. W. 895. Reliance, by the owner of property, upon a promise by the accused to do something in the future does not constitute an offense under the act. It is not necessary that the sufficiency of the evidence to prove other elements of the crime be determined.

The trial court erred in overruling defendant's motion at the close of the state's case in chief.

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

REVERSED AND DISMISSED.

CARTER, J., dissenting.

The information in this case charges that the defendant defrauded one Ott by pretending and representing to him that defendant was one of the owners of a promissory note in the amount of $110.43, given by Ott to one Bottom in payment of a life insurance premium, and represented that defendant was authorized to collect the note and to receive a part of the proceeds thereof as a part-owner, and further represented that if Ott would pay the note the defendant would cancel and surrender the same. The untruth of these statements is alleged. Other elements of the crime were properly charged.

The evidence shows that Ott gave two checks to the defendant in payment of the note which defendant cashed and retained, knowing full well that he had no interest whatever therein. The circumstances clearly indicate that Ott relied upon the representations of ownership and interest made by the defendant. In addition thereto, Ott was asked if he believed at the time he paid the note that defendant was the owner or part-owner of the note and was entitled to collect it. His answer was: "Well, I presumed so; yes." This, together with the circumstances shown by the record, sufficiently show a reliance on the part of Ott on the pretenses and representations made to him to take that issue to the jury.

The decision of the majority is placed wholly on the court's interpretation of one isolated statement made by the witness Ott on cross-examination. The witness Ott testified on cross-examination that defendant said he would get the note from Bottom and return it to Ott. The following colloquy between the witness and the examiner then took place: "Q. And you relied upon that? A. I relied upon that. Q. And that is all you did rely on, is that right? A. Yes."

I submit that the evidence of this witness must be considered in its entirety to the effect that false representations of ownership and interest in the note were made to him and relied upon by him. The fact that additional representations as to a future transaction were made and relied upon cannot have the effect of aborting the prosecution. Certainly, it cannot be the law that, if defense counsel can obtain one favorable response on cross-examination, even though it be the only statement of its kind in the record and refuted by all the other evidence of the witness, it becomes the duty of the court to direct a verdict against the state and thereby substitute its judgment for that of the jury as to the effect of all the evidence of the particular witness.

We must not lose sight of the fact that most witnesses are not learned in the law and that we cannot and should not apply technical refinements to isolated statements in the record. To adopt such a rule would make the administration of justice a game of technicalities that would require preliminary counsel and advice on the part of every witness who took the stand, a situation fraught with much danger to our judicial system. In my judgment, this case is one for the jury upon the evidence and circumstances shown by the record. The majority opinion of this court, in disregarding all the other evidence in the record and seizing upon one isolated statement of one witness as a basis for a reversal and dismissal of the case, is a long step backward in our attempts to eliminate technical refinements, not only as to the law, but as to the effect to be put upon the evidence of lay witnesses. Even the old common-law judges, with all their zeal for technical forms and meticulous refinement, would shudder at the effect of the decision which this court has this day announced. Reason and logic ought still to have their places in the administration of justice.

LOIS KELLEY, APPELLEE, V. LEE C. LUKE, APPELLANT.
299 N. W. 593

FILED JULY 29, 1941. No. 31169.

1. **Negligence.** The fact that there is a slight difference in floor levels in different parts of a hotel which the public are invited to enter does not in itself constitute negligence.
2. **Innkeepers.** The construction and maintenance of a circular platform in front of the door leading from a hotel lobby into a coffee shop is not in and of itself a negligent act that makes the hotel owner and operator liable for damages for injuries to an invitee who fell in passing from the lobby into the coffee shop.

APPEAL from the district court for Phelps county: LEWIS H. BLACKLEDGE, JUDGE. *Reversed and dismissed.*

Wilber S. Aten, for appellant.

Anderson, Storms & Anderson and *Robert E. Frush, contra.*

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

SIMMONS, C. J.

This case presents a question as to the liability of the owner and operator of a hotel to compensate an invitee for injuries received by a fall on the premises.

Plaintiff recovered a judgment and defendant appeals.

There is no serious dispute as to the physical situation existing at the hotel nor the facts of the fall. The defendant's hotel faces south and west on a main business corner in Holdrege. The lobby faces the south. It has in it large windows and an entrance door from the street. The coffee shop is immediately east of the lobby and in a separate room. It also has an outside entrance and large windows on the south. The coffee shop is partially divided by a serving counter and shelves that run lengthwise east and west and stand about six feet high. This counter is some four feet from the west edge of the coffee shop and does not interfere with light coming in from the outside directly south of the door hereinafter described. In the south part

of the room are lunch counters, and tables for guests are in the part north of the serving counter. The coffee shop is connected with the lobby by a door which is three feet wide, and opens into the coffee shop. The floor level of the coffee shop is a little over four inches below the level of the lobby floor. Immediately in front of the door leading from the lobby into the coffee shop is a semicircular platform six feet eight inches wide, at its edge parallel with the door entrance, and three feet five inches wide from the door to its outer edge, *i. e.*, the platform extends out from the lobby door three feet five inches and then descends by a straight line some four inches to the level of the coffee shop floor. The platform level is the same as the level of the lobby floor. The platform and the floor generally are of grayish brown terrazzo; however, extending about six inches wide around the outer edge of the platform, down its side and for about a foot wide around the base of the platform, the terrazzo is of a darker color. On the edge of the platform, about three feet from and immediately in front of the door, is a brass post about three feet high. Sometime before the accident, the dark edge of the platform had been painted blue. The evidence is that such steps are in use in public buildings in this state.

The accident occurred at noonday, July 25, 1939. The sun was shining brightly outside and it was hot. The awnings were partly down. There were no artificial lights burning in the coffee shop. The lobby was darker than the outdoors, the coffee shop darker than the lobby.

Plaintiff had an appointment to meet a friend and go to lunch at the hotel at noon. Although she had never been in this hotel before, she was a traveling saleswoman and spent considerable of her time in hotels and public eating houses. She entered the lobby and stood for some minutes looking out the window into the street. The friend came in; they talked a moment and started together into the coffee shop. In her own words this is what happened as told on direct examination.

"Tell us now about going into the coffee shop. A. We

went to the door and the door was shut. I put my hand on the door and Mr. Hon who was behind me also put his hand on the door and pushed it open. I glanced down, as I always do, to see if there was a step at the door. I looked down and didn't see any step. The floor was mottled and looked the same to me. I glanced up and looked around for a table. I saw one over in the corner as we came in. I walked straight ahead, or attempted to. Of course, the step was there and I went down. * * * Q. How far had you proceeded, as far as you know, before you fell? A. Well, I had just glanced into the coffee shop and glanced around. The coffee shop was pretty well filled and I glanced around and saw the table and started for it. I think it was the first or second step I took, no doubt, when I went down. Q. You glanced at the floor? A. As I went into the door and put my hand on the door. Q. What did you see? A. It was a mottled floor and looked to me to be all on a level."

On cross-examination she was asked the following questions and gave the following answers:

"As you went through the door going into the coffee shop you glanced around and looked down at the floor; tell us where you were at that time. A. I walked to the door and put my hand on the door and started to push it open. Mr. Hon then pushed it open and I looked down to see if there was a step. Q. Right at the door? A. Yes, sir. I saw there was no step. I noticed the floor was mottled in design; looked to be perfectly level. Q. Did you look at the floor about where the post was at that time? A. Well, I wouldn't know. As I went in I looked down. I always look down when I go in a door. I glanced along the floor and saw it was a mottled floor which looked to be perfectly level to me. Then I looked for a table and started for the table. * * * Q. You didn't notice the people and tables in the coffee shop were on a lower level? A. I didn't pay any attention to that. I was looking for a vacant table."

Mr. Hon, who was with the plaintiff, testified for her that, "as we opened the door, Mrs. Kelley glanced down at the floor and I did the same thing. I always do when I enter a

strange place. Then I think Mrs. Kelley looked around looking for a place to sit * * * and we started for the table." He was asked, "Was there any hesitation on the part of either of you as you went through the door?" He replied, "As I went through the door I noticed Mrs. Kelley glance down and I did the same thing. I would say we hesitated just momentarily and then went on through." He further testified that, "as you leave the lobby * * * and when you get through the door, you are on the platform."

Another of plaintiff's witnesses on cross-examination testified as follows: "You actually saw her start to fall? A. Yes. Q. Just before she fell where was she looking? A. I would say looking ahead. Q. Eastward? A. Yes. Q. That's what you mean by ahead? A. I think she was looking to see where they were going; looking for a vacant table. Q. She looked around? A. Yes."

There were no warning signs other than the difference in the color of the floor on the edge and at the base of the platform and the presence of the brass pole.

Defendant's witnesses estimate that this entrance has been used by 100,000 people a year the ten years the hotel has been in operation. The evidence indicates that several people have stumbled there and that three people have fallen there. Of these three, one was the plaintiff; one fell since the plaintiff and one before, although notice of the earlier fall does not seem to have been given to the defendant until after the time of plaintiff's accident. The details of these accidents are not shown. At the close of all the evidence the defendant moved separately that the jury be instructed to render a verdict in his favor, and that the action be dismissed for the following reasons: (1) The evidence was insufficient to sustain a verdict in plaintiff's favor; (2) the plaintiff has failed to sustain the burden of proof; (3) the evidence fails to establish any negligence on the part of this defendant proximately causing the accident; (4) the plaintiff was guilty of more than slight negligence. The trial court overruled the motion. Defendant appeals.

Plaintiff states: "The basis of the action was the negli-

gence of the appellant (defendant) in constructing and maintaining a dangerous and unsafe step between the lobby and coffee shop in said hotel, and in failing to give adequate notice of the existence of such dangerous step."

It is apparent that the plaintiff's fall was not caused by her inability to see the step. Expert testimony was offered as to the amount of light around the platform. It is sufficient to note that Mr. Hon, plaintiff's witness, testified that one "could have easily seen" the edge of the step had "particular attention" been paid to it, "but I did not notice it." Both plaintiff and her friend noticed the mottled color of the floor, that the platform was of the same color, and plaintiff "noticed a design of some kind." Plaintiff "saw there was no step" "right at the door." Plaintiff's friend also testified that immediately after the accident there was light enough in the dining room to read the menu without difficulty. It may also be noted that in their description of the platform and how the accident happened plaintiff and her friend do not refer to faulty light or a darkened condition. Darkness or dimness of light calls upon a person to exercise greater caution for his own safety than is ordinarily required. *Wentink v. Traphagen*, 138 Neb. 41, 291 N. W. 884.

The rule, well supported by the cases, is: "The mere fact that there is a slight difference between floor levels in different parts of a business building which the public are invited to enter does not in itself constitute negligence." 45 C. J. 866.

This court in two cases (decided since this action was tried) has reviewed somewhat similar situations. In *Pierce v. Burlington Transportation Co.*, 139 Neb. 423, 297 N. W. 656, the floor of a ladies' rest room was elevated some six or seven inches above the floor of the anteroom. Plaintiff slipped and fell over the step and was injured. This court there said: "The premises upon which the plaintiff was invited to enter and where the accident happened was a hotel which must be kept reasonably safe for all persons invited to use its facilities. The proprietor of a hotel is not an insurer against accidents to guests or other invitees. Lia-

bility arises only from a failure to exercise reasonable care and prudence in keeping the premises safe. * * * The mere fact that there was a step which plaintiff would have to ascend and descend in going to and from the rest room does not evidence a want of due care on the part of the hotel proprietor. Such steps are usual and customary in hotels. * * * There is nothing inherently dangerous in having the floor of a toilet and lavatory raised six or seven inches above the floor of the anteroom. * * * There is a failure to prove any negligence on the part of the defendant Jensen Hotel Company. Neither is there sufficient evidence to sustain a finding that the construction was dangerous or that a dangerous condition was the cause of the accident."

Again in *Lepley v. Von Dorn,* 139 Neb. 410, 297 N. W. 642, this court considered a case where there was a step down from an elevated floor in a bathroom in an apartment house. There the negligence was alleged to consist in not having the hallway sufficiently lighted and in failing to give a warning of danger. This court there said: "The construction of a bathroom with an elevated floor is common in homes, hotels, apartment houses, and public places. Lighting arrangements such as were in the hall and bathroom are in common use. * * * No inherent danger is shown either in the construction of the bathroom floor or the lighting of the hallway. It is obvious that no affirmative act of the defendants caused Mrs. Johnson to fall." There this court held that the proximate cause of the accident was the plaintiff's own acts.

A case almost exactly in point in all particulars is that of *Mills v. City of Wichita,* 146 Kan. 772, 73 Pac. (2d) 1054. There a public building was constructed with two rooms of different floor levels. The entrance into one room from the other opened upon a semicircular platform, elevated 5½ inches above the surrounding floor. The platform was slightly larger than the one in the case before us. It was made of terrazzo. It had a border around the base of the same color as the platform and different from the floor color. The plaintiff entered the room upon the platform,

walked along and fell off to her injury. Almost the identical charges of negligence in the construction of the platform, lights, etc. are made there as are made here. There the plaintiff fell because she was not looking where she was stepping. Here the plaintiff looked down, saw the platform, looked up, located a table and started toward it, the evidence being clear that, after looking down at the platform, plaintiff took one or two steps, and that during that time she was looking ahead at a table where she proposed to eat. There the court reviewed the authorities and held that the step was not such a dangerous one as to make the city liable. The same conclusions are necessary here.

The construction of rooms of different floor elevations is common in homes, hotels, apartment houses and public places. The caution which plaintiff and her companion used in looking down at the door indicates knowledge on their part of that fact. No inherent danger is shown either in the construction of the floor of the two rooms, or the platform, or the lighting of the rooms. The fact that there was a step that plaintiff had to descend does not evidence a want of due care on the part of the defendant. It is apparent that what happened was that plaintiff and her friend, upon opening the door, looked down, determined that there was no step down at the door (and there was none) ; they then looked up, located a table, started walking toward it, without further examination of the floor inside the coffee shop, and without paying "any attention" to the fact that the floor of the coffee shop was below the level of the platform, took one or two steps and plaintiff fell to her injury.

The conclusion is inescapable that the accident was caused by the failure of plaintiff to exercise due care for her own safety.

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

REVERSED AND DISMISSED.

SOREN R. NELSON, APPELLANT, V. ADOLF HOKUF: LOUIS MARGOLIN ET AL., APPELLEES.
299 N. W. 472

FILED JULY 29, 1941. No. 31178.

Landlord and Tenant. "Where * * * premises are leased for a public or semipublic purpose, and the lessor knows at the time of leasing that a dangerous condition exists thereon which renders the premises unsafe for the public use intended, the lessor is liable for injuries sustained by patrons of such lessee who, upon invitation express or implied, are admitted to such demised premises to make use of the same for the particular purpose for which it was leased." *Van Avery v. Platte Valley Land & Investment Co.*, 133 Neb. 314, 275 N. W. 288.

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

Gross & Crawford and *Harry L. Welch*, for appellant.

Lee & Bremers and *Richard E. Neill*, *contra.*

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

SIMMONS, C. J.

This case presents a question of the liability of a landlord for injuries to an invitee of the tenant.

The premises involved were leased by the defendants Margolin to the defendant Hokuf and used as a beer parlor and recreation center. The leased premises were about 25 feet wide and 70 feet long. To the right, on entering, was a space devoted to a barber shop; to the left was the bar, cigar and confectionary cases, and then a refrigerator. To the left rear of the room were two toilets, built out into the room and on the same floor level. The one in question had a door opening outward from the toilet. Directly in front of that door was the entryway into the basement. This was covered by a trapdoor, so constructed that, when the door was closed, the room presented a floor without obstructions. When opened, however, the trapdoor was back against the wall, and a three-foot by six-foot opening was in the floor,

immediately in front of the toilet door and beginning some eight or ten inches from that door. There were no guard-rails or warning signs around the trapdoor. There were no warning signs in the toilet. When the trapdoor was closed, the space above this opening, as well as other space in that part of the room, was used for chairs and tables for card-playing. The floor was made of wood, oiled and dark and uniform in color. A person using the toilet went across the closed trapdoor. The basement was used for storage. The lease of the premises provided that the tenant would make "no alterations or additions to, in, or upon said premises" without the written consent of the landlord. The tenant, however, was to make "minor repairs" at his own expense. The premises were constructed as described herein when the lease was made, and the use to which the premises were to be put was known at that time.

Plaintiff had been a customer of defendant Hokuf. On the morning in question he entered the establishment, purchased two cigars and went to the rear of the room, entered the toilet and closed the door. He did not know of the trapdoor. While plaintiff was in the toilet, an employee of defendant Hokuf opened the trapdoor and went to the basement to get a case of beer, leaving the trapdoor open. Plaintiff opened the door of the toilet, stepped out and fell into the opening and incurred serious injuries.

There is a marked dispute in much of the evidence as to occurrences in the place that morning, including warning to the plaintiff of the opening of the trapdoor while he was in the toilet. Defendants Margolin moved for a dismissal as to them, for the reasons that as to them (1) the plaintiff had failed to prove a *prima facie* case of negligence; (2) that he had failed to establish any negligence on their part which in any way contributed to the accident; (3) that the evidence established that the accident was caused solely by the negligence of the defendant Hokuf and the contributory negligence of the plaintiff. The trial court sustained the motion.

The evidence must be considered, then, in the light of

the established rule that calls for this court to assume the existence of all material facts which competent evidence on behalf of the plaintiff tends to establish, and, in addition, give the plaintiff the benefit of the proper inferences therefrom. *In re Estate of Skade,* 135 Neb. 712, 283 N. W. 851.

The premises were being used by Hokuf for the purposes for which he leased them. The defendants Margolin knew of the use and obviously had placed the toilets there for the use of the tenant's patrons. Likewise the trapdoor was placed there to enable the tenant to use the basement in connection with his business. These facilities were being so used when plaintiff was injured. The attention of the defendants Margolin (through their agent) had been called to the dangerous situation existing with this trapdoor in front of the toilet door; that "it was dangerous that way, that something might happen there;" that a party had fallen in there and "that there should be something done about it so that it would prevent any further accidents;" but nothing was done about it. In *Van Avery v. Platte Valley Land & Investment Co.,* 133 Neb. 314, 275 N. W. 288, this court approved the following rules. "Subject to specific exceptions, the lessor of land is not liable for bodily harm caused to his lessee, or others upon the demised land with the consent of the lessee or sublessee, by any dangerous condition, whether natural or artificial, which existed when the lessee took possession." "Where, however, premises are leased for a public or semipublic purpose, and the lessor knows at the time of leasing that a dangerous condition exists thereon which renders the premises unsafe for the public use intended, the lessor is liable for injuries sustained by patrons of such lessee who, upon invitation express or implied, are admitted to such demised premises to make use of the same for the particular purpose for which it was leased."

It is conceded that the trapdoor was well constructed and in good repair, and that when closed there was no element of danger in the use of the premises. It is likewise apparent that, when the trapdoor was open, it created a dangerous

situation. It is also apparent that the use of the premises by the tenant contemplated that the trapdoor be opened, and the entryway to the basement be used, and that when opened, and especially when the toilet was being used as plaintiff was using it, an extremely dangerous condition existed. The landlord must have contemplated that the premises, including the toilet, would be used by patrons when the trapdoor was opened, as well as when it was closed. There is no evidence that the construction was such as to prevent the use of the premises exactly as they were being used when the plaintiff's injury occurred. The trial court erred in sustaining the motion of defendants Margolin. This error requires that the judgment be reversed and the cause remanded for further proceedings.

The plaintiff offered in evidence an ordinance of the city of Omaha. The trial court refused to admit the offered evidence. Plaintiff assigns this as error. It is not necessary nor deemed advisable to pass upon that question now.

REVERSED.

IN RE ESTATE OF JEROME EDWARD BEACHLER.
JOSEPHINE BEACHLER, ADMINISTRATRIX, APPELLANT, V.
ROSCOE C. BEACHLER, EXECUTOR, APPELLEE.
299 N. W. 484

FILED JULY 29, 1941. No. 31129.

Executors and Administrators. A petition for an order directing the executor of a will to pay a share of the estate to an assignee thereof pursuant to a conditional assignment is fatally defective, where it does not allege that assignor failed to comply with the condition.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

Melvin Moss and *W. J. Moss*, for appellant.

J. L. Richards, contra.

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

ROSE, J.

In a proceeding in the county court of Thayer county to administer and settle the estate of Jerome Edward Beachler, deceased, Josephine Beachler, administratrix of the estate of LeRoy Beachler, deceased, presented a petition praying for an order directing Roscoe C. Beachler, executor under the will of Jerome Edward Beachler, deceased, to pay from the latter's estate to her a one-ninth interest therein which had been willed to Charles W. Beachler and by him assigned to LeRoy Beachler. The county court ordered payment as prayed in the petition of the administratrix and from that order Roscoe C. Beachler, executor of the estate of Jerome Edward Beachler, deceased, appealed to the district court where the judgment of the county court was reversed and the petition dismissed. From the dismissal Josephine Beachler, administratrix, appealed to the supreme court.

The assignment is dated March 24, 1930. It recites that the consideration for the assignment is $225 and that it is made on the express condition that it shall be null and void if Charles W. Beachler shall repay to LeRoy Beachler, his heirs or assigns, the $225 with interest within two years. The petition for an order directing Roscoe C. Beachler, executor, to pay to Josephine Beachler, administratrix of the estate of LeRoy Beachler, deceased, the one-ninth interest of Charles W. Beachler in the estate of Jerome Edward Beachler, deceased, does not allege that Charles W. Beachler failed to repay the $225 in compliance with the terms of the assignment, and therefore does not state facts sufficient to state a cause of action for the order sought. It follows that the district court did not err in reversing the order of the county court and in dismissing the petition.

AFFIRMED.

LUCY MACK, ADMINISTRATRIX, ET AL., APPELLANTS, V. ARTHUR SWANSON, EXECUTOR, ET AL., APPELLEES.
299 N. W. 543

FILED JULY 29, 1941. No. 31139.

1. **Specific Performance.** Oral agreements by childless husband and wife possessing separate estates to make irrevocable reciprocal wills for the benefit of each other and to provide that any residue of each estate, upon the death of both parties, shall go to the heirs of both, share and share alike, may be proved by circumstantial evidence and by the wills themselves when so executed, mutual obligations performed by both parties until the death of one of them being sufficient considerations.
2. **Statute of Frauds.** An entire contract partly oral and partly written and fully performed by one of the parties is not within the statute of frauds.

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

Walter Justin, D. M. Murphy and *D. M. Murphy, Jr.*, for appellants.

Gross & Crawford, Spittler & Hupp and *Fred N. Hellner, contra.*

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

ROSE, J.

This is a controversy between the heirs at law of William F. Mack who died December 30, 1937, and the heirs at law of his wife, Charlotte S. Mack, who died January 22, 1939, over distribution of the estates of both decedents.

When the husband and the wife were possessed of separate estates, both real and personal, they executed May 9, 1932, reciprocal wills, identical in form, each devising or bequeathing to the other all the property of the owner for life, any residue of either estate upon the death of both to pass to the heirs of both, share and share alike. They had been married 35 years and were childless. May 7, 1938, the widow executed another will purporting to revoke her former one and giving the residue of all property formerly

owned by both husband and wife to her own heirs at law—brother, nephews and nieces—thus departing from the reciprocal wills.

The plaintiffs are Lucy Mack, administratrix with the will annexed of the estate of William F. Mack, deceased, and Lucy Mack, Charles Mack, Clara M. Bassett and Anna Sweeney, heirs at law.

The defendants are Arthur Swanson, executor of the estate of Charlotte S. Mack, deceased, Arthur Swanson, and her other heirs at law named in the petition.

This is a suit in equity commenced in the district court for Douglas county. One paragraph of the petition reads as follows:

"On or about May 9, 1932, said two spouses, William F. Mack and Charlotte S. Mack, orally agreed that they would dispose of all their said property by leaving the same on the death of either of them to the survivor for life and the remainder or residue after the death of the survivor to the heirs then living of both said spouses and to carry out said plan they would execute their separate wills each naming the other spouse as legatee and devisee for life and giving the remainder or residue to the heirs then living of both said spouses."

The execution of the reciprocal wills, the wife's violation of the oral agreement, and other facts essential to relief in equity are pleaded in the petition. There is a prayer for the specific performance of the oral contract; for distribution of the residue of the estates of both decedents pursuant to the reciprocal wills; for restraint of distribution under the second will of Charlotte S. Mack, and for other equitable relief.

The making of the oral contract and the irrevocability of the reciprocal wills were put in issue by the answer of defendants. At the conclusion of the evidence adduced by plaintiffs, the trial court sustained a motion by defendants to dismiss the suit for want of proof that the husband and wife entered into a contract to execute irrevocable reciprocal wills. From the dismissal plaintiffs appealed.

The question to be determined on appeal is the sufficiency of the evidence to prove an oral agreement by husband and wife to make reciprocal wills. After those instruments were duly and legally executed by both husband and wife without fraud of any kind, a prior oral contract to do so was provable without direct evidence. Both husband and wife were competent to make testamentary disposition of their property. What they in fact did in that particular is evidence of their previous mutual voluntary purpose. Circumstances may evidence a prior, oral agreement for reciprocal wills as well as direct testimony. What the husband willed to his wife was stated by him in his duly executed will as follows:

"I give, devise and bequeath to my beloved wife, Charlotte S. Mack, all of my property, real, personal and mixed, of whatever kind or nature, real estate, stocks and bonds, cash, automobile, and household furniture, to have and to hold during her life and should either of us pass away, whatever of the residue of all properties of every kind and nature shall revert to the heirs of both then living, share and share alike."

What the wife willed to her husband was stated by her in her duly executed and witnessed will as follows:

"I give, devise and bequeath to my beloved husband, William F. Mack, all of my property, real, personal and mixed, of whatever kind or nature, real estate, stocks and bonds, cash, automobile, and household furniture, to have and to hold during his life and should either of us pass away, whatever of the residue of all properties of every kind and nature shall revert to the heirs of both then living, share and share alike."

These wills were drawn at the same time, the only difference between them being changes in names and in references of each to the other. They were signed and witnessed by the same persons at the same time and place a few days after they were drawn. The witnesses to the wills certified that the husband declared in their presence and hearing that the instrument signed by him was his last will and testament and that his wife made a similar declaration.

The executed wills were kept in a strong box accessible to both until after the death of the husband. The wills themselves, the definite purpose stated therein as to where the residue of the property of both should go upon the death of both and the surrounding circumstances, evidence a previous mutual agreement by husband and wife to make the irrevocable testamentary disposition of their property disclosed by the written instruments of identical import. Friends of William F. Mack testified he had at times expressed the purpose of himself and wife to make reciprocal wills, leaving the residue of their property upon the death of both to the heirs of both. The attorney who drew the reciprocal wills testified to the effect that William F. Mack and wife came to his office together; that the husband explained in the presence and hearing of the three of them the mutual plan to leave the residue of their property to the heirs of both, and that pursuant to directions he dictated the wills to a stenographer who read them to both husband and wife and that they both expressed satisfaction therewith. The evidence and circumstances summarized are uncontradicted. For the purposes of equity the oral agreement is fully established. For such purposes the oral agreement and the reciprocal wills should be treated as different parts of a single contract. The mutual promises of the parties amount to sufficient considerations. Performance of the oral contract by both parties during the remainder of the husband's life and the mutual writings pursuant to such oral contract clear the transactions from the statute of frauds. The rules of law and equity observed herein are well established in this state as well as in many other jurisdictions. *Brown v. Webster*, 90 Neb. 591, 134 N. W. 185, and the cases cited therein.

As the record is presented for review, plaintiffs are entitled to equitable relief. The suit therefore was erroneously dismissed. The judgment is reversed and the cause remanded for further proceedings.

REVERSED.

ALOIS F. KAUFMANN, APPELLEE, V. HENRY M. KAUFMANN ET AL., APPELLANTS.
299 N. W. 617

FILED JULY 29, 1941. No. 31156.

1. **Habeas Corpus.** When a little child of the age of 21 months is the subject of a habeas corpus proceeding, under section 29-2802, Comp. St. 1929, it is not necessary that such child remain in the courtroom at all times, but the trial court may direct on what occasions, during the trial, it shall be brought into court.
2. **Parent and Child.** Under the early English law, the father had a paramount right to the guardianship of his child, but in the latest decisions the welfare of the child is the controlling question.
3. **Habeas Corpus.** The welfare of the child being the one question of primary consideration to which all others must yield, the court must patiently examine the evidence in the light of the age of the child, its past and future. The question involves the study of the proposed home itself, and its entire surroundings, the temporal welfare of the child, as to food, clothing, discipline, and, if of tender years, careful nursing when required, and medical attention. Then the court must consider its spiritual and religious care and upbringing, and whether it will have loving care, with understanding and affection: In which of two proposed homes will the child have the most experienced foster-mother, with the better advantages for being fitted for its place in the world?

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed, with directions.*

Leon, White & Lipp, for appellants.

John L. Chew and *G. H. Seig, contra.*

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

PAINE, J.

This was an action in habeas corpus, brought by Alois F. Kaufmann, petitioner and appellee, against Henry M. Kaufmann and Ella Mae Kaufmann, respondents and appellants, seeking the custody and possession of his minor child, Alois F. Kaufmann, Jr. By the judgment of the district court, the writ was granted, and the respondents were

ordered to deliver the child to petitioner, which order was complied with in open court. Trial court overruled the separate motions of respondents for a new trial. Prior to giving up the child in court, the respondents asked the court to fix a supersedeas bond in order that the child might remain in their custody pending appeal to the supreme court. This request was denied. Thereafter a motion was filed in the supreme court for a supersedeas bond to be fixed, so that pending final determination the child should be left in the custody of respondents. After argument, this court on January 20, 1941, fixed a supersedeas bond in the sum of $500, and ordered the child to be placed in the custody and possession of the respondents until the further order of this court. The supersedeas bond being filed, the child has remained in the custody of the respondents.

The petition alleged that Alois F. Kaufmann was the father of Alois F. Kaufmann, Jr., who was born September 22, 1938, and that respondents forcibly and unlawfully detain said child from its natural father, contrary to his wishes, without legal right or claim, and have repeatedly refused to give up the child on the request of the juvenile authorities of the district court for Douglas county, and prays that a writ of habeas corpus be granted, directing respondents to have the body of said child before the court at a time and place to be fixed, and to obey the further order of the court in said matter.

The answer of respondents, after denying generally the allegations of the petition, admitted that Alois F. Kaufmann, Jr., was in their custody and possession, and had been in their lawful and legal custody for more than 17 months last past; that when the child was but three months old he was in a poor physical condition, and suffering from rickets, an eye ailment, and physical infirmities, and from malnutrition, and that the petitioner at that time confessed and admitted his inability to properly care for and raise the child, and that he did then offer to turn over permanently the custody, care and possession of the child to the

respondents, in order that the respondents might raise the child, and that the petitioner did further offer to relinquish and abandon permanently any control over the care, custody and maintenance of the child; that pursuant to such representations and offers of the petitioner, and upon such conditions, the respondents did then take the child into their custody and home, and did continuously, since the date the child was turned over to them, care for, attend and rear the child in a careful, wholesome and loving manner, and in a manner having regard for the welfare and best interests of the child; that the respondents nursed the child, attended his needs and requirements, and employed expert medical care in his behalf, so that the child was in a safe, healthy and sound physical condition. The answer further alleges that the respondents have constantly maintained a good and moral home for the raising of the child, and do now assert that the petitioner was then, is now, and at all times has been without a home to raise the child, and has never manifested any interest in or disposition for the welfare of the child.

The respondents charge that the petitioner in effect abandoned said child, but through their efforts his life was saved, and he was prevented from being placed in a public institution.

The respondents further charge that the petitioner has at no time offered to contribute to the support of said child, and that the respondents have paid all of the expenses for rearing and maintaining said child, including all medical expenses.

The respondents declare that they own their own home, that the head of the home is gainfully employed at a respectable vocation, and that the respondents are members and regular attendants of a church, and intend to raise the child as a Christian, and will give the child a good education. The respondents further charge that the petitioner is without a home, that he is engaged in the vocation of a bartender, and does not keep regular hours, and frequently absents himself from his dwelling-place until 4 or 5 o'clock in the morning.

After the trial in the district court, a writ of habeas corpus was granted to the petitioner, and respondents were directed to deliver possession of the child forthwith.

Thirteen errors were alleged in the motion for new trial, some of which will be discussed later in this opinion.

Respondents, objecting to delivery of the child, petitioned for an order granting a supersedeas bond pending appeal and a stay of delivery of the child until the supreme court shall have had time to act in said matter, and this petition was denied.

Thereupon, præcipe was filed in this court on December 31, 1940, and on January 3, 1941, respondents filed motion asking this court to set a supersedeas bond and direct petitioner to deliver custody of the child to respondents pending final determination of the case. Accompanying this motion were many affidavits, and this court granted a supersedeas bond, and directed the child remain with respondents until the case was determined.

In a controversy of this kind, this court is not bound, as a matter of law, to restore the little child to its father. The welfare of the infant is paramount to the wishes of the father, or any other relatives. *In re Burdick,* 91 Neb. 639, 136 N. W. 988.

It is therefore necessary to present a summary of the evidence, as disclosed by a careful reading of the entire bill of exceptions, covering the evidence as taken on the many days of the trial, for it was continued from time to time. The trial began on June 20, 1940, and the evidence closed on August 14, 1940, upon which day the writ of habeas corpus was granted.

The petitioner testified that he was 32 years of age; that Alois F. Kaufmann, Jr., his child, about which this litigation has arisen, was born September 22, 1938, and that he separated from his first wife December 5, 1938, the mother leaving the child with him; that he moved out to the home of the respondents, taking some bedroom furniture out there, and that he had remained, living at the home of the respondents until June 12, 1940, which was eight days be-

fore the trial began, and that he is now in a position to give the child a home.

Petitioner testified that he is working at the Storz Tavern, located next to the Storz Brewery; that when working daytime his regular hours would be from 7:30 a. m. to 4:30 p. m., but that due to the sickness of the owner, Mr. Kenney, he has during the past year had to put in extra hours in the evening.

He testified that his sister-in-law, Ella Mae, took the child, but he never said he was going to turn it over to them; that they had never asked him to buy any clothes for the child, and therefore he had not bought any, but he had asked his sister-in-law lots of times how much the bill was for clothes and other things, and she always said, "That is all right, I will take care of them." He positively stated that it was never his intention to give up his baby permanently.

He testified that, when he married his present wife, she was working in Kansas City, but came up about every week-end to Omaha, and that she quit work and came back to Omaha just a week before the trial, and that she was going to quit working and take care of the baby; that just a week before the trial petitioner left the home of respondents and moved to 2574 Pinkney street, which is the home of his father-in-law, and that he moved his bedroom furniture to that place.

On cross-examination the petitioner testified that he came to this country in 1927, lived in Chicago eight years, and the last four years in Omaha. He admitted that he had been arrested once in Chicago ten years ago, when he went out one night to celebrate and wrote a couple of no-fund checks, which his brother made good, so he was not confined in jail except a couple of days. He admitted that the sister-in-law had a small bank for the baby, and that friends and relatives put money in there for the baby, but he had never put any in, but said he was saving some down at Storz Tavern for the baby.

Bruce Kenney testified that his father had just died on

June 15; that he and his father owned the Storz Tavern, where the petitioner worked; that they have liquor, the license being in his name, and run a restaurant; that 60 per cent. of their business is selling lunches and dinners; that it has no connection with the Storz Brewery; that his father was sick for a long time, and that the petitioner acted as manager of the business. Kenney said he was engaged in the advertising business, but usually stops in this tavern in the morning, and eats lunch there every day, to watch what is going on, and signs the social security report; that the tavern takes in about $100 a day on the average; that the tavern opens at 7 a. m., and the door is closed at 1 a. m., after which the place is cleaned up, and the money is counted, and a record made of the day's purchases. This requires the petitioner to work very late. He has always been paid $25 a week, but now that witness' father has died he would like to pay him $35 a week, because of his increased responsibilities. Witness testified that he had never known of the petitioner drinking, and he knows nothing derogatory to his character or reputation.

Adolph Storz testified that he was president of the Storz Brewing Company, and had known the petitioner for three or four years; that he usually ate his lunch at this Storz Tavern. He says that the petitioner is a very upright, honest man, and that he has never seen him take a drink.

Mrs. Alois F. Kaufmann, the second wife of petitioner, testified that she is 26 years of age; that she resided in Omaha, then moved to Kansas City, and before that had lived in Lincoln and Washington, D. C.; that she had done stenographic and secretarial work in the University of Nebraska and in civil service work; that in Washington she worked for the Rural Electrification Administration; that she lived in Washington, D. C., from March, 1938, until May, 1939; that she worked in Omaha from May until October, and then was transferred to Kansas City.

On cross-examination she admitted that she had written letters to Omaha several months before, trying to find other

jobs at Omaha in some one of the government agencies. She was asked whether she had changed her mind about seeking employment, and her answer was, "Yes, I think so," and had decided to go in for housekeeping, and would give up the idea of working. This plan of housekeeping and keeping up a home for her husband had been in force for a period of about a week before the trial. Witness testified that she had to keep on working because she had doctor bills that she had to pay for her operation the fall before. She said that she had seen the child once out at their home; that he was not quite a year old, but at that time she was not really thinking of getting married; that she had seen the child once since that time. She testified that she told her husband that she was willing to take the child; that last Christmas they bought a present for the child, that it was a little pull toy, but had never sent him any other presents, or any clothes.

Chris Kuhl testified that he was 57 years of age; and his wife was 56; that he was born in Germany, and had been here since 1904; that some years ago he worked for the Storz Brewing Company as credit manager, and private secretary to the aged president, Gottlieb Storz, for about two years; that he then worked in a tavern, and at present was working for the Metz Brewing Company; that they have only one child, a daughter, the present wife of the petitioner.

Witness testified that his daughter is a graduate of the state university, and since her graduation has been occupying civil service positions; that when his daughter returned from Kansas City a few days before the trial, she and the petitioner moved into his home, and that that is entirely agreeable, and that it will be perfectly satisfactory if they bring the child into his home. Witness testified that he became acquainted with petitioner when he was working for the Storz Brewing Company; that they are good friends; that his daughter married him with his consent, and that the petitioner is a very, very moderate drinker, and that he has "had personal occasion a good many times to observe

that he sometimes even hates to take a drink with a friend and customer."

Witness testified that they had a modest home of four rooms and a kitchen and bathroom, which they rent; that there are two bedrooms, one he occupies with his wife and the other is occupied by the petitioner and his wife; that the other rooms are a kitchen and a living-room; that his wife is fairly well, but that she has asthma, and that when she gets those spells she knows fairly well what to do.

On August 14, 1940, further proceedings were had, after a recess of several weeks, and Mrs. Dorothea Kaufmann, the wife of the petitioner, testified that she started to work for the war department on July 25, and she presented a letter to the court from Major Cameron, being introduced as exhibit No. 1, showing that she was employed on a "probational indefinite emergency appointment," from which she was at liberty to resign at any time. She said she took this employment to enable her to pay the lawyer's bill in this case; that she would quit the job tomorrow if the court gave them the child; that her monthly salary is $120 a month. On cross-examination witness testified that she drank beer, but that there was nothing wrong with that. She said that whenever she "happened to want a glass of beer or a bottle" she would get it. She testified that she has not been married before; that she has never had any children of her own; that she has never raised nor reared any children.

The petitioner was recalled as a witness, and testified that his wife was working for the war department in extra work; that she started about two weeks ago; and works from eight in the morning until four in the afternoon, but that this is only temporary work to earn money with which to pay the petitioner's attorney, but insisted that, if the court should give him the possession of the child, his wife would quit working right away.

The petitioner also testified that he filed for his first citizenship papers in 1927 at Plattsmouth, Nebraska, and that about three weeks ago he had filed for his second citizen-

ship papers at the immigration bureau in Omaha. This was under a provision that, where the alien has married a citizen of the United States, the granting of final papers may be expedited.

Henry M. Kaufmann, respondent, testified that he was 29 years of age; that he and his two brothers, Pete and Alois, were all born in Germany; that Pete has been in this country 16 years, and Alois 14 years; that he became a citizen of the United States in 1935, and that Pete had also become a citizen. Henry testified that he was head baker for Louis Somer, having learned the trade in the old country, and has been head of the bakery department for five years, and receives a salary of $160 a month and all of his meals.

He said that they have paid all of the bills for the child, have given it every attention, are perfectly willing to continue to do so, and want to raise him; that they have never made any objection to the petitioner coming to see the child at any time, and if custody is given to them the petitioner and his present wife may see the child at any time. He testified that on the occasion in December, 1938, over at Pete's house, his wife told him, "I am going to take the baby to raise," and the petitioner spoke up and said, "If it is all right with Henry," and "I said, 'Sure it is' " and therefore they took the baby home and kept it. He testified positively that in all the time they had had the baby the father had never offered to pay or contribute anything toward the payment of the expenses of the child.

Mrs. Elvira Kaufmann testified that she was the wife of Pete Kaufmann, a brother of petitioner and Henry; that the petitioner came to her home in December of 1938 with the baby; that she had a child of her own, then about a year and a half old; that petitioner asked her to take charge of the baby, but she said at that time she was not able, and Ella Mae Kaufmann said she would take him, and the petitioner said she could have him "if Henry didn't mind," and she took the child that evening, and has had him ever since. She says she has visited the respondents' home;

that it is an ideal home, clean, sanitary, in a very nice, respectable district, and that the respondents are very solicitous of the welfare of the child, and keep him well dressed and in perfect condition.

Dr. Harry E. McGee testified that he had been in general practice in Omaha since 1919; that he delivered the baby when it was born in October of 1938. The following March he saw it at the home of the respondents. It had a high fever and intestinal flu. He ordered cod liver oil, orange juices, and certain injections. After that it was brought to the office on several occasions. He testified that the last time he saw the child it was well nourished and in good condition, except that it had a small hydrocele. All the bills for medical services were paid by respondent Ella Mae Kaufmann. He testified that the child had been given excellent care by her.

Betty Lainhart testified that she married the petitioner on June 2, 1937, when she was 16 years of age, and was divorced December 8, 1938, when she was 17. She testified that she had never seen her baby from the time of the divorce until about a month ago; that it was very well taken care of, was very well dressed, clean, and was laughing and playing. She testified that she was remarried on July 6, 1940; that they reside at 1710 Chicago street, in a rooming house, and that they have two furnished rooms. She testified that she had filed a petition of intervention so that she could fight for her baby too, but while she was on the witness-stand the court gave her attorney permission to withdraw this petition of intervention.

Ella Mae Kaufmann, one of the respondents, testified that they resided at 6334 Military avenue; that she was 27 years of age; married Henry M. Kaufmann in August of 1937; that they own their own home, and that her husband has been manager of the bake shop at Louis Somer's, Forty-ninth and Dodge streets, for the past ten years; that his salary is $160 a month; that they own an automobile; that they are both members of St. Bernard's church, a Catholic church in Benson; that they attend church every Sunday.

She testified that, at the time the petitioner parted from his first wife, he told her he had no place to take the child, and she agreed that she would take the child and raise it, and has given the child constant custody and care since that date. She testified that the petitioner did not contribute one cent from December 8, 1938, for the purchase of clothing, or food, or doctor bills.

Mrs. Kaufmann testified that the petitioner paid $5 a week for his room, board, and his laundry. She testified that she had had much experience in taking care of children, as she had worked in a good many homes in Omaha, and named Attorney Tunison and D. W. Lyle. She did not do the housework in some homes, but was nursemaid and took care of the children, and continued this work up to the time that she was married. She admitted that she refused to give up the child to the juvenile authorities when the petitioner sent them out to get the child; admits that she has never taken any legal action to adopt the baby. She testified that she had been advised by a medical authority that it was not possible for her to have any children of her own.

Mrs. Kaufmann testified that she had bought baby clothes for him constantly, and the special baby foods which have been necessary; that she loves the child, and they would like to adopt it; that the baby had rickets when she first got him, when the baby was less than three months old, and was in bad condition. She says that her husband treats the baby just as if it was his own child, takes him out for automobile rides, purchases toys, plays with him, and shows affection for him, while the petitioner never took the child out riding, rarely makes any inquiry as to the welfare of the child. Mrs. Kaufmann testified that if she can keep this baby they intend to try and adopt a little girl too. She said she has helped raise many children, in families where she worked as nursemaid, and that she was the oldest of ten children in her own family, and had lots of experience in helping to raise her little brothers and sisters, as she stayed home until she was 19 years old; that they lived on a farm near Wausa, Nebraska.

Rev. J. C. Buckley testified that he had been the pastor of St. Bernard's church, Benson, for 26 years; that the church is located one block from the home of the respondents, who are members and regular attendants of his church. He has often been in the home; it is very neat and clean, and they could not be more attentive to this child if it were their own. He testified that a week before the trial he called on the petitioner at the saloon next to the brewery, and told him that he should be happy in having his child so well taken care of, and, as he had just married another woman, he told him it was a very risky thing to give the care of the child to a complete stranger, and that there was usually very little affection between a stepmother and a stepchild, and told him of the experience with stepmothers in homes, that he had gained in several families. Rev. Buckley testified that the petitioner said: "Father, I am going out to see my brother this evening. I am going to talk this over with him and things will be all right." Rev. Buckley said that he felt very happy and came home. It is disclosed in the evidence that the baby was baptized into the Catholic church in November, 1938. He testified that the child, being a baptized Catholic, has a right to be brought up as a Catholic. The evidence is not clear as to whether the petitioner, or some one else, had the child baptized.

Some five pages of the bill of exceptions are taken up with a demand of the attorney for petitioner that section 29-2802, Comp. St. 1929, be complied with, and that respondents produce the child in court; that the purpose of the habeas corpus action is to have the body of the child in court, and without that it is a nullity. Attorney for respondents insisted there was no question but that the child was in their possession, that the petition so alleged, and the answer admitted it, and no purpose could be accomplished by keeping the baby in the courtroom when it should be taking a nap. The court said if the child was brought into court for even a few seconds, that would comply with the statute, for the child will have been in court. Attorney for petitioner insisted that the child should be in court at

the time the decision was rendered. The court stated that the habeas corpus is practically an action *in rem,* according to the statutes. The petitioner moved the court that, before the case proceed further, the respondents bring the child into court, there to remain pending the judgment of the court. The court overruled petitioner's request, but said to "have the child in here say at 2 o'clock this afternoon." Objection is made that, as the baby is only 21 months old, it cannot be kept in the courtroom, that it should be home asleep in bed.

At 2:20 p. m., June 24, the bill of exceptions shows, the baby was brought into court, and the court said: "Let Mrs. Ella Mae Kaufmann retain custody of the child until the court makes a further order. Now you may take him back and put him to bed. I think that gets our record in shape." The child was also in court when the decision was rendered.

In discussing the law relating to the matters directly at issue, we find that, at an early date, under the English law the father had a predominant right to the guardianship of his child. Even under circumstances of hardship to both the mother and the child, the English courts said the father had a paramount right in such matters, but in this country the father's rights have been qualified and conditioned in the interest of the child's welfare, and if the father has neglected the child, or if there is proof of unfitness of character, or impropriety of life and conduct such as to endanger the child's moral welfare, the guardianship of the child will be given to some other person, and in the latest decisions the welfare of the child is considered to be the controlling question, to which any arbitrary legal right of guardianship must yield, it being the endeavor of the court to promote the child's best interest, pecuniary, social, and moral. 25 Am. Jur. 11, sec. 6.

"In a controversy for the custody and control of a minor child between the grandparents and the father of the child, there is a strong presumption that the interests of the child require that it be confided to the care of its father; but,

when the circumstances and condition of the parties, and their character and purposes in regard to the child, show that it will probably be for its best interest to remain temporarily with its grandparents, who have for some time, with its father's consent, cared for the child and furnished it with a suitable home, the rights of the father must yield to the welfare of the child." *State v. Porter,* 78 Neb. 811, 112 N. W. 286.

"In a controversy for the custody of an infant of tender years the court will consider the best interests of the child and will make such order for its custody as will be for its welfare, without reference to the wishes of the parties." *Schroeder v. State,* 41 Neb. 745, 60 N. W. 89. See, also, *Sturtevant v. State,* 15 Neb. 459, 19 N. W. 617; *Giles v. Giles,* 30 Neb. 624, 46 N. W. 916; *Steward v. Elliott,* 113 Neb. 421, 203 N. W. 580; *Smidt v. Benenga,* 140 Ia. 399, 118 N. W. 439; *Ellison v. Platts,* 226 Ia. 1211, 286 N. W. 413.

Let us consider a case where this court took the child from the respondents and gave it to the mother. It is the habeas corpus case of *State v. Bryant,* 95 Neb. 129, 145 N. W. 266. The mother, being divorced, had secured employment, but had to go to a hospital for an operation, and turned her child permanently over to the respondents. But now, upon her remarriage, she has a good home, attends church and Sunday school, and her present husband is anxious to have the child in his home. The respondents, who have the child, fail to send it to school, to church, or to Sunday school, and take the little child out with them nights when they attend dances, and remain very late. This court said it is quite apparent that it is for the best interest of the child for the mother to have its care and custody.

"One with whom the child has had a home, where it has been properly treated and cared for, should be preferred over one whose appointment would necessitate its removal to a new home. So the separation of children of tender years from one another, or from those to whom they have become attached, should be avoided unless their true inter-

ests peremptorily require it." Woerner, American Law of Guardianship, 98, sec. 32. See, also, Simpson, Law of Infants (4th ed.) 168.

"The welfare of the child is the primary consideration to which all other questions must yield, and the court must consider, not only the spiritual and temporal welfare, but the minor's further training, education, morals, and the ability of the proposed guardian to best take care of the child. *In re Butcher's Estate,* 266 Pa. St. 479." *In re Guardianship of Herten,* 127 Neb. 88, 254 N. W. 698.

The case of *Lemke v. Guthmann,* 105 Neb. 251, 181 N. W. 132, is a habeas corpus proceeding for the possession of a nine-year-old boy. The aunt made a pleasant home for Paul, who called her mother. She could afford to give him luxuries, treated him with affection, and is bringing him up in the church she attends, which is the Catholic. When the aunt took this little boy, at the request of the dying mother, he was but a tiny babe. It is stated that the father, as a matter of law, has a first claim upon the child, but the question is, what is for the best interests of the child? The father is a Lutheran, and ordinarily would have the right to determine the religious instruction to be given the boy. See *Purinton v. Jamrock,* 195 Mass. 187, 80 N. E. 802, 18 L. R. A. n. s. 926. It was held that it is for the best interests of the child to leave him where he is, in the home of the aunt, on condition that the father can control or direct his educational and religious training.

When a somewhat similar case was here, this court said, in referring to the child: "There it is under moral and religious influences softened by liberality and freedom. A court may well hesitate to take a child away from such surroundings to try an experiment elsewhere. It is no disparagement to the stepmother to say that these conditions cannot be equaled in her home. * * * At the trial she made no claim to an affection for the child beyond that imposed by her duties as a stepmother. These facts are not mentioned as reflections upon her fitness to have the custody of the child, but to suggest the difference in conditions to

which a change of custody would subject it." *In re Burdick*, 91 Neb. 639, 136 N. W. 988.

The respondents argue, and we agree, that the child is now, and ever since coming to their home has been, cared for, reared and trained in a most exemplary and devoted manner, and the child will be safe, healthy, moral and happy if his raising and education remain their responsibility.

The father has paid very little, if any, attention to the child, has paid for no clothes, doctor bills, or keep, and has, according to the evidence, avoided all the responsibilities of parenthood. He has purchased just one little toy on one occasion.

Disregarding the wishes of all parties to this litigation, where, from the evidence, does the best chance lie for the proper development, upbringing and education of this child? Does the record justify removing this child from the pleasant home of two manifestly unselfish and loving foster-parents, and from their admittedly good influence and care, and placing him in the strange atmosphere of the proposed home? This court believes that it does not.

Therefore, the judgment of the trial court is reversed, and it is directed that the custody of this child remain with the respondents until further order.

REVERSED.

YEAGER, J., dissenting.

I cannot bring myself to agree with the majority in this case.

I find no serious fault with the legal principles set forth in the opinion, but under the principle that the father has the paramount right to the guardianship of his child, unless the best interests and welfare of the child require some other disposition, I cannot see how, under the record in this case, this court is able to say that the father is not entitled to his child.

It may be conceded that in the past the father never contributed as liberally to the support of the child as he might have, also that his circumstances, so far as finances are

concerned, do not equal those of the respondents, and further that the child has received loving care at the hands of the respondents. It appears that the father works at a place where beer and food are dispensed and that his wife, the stepmother of the child, takes an occasional drink of beer, and that a permanent home arrangement has not as yet been established for the child. The record discloses that the father works steadily, and no immoral practices on his part are shown.

I see nothing in all of this to justify taking from this father his paramount right to the guardianship of his child. Further, the legal effect would be to place the child in the hands of mere volunteers from whom the courts would be without power to exact support for the child if they refused to grant it of their own will.

The natural law, the moral law, the enlightened religious law and the written law recognize the obligation of the parent to support and sustain the child of tender years and the corresponding right to care, custody and control by the parent. Should this sacred relationship be destroyed by a mere difference in economic standing, of difference of opinion on morality or of religion, without a fairly definite showing of unfitness on the part of the parent? My attitude toward the duties, obligations and privileges of parenthood require of me an emphatic negative answer.

The trial judge heard the evidence and observed the witnesses and their demeanor while testifying, and no doubt was in a better position to understand and appraise the true facts than we are. In this view, and in the light of the record presented, I can find no justification for overturning the judgment of the district court.

CARTER, J., concurs in the dissent.

LINCOLN JOINT STOCK LAND BANK, APPELLEE, V. PLATTE VALLEY PUBLIC POWER AND IRRIGATION DISTRICT, APPELLANT.

299 N. W. 485

FILED JULY 29, 1941. No. 31055.

1. Waters. In an action for damages to growing crops alleged to have been caused by seepage resulting from the construction and operation of an irrigation canal, it is necessary to establish a causal relationship between the water in the canal and that causing the seeped condition on plaintiff's lands.
2. ———. Proof which merely leaves the matter to be established in the realm of speculation and conjecture is not sufficient to sustain a judgment.

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

Shuman & Overcash, for appellant.

Halligan, McIntosh & Feltz, contra.

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

CARTER, J.

This is an action to recover for damages sustained to growing crops as a result of seepage alleged to have been caused by water from the defendant's supply canal. Plaintiff recovered a judgment for $598.82, and defendant appeals.

Plaintiff was the owner, during the times herein mentioned, of two tracts of land lying south of the North Platte river in Keith county. For convenience, the east tract will be referred to as the Lute land and the west tract as the Snyder land. The lands alleged to have been seeped by defendant's supply canal are approximately one-half mile south of the North Platte river. Both seeped areas lie immediately south of the Union Pacific railroad which runs along the south side of the valley until it enters the Snyder land, where it turns north and crosses the North Platte river. A short distance south of the Union Pacific railroad

where it crosses the Lute land is an old railroad grade referred to in the evidence as the old Burlington grade. Commencing at a point just north of the Union Pacific railroad as it enters the Snyder land is the beginning of a drainage ditch which parallels the Union Pacific railroad on the north side thereof. This drain is referred to in the evidence as Bull ditch. The Keith-Lincoln county canal crosses the Snyder and Lute lands approximately one-half mile south of the seeped lands here in question. This canal provides irrigation water for the Snyder and Lute lands as well as the lands lying between these two tracts.

With these conditions existing, the defendant constructed a canal about one-half mile to the south of the Keith-Lincoln county canal. This canal was about 40 feet wide at the bottom and 60 feet in width at the top. It was used for the first time in 1935, but ran only a small head of water. Water ran in the canal in 1936 and until February, 1937, when a break in defendant's siphon across the South Platte river occurred and prevented its further use for some time. Damages to crops were claimed for the years 1937 and 1938.

There is evidence in the record that defendant's canal crosses several sand draws. Plaintiff did not show that these sand draws were carrying subterranean waters in the general direction of his seeped lands. An engineer called by the defendant testifies that borings made by him below defendant's canal showed that the earth was dry 15 feet below the surface.

It cannot be questioned that plaintiff's lands are seeped and water-logged. There is evidence in the record that they have always been so low that they have at times become wet. One witness testifies that he had been duck-hunting on these lands many times before defendant's canal was built. There is evidence that Bull ditch was constructed to carry away the waters causing this water-logged condition, and that because of a failure to clean Bull ditch, it had filled up with weeds and slime and failed to operate as a drainage ditch. In the opinion of the defendant's en-

gineer, this condition was a contributing factor to the existing condition. The evidence shows that the grade of the irrigable land immediately to the south of the seeped lands was rather steep, so much so that it was difficult to irrigate successfully and that much tail water ran down onto the seeped areas and contributed to the ponding of waters there. It also appears that irrigation from the Keith-Lincoln county canal has been supplemented by pump irrigation which contributes to the impounding of waters on plaintiff's lands. There is also evidence of a drainage ditch being constructed a mile and a half east of the Lute land, known as the Sarben drain. Statistics were offered which indicate that the flow of drainage water in the Sarben drain was not influenced by the flow of water in defendant's supply canal. Records made by defendant's engineer, and not impeached by the record, indicate that the water-table in and around the seeped area is highest when water is running in the Keith-Lincoln county canal.

That natural conditions have contributed to the seepage on plaintiff's lands cannot be disputed. The involved lands are naturally low and are generally referred to as first bottom lands. The evidence shows that they are underlayed with a hard clay formation not conducive to absorbing waters above it, which contributes to the seeped condition and makes drainage necessary. The old Burlington grade has also settled and packed until subterranean waters percolating toward the river have been held back by it and added to the seeped waters accumulated on the Lute land. The slope of the land immediately south causes much surface drainage to be cast down upon plaintiff's lands. This, added to the tail waters derived from the application of canal and pumped water for irrigation, adds to the accumulation of subterranean water. There is evidence in the record that subterranean flow from the river percolates into the area of plaintiff's seeped lands from the west during flood seasons, due to the fact that this area was once a channel of the river. All of this evidence tends to establish that there are causes for the seeped condition of

plaintiff's land other than the alleged seepage from defendant's supply canal. Under these circumstances, it is necessary for plaintiff to establish a causal connection between any seepage from defendant's supply canal and the seeped condition of plaintiff's lands. The mere fact that the ditch was built about the time the seepage is alleged to have manifested itself is not sufficient where other efficient and probable causes are shown by the evidence. That seepage from defendant's canal was the cause of the seeped condition of plaintiff's lands must be shown by sufficient evidence to take it out of the realm of speculation and conjecture before a judgment for damages can be sustained.

In *Joldersma v. Muskegon Development Co.*, 286 Mich. 520, 282 N. W. 229, the court, in a case similar in principle, said: "It was incumbent upon plaintiffs to establish by some means a relationship between the contents of defendant's sump and their damage. The burden of proof was not met, in view of all the circumstances, by a simple showing that defendant permitted salt water to seep into the ground and that salt appeared at a distance of several hundred feet to the south. It was their burden to establish this relationship, not by a guess of the jury, but by the production of some competent testimony."

In *Enders v. Sinclair Refining Co.*, 220 Wis. 254, 263 N. W. 568, the court said: "It is considered that the evidence in this case, instead of eliminating the possibility of contamination from other sources, is such as to establish quite satisfactorily the fact that pollution comes from other sources rather than from the defendant's bulk-station plant. The trial court apparently rejected the percolation theory, and rested the case entirely upon the proposition of a crevice which connected the two places. Whether or not there is such a crevice and whether or not it connects the two premises is purely a matter of speculation and conjecture. The only test that could be made was made and it tended to disprove rather than establish the plaintiffs' case. It cannot be said that plaintiffs have by a fair preponderance of the evidence established the fact upon which

they rely for recovery in this case. The plaintiffs recognize the principle that proof which merely leaves the matter to be established in the realm of speculation and conjecture is not sufficient, and rely upon the case of *Pfister & Vogel Leather Co. v. Industrial Commission,* 194 Wis. 131, 215 N. W. 815, to sustain their position in that regard."

And in *Wynn v. Wilson,* 252 Ky. 352, 67 S. W. (2d) 483, the court said: "Under the evidence it is just as probable that the oil or water came from another source as from the abandoned well, thus presenting a case where all that the jury could do was to indulge in surmise or speculation. Where that is the case the evidence is not sufficient to take the case to the jury, and appellant's motion for a peremptory instruction as to the injury to the spring should have been sustained."

In the case before us there is no proof of actual loss from defendant's supply canal or any showing of the direction of any underground flow immediately below the canal. There is evidence of other sources of seepage contributing to or causing the damage. Under these circumstances, the defendant's motion for a directed verdict should have been sustained.

For the reasons herein stated, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

JOHN A. BEALS, TRUSTEE IN BANKRUPTCY, APPELLANT, V. THOMAS F. CROUGHWELL ET AL., APPELLEES.

299 N. W. 638

FILED JULY 29, 1941. No. 31164.

1. **Trusts.** Where a testamentary trust, either expressly or by implication, imposes upon the trustee affirmative and substantial duties to perform, requiring the trustee to subserve the estate and use discretion with respect to the control, protection, management, maintenance and disposition of the trust *res,* and to protect the estate for a given time, and where, at the end of

such time, the beneficiary meets the terms of the trust agreement, and the trustee is still charged with some further affirmative and substantial duties with reference to the trust, and to carry out the useful purpose of the trust (in the absence of a statute of uses), the trust remains an active trust and is not a dry or passive trust, within the meaning of the law of this state.

2. Wills. A person, owning property and owing no duties to the creditors of an individual, to whom he seeks to give his property by will, is not guilty of an act of fraud or promotion of an illegal or immoral act, against the public policy of the state, if he suggests in his will that the beneficiary may proceed to take legal steps, in conformity with the policy of the law, to obtain the benefit of the provisions of the will, and in the event the beneficiary resorts to a court of bankruptcy to free himself of debt and obligations, as suggested in the will, in order to receive the benefits of the will, he is not guilty of fraud or of illegal or immoral act, against the public policy of the state,

3. ———. A testatrix, desiring to devise and bequeath to a nephew certain real and personal property, created by her will a spendthrift trust for a period of five years, requiring the trustee to exercise control, protection, management, maintenance and disposition of the trust *res*, and further providing that none of said property be in any manner used to pay any of the nephew's debts or obligations, the testatrix being in no manner responsible for any of the debts or obligations of the beneficiary, and further subject to the condition that the real estate and personal property, as evidenced by the will, devised and bequeathed to the nephew shall be paid to him whenever he becomes able to pay his just debts and liabilities from other sources,—a condition recognized as valid by the law of Nebraska. The beneficiary secured his discharge from bankruptcy pursuant to the suggestion contained in the will and, by so doing, freed himself from obligations and debt, as directed by the testatrix in her will. Having complied with the terms of the will in order to receive the benefit of the real and personal property so willed to him, the beneficiary is entitled to the absolute fee simple title to the real estate and the absolute title to the personal estate. *Held*, the will containing such provisions is not illegal or immoral, or against the public policy of the state.

APPEAL from the district court for Loup county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

James J. Fitzgerald, for appellant.

B. A. Rose and *A. F. Alder, contra.*

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

MESSMORE, J.

The trustee in bankruptcy brought this action in behalf of Thomas F. Croughwell, pursuant to a written order issued by the referee in bankruptcy. During the pendency of the litigation, plaintiff, John A. Beals, died, and the action was revived in the name of his successor.

Section 20-21,143, Comp. St. 1929, provides in part: "Any person interested as or through an executor, * * * trustee, * * * in the administration of a trust, or of the estate of a decedent, * * * or insolvent, may have a declaration of rights or legal relations in respect thereto: (a) To ascertain any class of creditors, * * * or (b) To direct the executors, * * * trustees to do or abstain from doing any particular act in their fiduciary capacity; or (c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings." The foregoing provision of the statute constitutes the basis of the plaintiff's case.

The petition alleges that Catherine Largey died in Loup county, Nebraska, on or about December 21, 1935, leaving a last will and testament. The will, by its terms, created a trust for a period of five years from the date of decedent's death. During the five-year term the income from all property, real and personal, remaining after certain bequests, was to be paid to Thomas F. Croughwell, subject, however, to the provision that the income from the trust *res* should not be subject to any garnishment, attachment or legal process, and should not be subject to the payment of any of his debts or be reached for the use and benefit of his creditors by any legal process, or by any order of a court of bankruptcy. We here set forth a provision of the will which gives rise to the controversy:

"At the end of five years from the time said estate vests as above provided for in the said Mary Croughwell

for the uses herein set forth, if upon that date said nephew, Thomas F. Croughwell, owes no debts which may be enforced against him by legal process, then in that event, and in that event only, all of my real estate and all of my said personal property, and all of the property which shall then vest in said Mary Croughwell in trust as herein provided for, or her successor in such office, shall at once go to and become the absolute property of the said Thomas F. Croughwell, and my said Trustee, or her successor in trust, shall thereupon execute and deliver to the said Thomas F. Croughwell all necessary instruments in writing and take such other steps as may be necessary to vest all of said estate at that time in the said Thomas F. Croughwell in accordance with my said wishes and the terms of this last Will and Testament.

"In the event, however, that the said Mary Croughwell, as such Trustee, or her successor in trust, shall for any reason, at that time and under the conditions herein set forth, fail to so vest the title to said property in the said Thomas F. Croughwell, the latter shall then have the right by proper action in court to quiet in himself the title of said property."

The petition further alleges that Thomas F. Croughwell filed a petition in bankruptcy, was declared a bankrupt, and there are no funds with which to pay the creditors in the bankruptcy court except the real estate devised by Catherine Largey; that the attempt on the part of the testatrix to grant the beneficial enjoyment of the property and to provide the beneficiary of the trust with the means to secure the fee simple to the corpus of the trust, and at the same time exempt the corpus of the trust from the claims of creditors, is void and contrary to public policy, and that the creditors are entitled to have the property subjected to the payment of their claims, and prays that the court instruct the executrix and the trustee of the will as to the disposition to be made of the corpus of the trust.

The answer of Thomas F. Croughwell denies that the testamentary trust is a dry, passive trust, or a trust that

is illegal, immoral, or against public policy, and generally denies the affirmative allegations of the plaintiff's petition; alleges affirmative subject-matter as to the legality of the trust and his right to benefit thereby; prays that the trust provisions be held legal as to him. The answer of Catherine M. Croughwell, for the purposes of this case, alleges that she has a contingent remainder interest in the property, subject to the life estate of Thomas F. Croughwell, and prays that she be decreed such remainder interest, and further that she be entitled to receive the income from the trust property as long as there are debts outstanding against Thomas F. Croughwell. The reply is a general denial.

The cause was submitted on the pleadings without factual controversy. The court decreed and adjudged that the trust created by the will of Catherine Largey, in favor of her nephew Thomas F. Croughwell, is an active spendthrift trust and vests the legal title to her estate in the trustee; further decreed and adjudged that the terms of the trust be strictly carried out; that the terms thereof excluding creditors are legal and that the plaintiff in the instant action, representing the creditors of Thomas F. Croughwell (the beneficiary of the testamentary trust), has no interest in the estate and no right to subject it to the payment of claims of said creditors. Judgment was rendered accordingly. From this judgment, plaintiff appeals.

Thomas F. Croughwell, a nephew of the deceased, had been reared by her from infancy. Before the making of the will he was insolvent, owing debts aggregating $75,000. It is apparent from the will that Catherine Largey did not desire any part of her money or property which she would leave to her nephew to go to the payment of his debts.

Plaintiff directs our attention to the paragraph of the will above set out, contending that such paragraph makes the trust the temporary depository for the property until such time as Thomas F. Croughwell successfully eludes his creditors; that when he has succeeded in doing so, he shall

receive the full title to all the property. It is plaintiff's contention that the will devises only the bare legal title to the trustee, and grants to the beneficiary the right to the proceeds, together with the right to secure the legal title, thereby creating a dry, passive trust, and that equity will consider the legal as well as the equitable title merged in the *cestui que trust* and subject to execution by his creditors. In support of such contention, plaintiff cites the Nebraska cases of *Flanagan v. Olderog,* 118 Neb. 745, 226 N. W. 316, and *Hill v. Hill,* 90 Neb. 43, 132 N. W. 738. The provisions of the wills in the foregoing cases are as follows:

In *Flanagan v. Olderog, supra:* "I give and bequeath unto my beloved daughter Ann L. Flanagan, to be held in trust by her for my beloved son Bernard W. Flanagan, his heirs and assigns, one-fourth (¼) of all the residue of my estate subject only to the bequests and devises above set forth in paragraphs first, second and sixth."

In *Hill v. Hill, supra:* "I will and bequeath to my nephew, John W. Hill, Jr., in trust for my lawful heirs, all my estate, both real and personal, of every kind and nature, to be held by said trustee for the term of five years, and to be distributed among my lawful heirs at the end of such period."

It is obvious that the provisions of the wills in these two Nebraska cases neither expressly nor by implication imposed upon the trustee an affirmative and substantial duty to perform, or useful purpose to subserve, or discretion to exercise, with respect to the control, protection, management, maintenance or disposition of the trust property, but, rather, placed the trustee in a position only where the trustee constituted merely a temporary lodging place for the legal title as a matter of convenience. In the instant case the provisions of the will are distinctly different and create an entirely different situation. The trustee is obligated to perform affirmative and substantial duties in the management, control, protection, maintenance and disposition of the trust, and exercise discretion in so doing. We here set forth, in substance, some of such duties:

(1) The trustee is to hold the property, both real and personal, in trust for five years; (2) to reduce the personal property to cash; (3) to invest it in first-class, first mortgage loans, with adequate land security; (4) to keep the real estate rented, collect the rents, pay to the beneficiary all of the interest and proceeds of the estate, except such amount as may be necessary for taxes and expenses; (5) in the event the beneficiary fails to comply with the provisions of the trust to obtain the benefits thereof, the trust to continue upon the same authority, power and control as provided for the five-year period; then during the term of the trust the income and proceeds shall be paid to the beneficiary, for his sole and personal use, by the trustee. Under the circumstances, the following authority is applicable:

In the case of *Lancaster County Bank v. Marshel,* 130 Neb. 141, 264 N. W. 470, this court held: "So long as the trustee, either expressly or by implication, has imposed upon him some affirmative and substantial duty to perform or useful purpose to subserve, or discretion to exercise with respect to the control, protection, management, or disposition of the trust property, or to protect the estate for a given time or until the death of some person, in this state (in the absence of a statute of uses) the trust remains an active trust."

We conclude, for the reasons herein set forth, that the trust in question is an active trust, and the plaintiff's contention that the trust is a dry, passive trust is not well taken.

We come to a consideration of plaintiff's contention that the trust is contrary to public policy, in that it permits the beneficiary to have the sole power to terminate the trust and secure the corpus and still remain immune to the payment of his just debts.

In considering this assignment of error, it must be borne in mind that the estate in question was at all times the property of Catherine Largey. She owed none of the debts in question and was under no obligation, either equitably or

legally, or otherwise, to subject any part of her estate to the payment of any such debts. They were the debts of her nephew, Thomas F. Croughwell. He had no interest in any of the property of his aunt except that which she might desire to give to him, as designated in her will, and under conditions which she might impose. Thus, all of the property being hers, she had the right to dispose of it as she saw fit. In this state one may will his property to any person for any purpose, providing such purpose is not illegal, immoral or against the public policy of the state. See *In re Bissell*, 63 Neb. 585, 88 N. W. 683. The creation of a spendthrift trust is not, under the law, prohibited in Nebraska. See *Lancaster County Bank v. Marshel, supra; Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075.

Plaintiff, in furtherance of this condition, states in substance: It may be implied from the will that, if Thomas F. Croughwell secured a discharge from his debts by bankruptcy proceedings before the expiration of the five-year period by following the suggestion in the will, as to the manner in which he might defeat his creditors, he perpetrated a fraud on his creditors, and, under such circumstances, the spendthrift trust, as created by the will, is void.

One may very properly take advantage of a proceeding in bankruptcy to discharge his debts and obligations, and by doing so he is not performing an illegal act. The mere fact that a person seeks the relief afforded by a bankruptcy proceeding does not brand that person as being dishonest and does not import dishonesty or immorality. A person owning property and owing no duties to the creditors of an individual, to whom he seeks to give his property by will, is not guilty of fraud if he suggests to such person that he might proceed to take legal steps, in conformity with the policy of the law, to obtain the benefit of provisions of a will, and the beneficiary of the will is not guilty of fraud in adopting a procedure to secure a discharge of his debts, as provided by law and used extensively by insolvent debtors.

"Except where a person creates a trust for his own benefit, if it is provided by the terms of the trust that the beneficiary shall be entitled to receive the principal of the trust property only when he shall become financially solvent, his interest under the trust cannot be reached by his creditors or by his trustee in bankruptcy." Restatement, Trusts, 392, sec. 159. The foregoing language is clear and comprehensive. See, also, 60 C. J. 804.

The following cases are in point and applicable to the situation in the instant case:

In *Hull v. Palmer*, 155 App. Div. 636, 140 N. Y. Supp. 811, appearing also in 213 N. Y. 315, 107 N. E. 653, the father bequeathed a certain amount to the defendant to pay the income therefrom to the testator's son. The will provided that the defendant trust company was to pay said income as long as the property was held in trust, but that, if the son should be released from his debts, for which he was liable, from sources other than the trust fund and become solvent, or secure a discharge from his liabilities, the son would then be entitled to the principal of the trust and the trust would terminate. The will was admitted to probate. The son filed a voluntary petition in bankruptcy and received his discharge. The trustee proceeded for a judicial settlement. The court adjudged the son entitled to have the trust fund paid to him. Subsequently, the trustee in bankruptcy brought suit against the trust company to recover the principal, alleging that the principal should be subject to payment of balance due on debts proved against the bankrupt estate. Upon demurrer, the suit was dismissed, and the decision was subsequently affirmed by the supreme court of the United States in *Hull v. Farmers Loan & Trust Co.*, 245 U. S. 312, 38 S. Ct. 103, wherein the court said: "This is not a case where a testator seeks to bequeath property which shall be free from liability for the beneficiary's debts. *Ullman v. Cameron*, 186 N. Y. 339, 345. Here the testator has merely prescribed the condition on which he will make a gift of the principal. Under the law of New York he had the right

to provide, in terms, that such payment of the principal should be made, only if and when Francis (his son) should have received in bankruptcy a discharge from his debts and that no part of the fund should go to his trustee in bankruptcy. The language used by the testator is broader in scope, but manifests quite as clearly, his intention that the principal shall not be paid over under circumstances which would result in any part of it being applied in satisfying debts previously incurred by Francis (his son). The bankruptcy act presents no obstacles to carrying out the testator's intention. *Eaton v. Boston Safe Deposit & Trust Co.*, 240 U. S. 427. As the court of appeals said: 'The nature of the condition itself determines the controversy.' "

In the case of *Ames, Petitioner*, 22 R. I. 54, 46 Atl. 47, the first paragraph of the syllabus reads: "A testatrix devised her estate to trustees to pay the income thereof to her son for life, and upon his death to convey to his issue in fee or absolutely the body of the estate disencumbered of the trust; and after reciting that her son was deeply insolvent, and that her purpose was to provide for his support, provided in a codicil that 'if my son shall by discharge from his creditors, or by force of any bankrupt act of the United States at any time hereafter in force, be released from the debts with which he is encumbered, then this trust with regard to the portion of my property to which my son shall be entitled, to the extent of the interest or title of my son so released, shall cease and be determined, and my trustees shall convey to my son so released his portion or estate in my property in conformity to my will, to be held and enjoyed by him released free from all control and trust whatsoever.' The son died, leaving issue. Prior to his death he paid all the debts referred to in the will for which he was liable." The court held that "the purpose of the testatrix being to keep the property from vesting in the beneficiary until such time as he was freed from liability to the claims of creditors, the beneficiary, by paying the debts for which he could be held, was there-

by discharged from those debts." The court further held that "under the terms of the codicil, from the discharge of the beneficiary from his debts he took an absolute estate in fee in the real estate, and the personal property absolutely."

For the reasons given in this opinion, we conclude that the judgment of the trial court is right.

AFFIRMED.

FIRST TRUST COMPANY OF LINCOLN, GUARDIAN, APPELLANT, V. MAUD HAMMOND, APPELLEE.

299 N. W. 496

FILED JULY 29, 1941. No. 31006.

1. **Gifts.** To make a valid and effective gift *inter vivos*, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee, and the transfer must be so complete that if the donor again resumes control over it without the consent of the donee he becomes liable in trespass.
2. **Husband and Wife.** Where parties are husband and wife, there is a presumption that the transfer of title to personal property by one spouse to the other was intended as a gift.
3. **Banks and Banking.** "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business." Comp. St. 1929, sec. 8-164.
4. **Husband and Wife.** Where a husband deposits money in a bank payable to himself or wife as joint tenants with a right of survivorship, and not as tenants in common, a completed gift is consummated by the husband to the wife, even though the wife never had manual possession of the pass-book.
5. ———. Where a husband deposits money in a bank payable to himself or wife as joint tenants with the right of survivorship, and not as tenants in common, such deposit so made is presumed to have been made with donative intent and for the benefit of the wife with the intention of giving her, if she survives, the complete title to the fund.
6. **Banks and Banking.** Section 8-164, Comp. St. 1929, is intended for the protection of the bank and also to fix the property rights

of the persons named, unless the contrary appears from the terms of the deposit.

7. **Trusts.** The property rights of the defendant and Willard Hammond having been fixed as to the savings account, and to the checking account as of its condition on August 5, 1938, the court, in this case, on the issues tendered, was without right to interfere or make any orders in relation thereto at the request of the plaintiff.
8. **Husband and Wife.** Additions to the joint checking account made by defendant out of the income from or sale of property of Willard Hammond after August 5, 1938, created no title to such additions in the defendant.
9. **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." *Lucas v. Lucas*, 138 Neb. 252, 292 N. W. 729.

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

Woods, Aitken & Aitken, for appellant.

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

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

YEAGER, J.

This case was before this court previously on a motion to dismiss the appeal. The opinion is reported in 139 Neb. 546, 298 N. W. 144. The First Trust Company of Lincoln, Nebraska, a corporation, plaintiff and appellant, instituted the action in the district court for Lancaster county, Nebraska, wherein it filed a petition against the defendant, appellee herein. Only the substance of the petition will be set out here. It was alleged that Willard Hammond and Maud Hammond, the defendant, are husband and wife, and that prior to the incidents and occurrences involved in this action Willard Hammond was the owner and possessed of a very considerable amount of property. On September 26, 1938, he was declared incompetent by the county court of Lancaster county, Nebraska, and on the same date the Continental National Bank was appointed guardian of his

person and of his estate. Thereafter, on May 17, 1939, through proper proceedings the First Trust Company of Lincoln, Nebraska, became the substituted guardian.

In the petition it was further alleged that on the 6th day of August, 1938, the defendant caused Willard Hammond to be committed to the Still-Hildreth Osteopathic Sanatorium at Macon, Missouri, where he had remained continuously to the date of the filing of the petition; that prior to the date of such commitment, and prior to the adjudication of incompetency and appointment of a guardian, Willard Hammond kept property of substantial value consisting of real estate bonds, certificates of stock, negotiable securities, cash and other personal property, of which he was the sole owner, in certain safety deposit boxes, to which boxes the defendant had access, and that defendant refuses to deliver up the keys to such boxes and refuses access thereto to the plaintiff; also that there were bank accounts belonging to Willard Hammond, from some of which he alone had the right of withdrawal, and from some of which he had the joint right of withdrawal with the defendant, knowledge of the location of which accounts the defendant refuses to disclose to plaintiff, all of which money and property defendant has fraudulently converted to her own use.

It is further alleged that plaintiff has demanded that defendant deliver over all of the property of Willard Hammond, which demand was refused.

It is further alleged that since August 6, 1938, the defendant has received the income from the real estate of Willard Hammond, the interest on his securities and the dividends from his stocks, all of which, together with moneys and other property of the said Willard Hammond, she has wrongfully and fraudulently converted to her own use.

The prayer is for injunctive relief against disposition of any of the money or property of Willard Hammond, that the defendant be declared a constructive trustee of all of the property in question, that the property be impressed

with a trust in favor of plaintiff as guardian, and for an accounting and order on the defendant to pay to plaintiff all sums found to be due Willard Hammond.

The answer admitted the corporate capacity of the plaintiff, that Willard Hammond had been declared incompetent on September 26, 1938, and that on the date of the commencement of this action plaintiff was the duly appointed guardian of Willard Hammond. Further answering the defendant generally denied the allegations of the petition.

On the issues presented by the pleadings a trial was had to the court. The plaintiff adduced all of its evidence, at the conclusion of which the defendant moved for a dismissal of plaintiff's petition. The motion was sustained in part and overruled in part. The defendant adduced no evidence in her own behalf. Decree was thereupon entered on April 3, 1940. In the decree the defendant was ordered, within 20 days, to deliver to the clerk of the district court for the use of plaintiff 47 certificates of stock, representing 3,071 shares in various corporations, the same having been found to be the property of Willard Hammond. No evidence of the value was adduced and none was fixed by the decree. As to all other claims of the plaintiff the petition was dismissed.

From that portion of the decree which is unfavorable to it the plaintiff has appealed. The defendant did not cross-appeal.

In three assignments, all of which are directed to the same proposition, the plaintiff insists that the trial court committed error in thus dismissing the petition of the plaintiff. It insists that the evidence shows that all of the money and property in question was the money and property of Willard Hammond, and that it had been taken wrongfully and converted to her own use by the defendant.

A list of property involved in this action is found in exhibit 161, introduced in evidence in this case. There can be no question under the evidence that, as between Willard Hammond and the defendant, the source of ac-

quisition of the money and property which was on hand on September 26, 1938, was Willard Hammond. The exact source of all of it is not disclosed, but a considerable inheritance came from a trust created by his mother which was distributed after her death. Apparently this was commingled with the property previously acquired. Likewise, there is no question in the evidence that after September 26, 1938, the defendant took all of this property. She either took it rightfully as her own, or she converted it wrongfully and fraudulently as is charged by the plaintiff. If she took it rightfully as her own, she did so by gift consummated on the 5th day of August, 1938. If it was not given to her by gift consummated on the 5th day of August, 1938, then she converted it wrongfully and fraudulently and must be required to account to the plaintiff.

Is a gift by Willard Hammond to the defendant of any or all of the property involved shown by the evidence of the plaintiff? As has already been indicated the defendant offered no evidence. The record discloses no conversations between Hammond and his wife on the subject of gift prior to the 5th day of August, 1938. At all times prior to August 5, 1938, all business transactions relating to the property in question were carried in fact and on the books by, for and in the name of Willard Hammond. For a number of years prior to December, 1933, Willard Hammond kept his securities in safe deposit boxes at the Lincoln Trust Company. He and defendant had access to the boxes under a lease with the trust company. In December, 1933, while Hammond was away at the sanatorium named, defendant caused the securities to be removed and placed in safe deposit boxes at the First Trust Company, to which boxes both parties likewise had access. This arrangement continued until after Hammond went to the sanatorium in August, 1938. In one of the boxes was an envelope containing securities on which was noted that this was a Willard Hammond and Maud Hammond trust. Nothing appears in the record indicating how this was set up or whether or not it was in fact a trust. Hammond dealt

with it and carried on transactions in relation to it in fact and on his books as his own personal property.

Prior to April, 1932, the defendant had little or no contact with the business affairs of her husband. On April 6, 1932, Hammond went to Still-Hildreth Osteopathic Sanatorium where he remained until May 30, 1932. He again went on May 2, 1933, and returned on May 22, 1933. He went a third time on November 8, 1933, and remained to June 23, 1934. On August 6, 1938, he went back and has never returned. After April 6, 1932, defendant participated largely in the conduct of the business affairs with the assistance of the bookkeeper of Hammond.

On October 30, 1933, a deposit of $19,467.92 was made in a joint savings account of Willard Hammond and the defendant. On August 5, 1938, this account amounted to $20,648.56.

In April, 1932, while Hammond was in the sanatorium, the defendant opened a joint checking account in her name and that of Willard Hammond at the First National Bank. This account was never authorized by Hammond, but it was allowed to remain current and was never closed until March 8, 1939, when it was closed by the defendant. On August 5, 1938, the balance in the account appears to have been $2,059.87. The account was opened by the deposit of an accumulation of business checks belonging to Willard Hammond. It was kept current from beginning to end by the avails of Hammond's business.

Over the years income tax returns were made for defendant and her husband. Sometimes they were joint and at other times not. It appears that the reason for the variations was that the bookkeeper went over the various plans and selected the one in each instance which would require the smallest payment of tax.

On August 5, 1938, there were in the boxes securities which had been indorsed in blank and which could have been transferred without any further manual act except delivery.

This, we think, is a fair reflection of the facts and cir-

cumstances from which the defendant seeks to draw inferences to support the claim of defendant that Willard Hammond, on the 5th day of August, 1938, gave to the defendant as her absolute property, or in joint tenancy with him, all of the property involved in this action.

If a gift by Willard Hammond to the defendant was ever consummated, it was done on August 5, 1938. The defendant did not testify in this case, but evidence given by her in another proceeding was admitted by the court on this subject. That testimony is the following: "Q. Do you, Mrs. Hammond, recall when Willard came home on the night of August 4, 1938? A. Yes. Q. Do you recall what he talked about there at that time? A. Yes. Q. Now just tell the jury what he said. A. Well, he came home very upset and he was just almost exhausted; and he ate his dinner, and I knew something was wrong. And we went out and sat on the porch and he finally—he turned around and he says 'Do you know I have just ruined us? I have ruined you?' And then he told me about Mrs. Fling having them in the vault there for five hours trying to get his own securities away from him, and he wasn't trying to get anything of hers; but she wanted his. He was very nervous. Then he had some checks there and he gave them to me to hold, and he also gave me his keys. I said 'Well, if you feel like that the next morning, we will go down and take your things out of that box,' which we did. And he gave them to me. And he says 'Now, you protect yourself, and, also, with the savings account.' Q. And then he turned over to you the checks? A. Yes. Q. And what did you do with them? A. I put them in the joint account. Q. In the First National Bank? A. Yes, the First National Bank."

This is all of the direct evidence there is on the question of gift by Willard Hammond to the defendant. There is other testimony of the defendant, admitted from other hearings, indicating the previous attitude of defendant toward what is now claimed by her to be a gift, but it can have no bearing on any question except the good faith of

the present claim, hence it need not be set out. The question is not what defendant thought, but what Willard Hammond did.

Under the evidence as outlined we must now determine whether or not Willard Hammond, on August 5, 1938, made a gift in whole or in part, absolutely or in joint tenancy, to the defendant in this case.

To make a valid and effective gift *inter vivos,* there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee, and the transfer must be so complete that if the donor again resumes control over it without the consent of the donee he becomes liable as a trespasser. *Ladman v. Farmers & Merchants Bank,* 130 Neb. 460, 265 N. W. 252; *Smith v. Pacific Mutual Life Ins. Co.,* 130 Neb. 501, 265 N. W. 534.

The defendant states as a conclusion, in the following language, that Willard Hammond gave "his things" to her; "And he gave them to me." Specifically she states that he delivered to her an accumulation of checks representing an aggregate of approximately $5,000, and a certain check for $15,000 which he had received in 1935 and which he had never deposited or cashed. The accumulated checks were deposited by defendant in the joint account in the First National Bank.

This evidence is insufficient to show an intention on the part of Willard Hammond to relinquish all further dominion over his property or to show an actual or constructive delivery thereof to the defendant, except as to the check for $15,000, and the accumulation of checks amounting to about $5,000. We think that there is sufficient evidence of a gift *inter vivos* as to these items when coupled with the legal presumption which follows transfer of property by one spouse to the other.

This court, in connection with the placing of title to real estate by one spouse in the other, has laid down the rule that, where the parties are husband and wife, there is a presumption that the placing of title in the name of one spouse was intended by the other spouse as a gift. *Kobarg*

v. Greeder, 51 Neb. 365, 70 N. W. 921; *Veeder v. McKinley-Lanning Loan & Trust Co.*, 61 Neb. 892, 86 N. W. 982; *Doane v. Dunham*, 64 Neb. 135, 89 N. W. 640; *Brodsky v. Brodsky*, 132 Neb. 659, 272 N. W. 919. No reason is apparent why the same rule should not apply in case of transfer of personal property.

We are of opinion that the trial court was correct, wherein the effect of its decree was to hold that the plaintiff had no right to exclusive possession or control over the joint savings account and the money which was in the joint checking account on August 5, 1938. The issues as presented by the pleadings do not permit of a determination of rights of joint tenants in and to these joint accounts during the existence of the joint tenancies. Section 8-164, Comp. St. 1929, provides as follows: "When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business." This court, in construing this section of the statute, has held that where a wifé deposited money in a bank payable to herself or husband as joint tenants with a right of survivorship, and not as tenants in common, a completed gift is consummated by the wife to the husband, even if the husband never had manual possession of the pass-book; also, that a deposit so made is presumed to have been made with donative intent and for the benefit of the husband, with the intention of giving him, if he survives, the complete title to the funds, and further that the statute is intended for the protection of the bank and also to fix the property rights of the persons named, unless the contrary appears from the terms of the deposit. *In re Estate of Kamrath*, 114 Neb. 230, 206 N. W. 770; *In re Estate of Johnson*, 116 Neb. 686, 218 N. W. 739; *Kehl v. Omaha Nat. Bank*, 126 Neb. 695, 254 N. W. 397.

The property rights of the defendant and Willard Hammond having been fixed as to the savings account, and as

to the checking account as of its condition on August 5, 1938, the court, in this case, on the issues tendered, was without right to interfere or make any orders in relation thereto at the request of the plaintiff.

It would be inequitable and improper to hold that any additions to the joint checking account made by defendant out of income from or sale of property of Willard Hammond after August 5, 1938, should become part and parcel of the joint checking account to which defendant was entitled. Clearly such additions would have the same character as property not sold or income not deposited.

We conclude, therefore, that the trial court erred in dismissing the petition of plaintiff to the extent that it was dismissed; we conclude that the evidence shows that all of the property in question here, except the $15,000 check, the accumulation of checks amounting to about $5,000, the joint savings account amounting to $20,648.56, and the joint checking account amounting to $2,059.87, was the property of Willard Hammond and that the plaintiff was entitled to its possession as guardian; we conclude that the properties not excepted herein were wrongfully converted to her own use by the defendant, and that such properties were constructively in her trust, and that she should be required to deliver these properties, together with the income therefrom and accretions thereto, to the plaintiff.

This case must then be controlled by the holding in *Lucas v. Lucas,* 138 Neb. 252, 292 N. W. 729. In that case it was held: "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."

The decree of the district court, therefore, to the extent it was appealed from, is reversed and the cause remanded for a new trial in conformity with the findings herein.

REVERSED.

On motion for rehearing, the following supplemental opinion was filed November 21, 1941.

YEAGER, J.

On consideration of the motion for rehearing, and a

further analysis of the record and the proceedings, it is deemed necessary to supplement the original opinion in this case found *ante,* p. 330, 299 N. W. 496.

In the opinion it is stated: "On the issues presented by the pleadings a trial was had to the court. The plaintiff adduced all of its evidence, at the conclusion of which the defendant moved for a dismissal of plaintiff's petition. The motion was sustained in part and overruled in part. The defendant adduced no evidence in her own behalf. Decree was thereupon entered on April 3, 1940." This is a correct reflection of the record to this extent, but it ignores the fact that after the motion the plaintiff rested its case as did also the defendant.

This situation then renders inapplicable the rule adopted from *Lucas v. Lucas,* 138 Neb. 252, 292 N. W. 729, as follows: "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." This rule should have no application where both parties have rested, as in the case at bar.

This departure from the original opinion requires, on the weight of evidence, that this court shall find that all of the property and estate in question here, except the $15,000 check, the accumulation of checks amounting to about $5,000, the joint savings account amounting to $20,648.56, and the joint checking account amounting to $2,059.87, was the property of Willard Hammond, and that the plaintiff was entitled to its possession as guardian; that the properties not excepted were wrongfully converted to her own use by the defendant, that such properties were constructively in her trust, and that she should be required to deliver these properties, together with the accretions thereto, to the plaintiff.

The decree of the district court, therefore, to the extent it was appealed from, is reversed, with directions to said district court to enter decree and judgment in conformity with the opinion as modified by this supplemental opinion.

REVERSED, WITH DIRECTIONS.

WARREN MULHALL, APPELLEE, V. STATE OF NEBRASKA, APPELLANT.

299 N. W. 481

FILED JULY 29, 1941. No. 31135.

1. **Public Lands.** To declare a forfeiture for failure to pay interest on a contract for the sale of school land is mandatory under section 72-219, Comp. St. 1929; and when no such forfeiture is declared the contract remains in full force and effect.
2. ———. The board of educational lands and funds has no power in conveying land by deed to add restrictions not contained in the original sales contracts.
3. ———. The description "S.E.¼ of the S.W.¼ * * * containing forty acres, more or less," was sufficient to carry with it all accretions.
4. **Waters.** Accretions must be expressly excepted or reserved in a conveyance to avoid a transfer.
5. ———. "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Comp. St. 1929, sec. 76-106.

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

Walter R. Johnson, Attorney General, and *Robert A. Nelson,* for appellant.

Frederick M. Deutsch and *Sifford & Wadden, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

THOMSEN, District Judge.

This action is brought by the plaintiff, appellee, against the defendant, appellant, to quiet title to lands in Dixon county, Nebraska. Defendant filed cross-petition to quiet title to the accretions to such land. The plaintiff also asked that defendant, and others, be enjoined from selling or offering to sell the land in question. The district court found in favor of the plaintiff, and against the defendant on its cross-petition, and the defendant appeals.

Under authority of chapter 72, art. 2, Comp. St. 1929,

section 72-201 *et seq.*, the commissioner of public lands and buildings is authorized to lease and sell school lands under certain conditions. July 1, 1914, in compliance with the statutes a certificate of sale to certain school land was issued to Jacob Bottorff after auction at which he was the successful bidder. The consideration was $1,000, one-tenth of the purchase price being then paid, the balance at the end of 20 years. The contract further provided for annual interest payments. The property described was "The Southeast Quarter of the Southwest Quarter (SE ¼ SW ¼) of Section 16, in Township 31, Range 6 East of the 6th Principal Meridian, containing forty acres, more or less, according to the United States survey thereof."

Two assignments of this contract were made: The first from Bottorff to John Mulhall on February 10, 1920, and the second from John Mulhall to his son, Warren Mulhall (the plaintiff), on April 17, 1923. Both assignments were properly recorded in the office of the land commissioner. Both assignments described the land as above with the addition of the words "and the accretion thereto."

The events between the immediate parties prior to March 28, 1938, are immaterial to a decision, but on that day the commissioner of public lands and buildings mailed to the plaintiff a letter stating that the time limit for the payment of the purchase price on the foregoing sale contract had expired and that, "unless the balance of this contract is paid in the near future or proper arrangements made for an extension of time, the land covered by this contract will be advertised and offered for sale." Further correspondence shows that he owed delinquent interest for two years. The plaintiff asked for an extension of time, and hearing before the board on his application was set for May 9, 1938. On that day the board met and by unanimous action canceled plaintiff's contract, but this action of the board on a hearing on May 23, 1938, and June 9, 1938, was set aside, it being shown that plaintiff had arranged for a continuance of the first hearing before May 9 because of the inability of his counsel then to be present, and

that the secretary of the board had agreed to such continuance. At the June 9 meeting of the board its action of May 9 was definitely rescinded, Mr. Mulhall was given 30 days within which to make payment of principal and interest, and it was decided to offer to Mr. Mulhall a deed to only the 40 acres, specifically excluding accretions. Mr. Mulhall declined the proffered deed, but demanded a deed with land described as in the original contract. The principal and interest have been paid in part to the county treasurer, and in part into court, so that both are available to the state. Proper tenders had theretofore been made, so no question is presented in that respect. The board never again declared the contract canceled or forfeited for failure to pay delinquent interest or principal. To declare a forfeiture for failure to pay interest is mandatory under section 72-219, Comp. St. 1929. Thus, the contract is still in full force and effect. See generally *Hile v. Troupe*, 77 Neb. 199, 109 N. W. 218; *State v. Cowles*, 90 Neb. 839, 134 N. W. 959; *Stock Yards Nat. Bank v. Wyman*, 130 Neb. 113, 264 N. W. 157; *Spahr v. Godfrey*, 130 Neb. 539, 264 N. W. 560. *Richardson v. Pratt*, 20 Neb. 196, 29 N. W. 382, and *State v. Clark*, 39 Neb. 899, 58 N. W. 585, cited by defendant, are not in conflict with this conclusion, although decided under the old law, since superseded by section 72-219.

The plaintiff contends that the board of educational lands and funds, when presented with full payment of principal and interest, was bound to issue a deed in conformity with the sales certificate, and had no power to add restrictions or reservations, first, because the sale certificate controlled by its description the extent of property, with whatever legal implications the wording might bear, which the state had agreed to sell and the purchaser had agreed to buy; and, second, that such board is a creature of law and has no power to dispose of educational lands other than in the manner set forth in the statute; that since the statute, under which it operates, does not authorize the board to sell less than a fee, it has no power to exclude accretions

from the land offered to be sold, citing *State v. McKelvie*, 111 Neb. 224, 196 N. W. 110. In that case the sale certificates reserved mineral and other rights, and the court held the board was not authorized to make such reservations. In the instant case it would seem that, if reservations of additional land acquired by accretion were made in the sale certificate, a sale of the fee to the original 40 acres alone might be within the authority granted to the board. Since such reservations were not made in the sale certificate, this second point of the plaintiff's reasons we need not now decide. On the first point, however, we agree. The board had the right to declare a forfeiture for nonpayment of interest, proceed with a resale of the property as provided by statute, or grant further time for payment, to a certain extent discretionary, or to receive payment, and, if in full, then to issue a deed in accordance with the terms of the sale certificate. The original sale certificate determined the description to be followed, and the area therein agreed to be sold could not be limited or enlarged in the deed. The legal connotations were without the board then to avoid, the state having in the sale certificate bound itself to sell the quarter of the quarter-section as described.

When the sale contract with Bottorff was made in 1914 the Missouri river was probably a city block to the east of the east line of the forty. The original United States survey placed the river partly along the east side of the quarter, and as late as 1886 the river had moved westward through the forty and later only a few feet east from the line on the south and about two-thirds of a block on the north. The original survey showed the tract to contain 48.80 acres—that portion of the southeast quarter of the southwest quarter and the southwest quarter of the southeast quarter of section 16 which the river had left unplowed —and was known as lot five, when conveyed by the United States of America to the state of Nebraska. From a point directly east of the tract in question to a point directly north, the river turns and describes a wide arc. The line thus made, in determining accretions, is proportionately

divided among the adjacent landowners, and as a consequence the accretions to this parcel go in a northeasterly direction, not directly easterly.

When in 1914 Bottorff became the buyer, such a small area of accretion land, five to eight acres in all, adjoined the quarter that, had it so remained, no question would probably have arisen; but since then the river has gradually moved eastward so that now to the northeast—the direction to which accretions in this instance are measured —about 78 acres of new land has formed. The main contest is for this additional land.

Testimony as to what quantity of land the original buyer thought he was receiving and that the then board estimated the land's value at $25 an acre is not impressive nor controlling. The small quantity of accretions then existing—a width along the forty of only about 20 rods, barely enough for comfort from the ravages of the Big Muddy—would hardly be considered, or, if considered, would be included in the clause "more or less." Furthermore, such testimony was inadmissible, under all the circumstances. What was intended to be conveyed must be determined from the instrument. *Carr v. Miller,* 105 Neb. 623, 181 N. W. 557; *Eiseley v. Spooner,* 23 Neb. 470, 36 N. W. 659; 18 C. J. 277 *et seq.* In any event, the description in the contract controls and carries with it whatever accretions had then formed. *De Long v. Olsen,* 63 Neb. 327, 88 N. W. 512. Accretions attach in the same manner as fixtures and growing trees, require no special description, and must be expressly excepted or reserved to avoid a transfer. See generally 45 C. J. 571; Note, 58 L. R. A. 199; *Stern v. Fountain,* 112 Ia. 96, 83 N. W. 826; *Haynie v. May,* 217 Ia. 1233, 252 N. W. 749; *Jefferis v. East Omaha Land Co.,* 134 U. S. 178, 10 S. Ct. 518; *Topping v. Cohn,* 71 Neb. 559, 99 N. W. 372. *Stavanau v. Gray,* 143 Minn. 1, 172 N. W. 885, cited by defendant, is a description by metes and bounds, and yet is contrary to the weight of authority. Shepard's Citations show it cited but once on the subject under discussion and then discredited. *Haynie v. May, supra.* The

description as given above in the quoted portions of the contract was sufficient to carry with it all accretions.

It seems established by the evidence that, when the state of Nebraska acquired the land under discussion, the tract was then located on the river and thus the title to the accretion at the time of sale to Bottorff would pass to him and later to his successors. *Topping v. Cohn*, 71 Neb. 559, 99 N. W. 372; *Jefferis v. East Omaha Land Co., supra.* "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." Comp. St. 1929, sec. 76-106. See *Carr v. Miller*, 105 Neb. 623, 181 N. W. 557. The rights of the state in conveying such land are measured by the same law as that of a private individual. *Bigelow v. Herrink*, 200 Ia. 830, 205 N. W. 531; 9 C. J. 181.

Having reached the foregoing conclusion, it follows that the trial court's decree is in all respects correct, and it is therefore

AFFIRMED.

IN RE ESTATE OF JOHN KOPAC.
OLLIE KOPAC, APPELLEE, V. EMIL KOPAC, APPELLANT.

299 N. W. 489

FILED AUGUST 1, 1941. No. 31107.

1. **Homestead.** In a proceeding to administer and settle an estate, the county court has jurisdiction to set aside to a widow for life the unencumbered homestead of her deceased husband.
2. ———. On a contested application to the county court for an order setting aside to a widow for life a homestead estate in a 160-acre farm, evidence reviewed *held* sufficient to prove that the farm, unencumbered, was owned by the husband and occupied by him and applicant at the time of his death and that applicant was his widow.
3. **Appeal.** A litigant who is not entitled to any relief in the litigation, as shown by the evidence, is not aggrieved by the failure of the court to grant him a jury trial.

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

Edward Asche and *Lloyd L. Pospishil,* for appellant.

Cook & Cook and *Joe R. Broz, contra.*

Heard before ROSE, EBERLY and YEAGER, JJ., and THOMSEN and WENKE, District Judges.

ROSE, J.

In a proceeding to administer and settle the estate of John Kopac who died intestate February 6, 1939, Ollie Kopac, as his widow, petitioned the county court of Colfax county to assign to her for life a homestead in the northeast quarter of section 28, township 19, range 3, Colfax county. She alleged she was the wife of John Kopac at the time of his death; that he owned the land in fee; that it constituted his homestead and was occupied as such by him and petitioner; that there were no creditors of the estate and that his personal property was sufficient for payment of the costs and expenses of administration.

In formal objections to the granting of the petition Emil Kopac, an heir at law, twice admitted that the land in controversy was the homestead of John Kopac, but alleged that Ollie Kopac was not his wife and not entitled to the homestead. Later, in amended objections, he denied the land was the homestead of John Kopac at the time of the latter's death.

Upon a trial of the issues the county court found that the allegations in the petition of Ollie Kopac were true and assigned her husband's homestead of 160 acres of land to her for life. Objector, Emil Kopac, appealed to the district court, where the judgment was the same as that of the county court. From the judgment of the district court Emil Kopac appealed to the supreme court.

It is insisted by the objector that the county court did not have power to determine title to real estate or to assign a homestead to petitioner. In determining the homestead issue in the settlement of decedent's estate, the county court did not adjudicate the title to real estate, but found the facts on which the statute of descent passed the home-

stead title to the widow. It is settled law that the county court has jurisdiction to set aside to a widow for life the homestead of her deceased husband. *Fischer v. Sklenar,* 101 Neb. 553, 163 N. W. 861; *In re Estate of Robertson,* 86 Neb. 490, 125 N. W. 1093; *Guthman v. Guthman,* 18 Neb. 98, 24 N. W. 435; *Tyson v. Tyson,* 71 Neb. 438, 98 N. W. 1076; *Draper v. Clayton,* 87 Neb. 443, 127 N. W. 369.

To prove in the district court on appeal the allegations of her petition, Ollie Kopac introduced in evidence copies of the following authenticated documents: Duly verified affidavit of herself and John Kopac for a marriage license, February 15, 1932; their marriage license issued by the county judge of Dodge county pursuant to their affidavit; their certificate of marriage by the county judge of Dodge county February 15, 1932. On the witness-stand petitioner testified to the facts stated in the foregoing documents; to her marriage to John Kopac February 15, 1932; to his death February 6, 1939; to being his wife before his death and his widow since. She testified further that she was an unmarried woman when she and John Kopac were married; that they lived together as husband and wife until the latter's death; that she had no children living; that she was John Kopac's first wife. The marriage was in compliance with the law of Nebraska. *Collins v. Hoag & Rollins,* 122 Neb. 805, 241 N. W. 766. The evidence proves that both were eligible for marriage February 15, 1932; that she became the lawfully wedded wife of John Kopac on that date and lived with him as his wife until his death, February 6, 1939. The burden was on Emil Kopac, heir at law, to prove his plea that Ollie Kopac was not the wife of John Kopac, but he utterly failed to do so as shown by the record and by the findings of the county and the district courts.

Was the quarter-section of land as a homestead properly set aside to the widow for life? It was stipulated by the parties at the trial in the district court that John Kopac owned in fee at the time of his death the land described in the petition of the widow; that there were no creditors;

that personal property in the estate of decedent was sufficient to pay the expenses and costs of administration. The evidence proves the following facts: During the married life of John Kopac and wife the land claimed as a homestead was a farm and the first dwelling-house thereon was occupied by a tenant who did not have a lease in writing after 1935, but said the rent was whatever he could pay. In the spring of 1936 John Kopac built a home on the southeast corner of the farm, fenced two or three acres around it to protect the improvements, moved into the home with his wife, made garden, raised chickens, received a portion of the proceeds of the farm as rents and made the farm the home of himself and wife until his death.

The tenant on the farm did not intervene in this proceeding to traverse the homestead claim of petitioner or to assert for himself a homestead or to protect a formerly acquired homestead, but Emil Kopac, objector, put the tenant on the witness-stand to prove that the latter had in the same land a homestead estate which defeated the claim of petitioner. The record of the district court shows that the decree assigning the homestead to petitioner was entered June 26, 1940, and that the testimony of the tenant shows he previously vacated the premises February 29, 1940. The district court properly held that the evidence was not sufficient to support a finding that the farm was the homestead of the tenant when John Kopac died, February 6, 1939.

The objector contends also that the district court erroneously deprived him of a jury trial on his appeal from the county court to the district court. The contention is without merit. In a jury case the court enters the final judgment. A verdict in favor of objector herein, if rendered, would have to be set aside as unsupported by the evidence. There was no meritorious defense to the widow's petition. The decree of the district court was the only one permissible on the record made. The objector, therefore, was not prejudiced by the denial of a jury trial.

AFFIRMED.

ETHEL ROSS, ADMINISTRATRIX, APPELLEE, V. EDWARD H. CARROLL ET AL., APPELLANTS.

299 N. W. 477

FILED AUGUST 1, 1941. No. 31167.

1. **Automobiles.** In an action under Lord Campbell's Act, evidence reviewed *held* sufficient to support the jury's finding that the proximate cause of a motor-vehicle collision resulting in the death of plaintiff's husband was the negligence of defendants, and also *held* sufficient to support a verdict in favor of plaintiff for $4,000.
2. ———. In an action under Lord Campbell's Act, the jury may be permitted to consider the last clear chance doctrine, where defendants by the exercise of ordinary care had time and opportunity to avoid the fatal accident and failed to do so.
3. **Appeal.** Harmless error in the instructions of the court to the jury is not a sufficient ground for the reversal of a judgment.

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

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

Kenneth S. Wherry and *John C. Mullen, contra.*

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

ROSE, J.

This action was commenced in the district court for Richardson county under Lord Campbell's Act, Comp. St. 1929, sec. 30-809, to recover from defendants $25,000 in damages for alleged negligence resulting in a collision between motor vehicles on a public highway and in the death of Chester Morgan Ross whose widow, Ethel Ross, is plaintiff and administratrix of the estate of decedent.

The collision occurred in Gage county on the morning of June 20, 1938, on a graveled curve in the highway at the intersection eight miles east and one mile north of Beatrice between that city and Vesta. On the way from Vesta to Beatrice, Ross, a guest, was riding in a 1925 Model T

Ford roadster with the owner, Alva Ross Moslander, at the wheel. Neither driver nor guest was conscious after the collision and both died that day in a hospital at Beatrice.

The other car in the collision was an International truck, weighing at the time about 8,500 pounds, owned by Edward H. Carroll and Harold A. Morgan, partners as Carroll-Morgan Company, defendants, and driven by Melvin Neff, also a defendant.

Among the alleged acts of negligence imputed by plaintiff to defendants are the following: Excessive speed on a curve where vision in the course of travel was obstructed at the intersection; failure to give a signal when approaching the intersection or when driving on the curve; driving on the wrong side of the highway on a curve.

In an answer to the petition defendants denied the negligence imputed to them by plaintiff, and alleged that the proximate cause of the collision and of resulting damages was the negligence of Ross and Moslander. The reply to the answer was a general denial.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $4,000. From judgment therefor, defendants appealed.

The principal ground urged by defendants for a reversal is insufficiency of the evidence to sustain a verdict in favor of plaintiff. It is earnestly argued that the trial court erred in refusing to direct a verdict in favor of defendants at the close of plaintiff's evidence and again when both sides rested.

At a former trial the district court directed a verdict for defendants at the close of plaintiff's evidence. From a dismissal of the action plaintiff appealed to the supreme court, where the dismissal was reversed and the cause remanded for further proceedings. *Ross v. Carroll,* 138 Neb. 1, 291 N. W. 726. The issues were the same at both trials. Undisputed facts are: The driver of the Ford was on his way from Vesta to Beatrice, going around the curve described. The driver of the truck was going in the op-

posite direction on the same curve. The vehicles collided on the curve. The two occupants of the Ford were fatally injured by the impact and did not live to tell the story. The Ford was practically demolished. The truck was turned on its right side. There is evidence that it entered the curve at a speed of 30 or 35 miles an hour; that visibility of the highway in the course of travel was limited and that no horn was sounded. Under the pleadings, this was the principal issue of fact: Was the negligence of defendants' driver the proximate cause of the collision? On behalf of plaintiff it is insisted that she proved the affirmative by circumstances and by the position and condition of the two cars after the collision. Some of plaintiff's witnesses who came on the scene before the cars were removed testified to the effect that part of the truck was across the center line of the highway on the wrong side—in the Ford's lane of travel; that broken glass and oil were observed there, indicating the place of impact, and that the Ford was on the proper side of the highway.

Plaintiff's evidence was reviewed at some length in the former opinion and, after stating the rule for determining its sufficiency, the following conclusion was announced:

"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." *Ross v. Carroll,* 138 Neb. 1, 291 N. W. 726.

The import of the evidence adduced by plaintiff at the former trial is the same as her evidence herein. There is, however, an additional item of evidence in the record now under consideration. Stella Moslander, mother of Alva Ross Moslander, testified that, on the day of the fatal collision, she met Edward H. Carroll and Melvin Neff in the emergency room of the hospital to which Ross and Moslander, fatally injured and unconscious, had been

taken, and heard a conversation in which Carroll said to Neff, "See what you have done," and Neff said, "I know I was driving too fast and I was too far past the center of the road." This conversation was positively denied by both Carroll and Neff, but each admitted he was present at the time and place indicated and then and there met the witness and saw the two victims of the fatal collision. Testimony that the truck came to rest on the wrong side of the center of the highway was also contradicted by witnesses who testified on behalf of defendants, but the credibility of the witnesses on both sides and the weight of their testimony were questions for the jury, where, as in the present instance, there were no uncontradicted physical facts or circumstances to disprove the facts to which the witnesses for plaintiff testified or to show they were unworthy of belief.

The evidence adduced by plaintiff was examined on the former appeal and again on motion for a rehearing and held sufficient to support a verdict in favor of plaintiff. On the second trial the verdict was in her favor and on the second appeal the reviewing court has reached the conclusion that the verdict was sustained by the evidence. The assignments of error directed to insufficiency of the evidence are therefore overruled.

It is further contended that the judgment should be reversed on the ground that the district court erroneously gave an instruction containing the last clear chance doctrine to the effect that, if the driver of the truck discovered the peril of the occupants of the oncoming Ford in time to avoid the collision by the exercise of ordinary care and failed to do so, defendants may be held liable to plaintiff for resulting damages. The objection to this instruction is that the doctrine of the last clear chance presupposes time for action and opportunity to prevent injury, which defendants say the driver of the truck did not have in the case at bar, citing *Nielsen v. Yellow Cab & Baggage Co.*, 130 Neb. 457, 265 N. W. 420, and *Diehm v. Dargaczewski*, 135 Neb. 251, 280 N. W. 898. The evidence tends to prove

that there was negligence of the truck driver who saw the Ford when it was 30 or 35 feet away; that the left front corners of both cars were damaged by the impact, indicating a turn of the truck to the right would have avoided a collision; that the driver of the truck applied the brakes but did not turn to the right; that there was space to the right of the gravel for a right turn to avoid the collision; that the Ford was in the proper lane of travel. With evidence tending to prove such facts, error in the giving of the instruction containing the last clear chance doctrine is not affirmatively shown.

Instructions on the measure of damages are criticized but are not prejudicial to defendants, if erroneous. There is nothing in the record to indicate that the jurors were prompted by passion or prejudice to render a verdict in favor of plaintiff for $4,000. That amount is not excessive under the evidence, which shows that Chester Morgan Ross had good health; that he was 25 years of age at the time of his death; that he was a good carpenter capable of earning, and had been paid, 85 cents an hour for his work; that his expectancy of life was 37 years; that he died June 20, 1938, and left a wife who gave birth to a child October 14, 1938. On the facts of the record as found by the jury the verdict should not be held excessive or the instructions on damages prejudicial to defendants. *Lindley v. Wabash R. Co.*, 120 Neb. 195, 204, 231 N. W. 812, 233 N. W. 450. Reversible error has not been found and the judgment is

AFFIRMED.

PATHFINDER LIFE INSURANCE COMPANY, APPELLEE, V. DANIEL W. LIVINGSTON ET AL., APPELLANTS.

299 N. W. 537

FILED AUGUST 1, 1941. No. 31171.

1. **Action.** "Where one has a valid cause of action against another, his motive in instituting it is immaterial, and the fact that it is inspired by malice is no defense." *Jacobson v. Van Boening*, 48 Neb. 80, 66 N. W. 993.

2. **Insurance.** Policyholders of a mutual life insurance company may bring and maintain in the district court a suit in equity to require its officers and directors to account for insurance funds which they have misappropriated and in which the policyholders have an interest and to recover in favor of the insurance company judgment therefor, where the latter and the insurance department failed to sue for such redress.

APPEAL from the district court for Hall county. EDWIN P. CLEMENTS, JUDGE. *Reversed and dismissed.*

Lloyd E. Peterson, Harry Grimminger and *Daniel W. Livingston,* for appellants.

Ray M. Higgins and *Sterling F. Mutz, contra.*

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

ROSE, J.

This is a suit in equity brought in the district court for Hall county for a permanent injunction preventing plaintiffs in equity in another independent suit in equity from proceeding further therein and from commencing or prosecuting any other proceeding of the same nature.

It is shown by the record herein, the second suit in equity, that Daniel W. Livingston and Joel H. Andrews, policyholders in the Pathfinder Life Insurance Company, on behalf of themselves and all other policyholders similarly situated, plaintiffs, brought in the district court for Hall county a suit in equity against Stanley D. Long, John E. Hoye, John Stevens, E. H. Lorenzen, G. S. Cooley, F. V. Hulquist, F. A. Robertson and the Pathfinder Life Insurance Company, defendants, alleging that the individuals named as defendants are officers and directors of the insurance company and as such unlawfully expended reserve funds of the insurance company and misappropriated $101,319.34 of insurance funds, and that the policyholders prayed for an accounting of misappropriated funds and for judgment therefor in favor of the insurance company against its officers and directors. It is further shown by the record herein that the policyholders named alleged in

their original petition in equity that by extravagant and profligate expenditure of insurance funds the officers and directors of the insurance company caused its insolvency and that there was a prayer for the appointment of a receiver.

To prevent prosecution of the suit of the policyholders, based on the petition in equity containing the allegations summarized, the Pathfinder Life Insurance Company commenced a second suit in equity in the district court for Hall county against Daniel W. Livingston, Joel H. Andrews and Harry Grimminger in which it alleged, among other things, that the suit of the policyholders was not brought in good faith but to harass, annoy and damage the insurance company. Another alleged ground for an injunction to prevent the prosecution of the former suit was in substance that the authority to bring a suit for the relief sought by the policyholders is, in the first instance, exclusively in the department of insurance. On pleadings that put these allegations in issue, the parties in the second suit went to trial before the district court. The decree reads thus:

"It is therefore considered, ordered, adjudged and decreed that the defendants, Daniel W. Livingston, Joel H. Andrews and Harry Grimminger be permanently enjoined from pursuing the action in the district court of Hall county, Nebraska, entitled 'Daniel W. Livingston and Joel H. Andrews, etc., plaintiffs, v. Stanley D. Long et al., defendants,' or in any manner carrying on said action by filing pleadings or amended petitions or otherwise prosecuting the said action in court, and enjoining said defendants from taking depositions of any witnesses whomsoever in said cause; that the defendants and each of them be enjoined from filing any additional actions in the district court based upon such claimed allegations and enjoined from bringing other actions against the plaintiff of a similar character in the district court."

From this decree the policyholders appealed to the supreme court.

As a ground for the injunction and as a justification for the decree, counsel argue that the suit of the policyholders was not brought in good faith but to harass, annoy and damage the company. On this proposition *Shevalier v. Stephenson,* 92 Neb. 675, 139 N. W. 233, is cited. That case is not in point. The prosecutions enjoined were successive actions brought and dismissed, plaintiff refusing to go to trial. The policyholders in their suit insisted on prosecuting it, but were restrained at the suit of the insurance company from doing so. The rule applicable to this feature of the controversy herein has been stated as follows:

"Where one has a valid cause of action against another, his motive in instituting it is immaterial, and the fact that it is inspired by malice is no defense." *Jacobson v. Van Boening,* 48 Neb. 80, 66 N. W. 993. See, also, *Cleland v. Anderson,* 66 Neb. 252, 92 N. W. 306; *Cobbey v. State Journal Co.,* 77 Neb. 619, 110 N. W. 643; *Flinn v. Fredrickson,* 89 Neb. 563, 131 N. W. 934.

The insurance company also relies on exclusive jurisdiction of the insurance department of the state, in the first instance, to commence and prosecute an action for the redress sought by the policyholders in their suit against the insurance company, its officers and directors. This position is untenable. One purpose of the suit of the policyholders, as shown by their petition, was to require the officers and directors of the insurance company to account for alleged misappropriated insurance funds in which the policyholders had an interest and to recover judgment against the wrong-doers therefor. Their hostility to an accounting in the district court is shown by their resort to injunction to prevent it. The district court was empowered by the Constitution to redress such wrongs in equity, a jurisdiction not taken away by the insurance code or by any other legislative enactment, a power not conferred on any other tribunal. This question of jurisdiction was discussed at length and answered adversely to the position of the insurance company in the recent case of

Clark v. Lincoln Liberty Life Ins. Co., 139 Neb. 65, 296 N. W. 449. The injunction was unauthorized and is reversed and the suit in which it was granted dismissed.

REVERSED AND DISMISSED.

RESSIE MOSLANDER, ADMINISTRATRIX, APPELLEE, V. EDWARD H. CARROLL ET AL., APPELLANTS.
299 N. W. 479

FILED AUGUST 1, 1941. No. 31226.

Death. In an action under Lord Campbell's Act, evidence reviewed *held* sufficient to support the jury's finding that the proximate cause of a motor-vehicle collision resulting in the death of plaintiff's husband was the negligence of defendants, and also *held* sufficient to support a verdict in favor of plaintiff for $5,500.

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

Chambers, Holland & Locke and *Paul P. Chaney*, for appellants.

Kenneth S. Wherry and *John C. Mullen, contra.*

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

ROSE, J.

This action was commenced in the district court for Richardson county under Lord Campbell's Act, Comp. St. 1929, sec. 30-809, to recover from defendants $25,150 in damages for alleged negligence resulting in a collision between motor vehicles on a public highway and in the death of Alva Ross Moslander whose widow, Ressie Moslander, is plaintiff and administratrix of decedent's estate.

The collision occurred in Gage county on the morning of June 20, 1938, on a graveled curve in the highway at the intersection eight miles east and one mile north of Beatrice between that city and Vesta. On the way from Vesta to Beatrice Moslander was driving a 1925 Model T

Ford roadster accompanied by Chester Morgan Ross, a guest. Neither guest nor driver was conscious after the collision and both died that day.

The other car in the collision was an International truck owned by Edward H. Carroll and Harold A. Morgan, partners as Carroll-Morgan Company, defendants, and driven by Melvin Neff, also a defendant.

Among the alleged acts of negligence imputed by plaintiff to defendants are the following: Excessive speed on a curve where vision in the course of travel was obstructed at the intersection; failure to give a signal when approaching the intersection or when driving on the curve; driving on the wrong side of the highway on a curve.

In answer to the petition defendants denied the negligence imputed to them by plaintiff, and alleged that the proximate cause of the collision and of the resulting damages was the negligence of Moslander and Ross. The reply to the answer was a general denial.

Upon a trial of the cause the jury rendered a verdict in favor of plaintiff for $5,500. From judgment therefor, defendants appealed.

The claim of plaintiff is based on the negligence and collision involved in *Ross v. Carroll, ante,* p. 350, 299 N. W. 477. The issues of fact and law in both cases were practically identical and in controlling respects the evidence was the same. The appeals were submitted and considered together. The evidence herein shows that Alva Ross Moslander was 24 years of age at the time of his death, June 20, 1938; that his health had been good; that he left a wife and two children, and that his wife gave birth to a third child January 27, 1939; that the husband had earned $56 a month and had a life expectancy of 38 years. The record contains nothing to indicate that the jury were prompted by passion or prejudice in finding the damages to be $5,500, nor is that amount excessive in the light of the evidence. For the reasons stated in the opinion in the *Ross-Carroll* case, the judgment below is

AFFIRMED.

ALFONSE DOBRUSKY V. STATE OF NEBRASKA.
299 N. W. 539

FILED AUGUST 1, 1941. No. 30976.

1. **Criminal Law.** The holding of an accused person for trial in the district court at the conclusion of a preliminary examination upon a valid complaint gives that court jurisdiction until he be discharged "by due course of law."
2. **Indictment and Information.** The order of the district court sustaining a motion to quash the information filed by the prosecuting officer, unaccompanied by a judgment dismissing the proceedings or discharging the defendant, does not operate to terminate the proceedings or discharge the defendant "by due course of law."
3. ———. Under the provisions of section 29-1811, Comp. St. 1929, defects which might have been attacked by a motion to quash or a plea in abatement are waived when the defendant voluntarily pleads to the general issue.
4. **Evidence** in the record examined, and *held* ample to sustain the verdict and sentence.

ERROR to the district court for Otoe county: WILMER W. WILSON, JUDGE. *Affirmed.*

Lloyd E. Peterson, for plaintiff in error.

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

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

EBERLY, J.

The State in this proceeding filed its "amended information" in the district court for Otoe county, Nebraska, on October 9, 1939, charging plaintiff in error, Alfonse Dobrusky, herein designated as defendant, with the crime of manslaughter. This information sets forth, in substance, that at and within the said county on or about the 12th day of July, 1939, the defendant did then and there one Delphine Turille, unlawfully and feloniously, but without malice, kill and slay. This charge grew out of an automobile accident on that date in which Delphine Turille, riding

with Dobrusky, was killed. The trial resulted in a verdict of guilty, and from the order of the trial court overruling defendant's motion for a new trial, and from the penalty imposed by the court, defendant prosecutes error to this court.

The assignments of error, constituting the burden of the defendant's appeal, are as follows: (1) That the trial court erred in sustaining the motion of the state to reconsider the court's order sustaining defendant's motion to quash the original information filed on September 2, 1939; (2) the court erred in permitting the amended information to be filed on October 9, 1939; (3) that, after the order quashing the original information, the trial court had no further jurisdiction over the person of the defendant or to try or determine any further issues in this proceeding; (4) that the evidence in the record is insufficient to sustain the verdict or the sentence imposed by virtue thereof; (5) that the court erred in refusing to grant a new trial because of newly discovered evidence.

The following constitutes the important chronology in this case:

September 2, 1939: Original information filed by the state.

September 16, 1939: Motion of defendant to quash information submitted to the court.

September 18, 1939: Motion to quash information sustained by the court, but the court's order as thus entered did not include a dismissal of the proceedings or a discharge of the defendant.

September 18, 1939: Order entered adjourning May, 1939, term of district court *sine die.*

September 18, 1939: September, 1939, term of said court opened.

September 26, 1939: State given leave to withdraw motion to reconsider the former ruling of the court sustaining defendant's motion to quash original information, and also to withdraw an amended information filed September 19, 1939.

September 28, 1939: Defendant filed special appearance,

"for the sole purpose of objecting to the jurisdiction of the court over the person of the defendant or to try or determine any further issues in this proceeding for the reason that the court is without jurisdiction."

October 7, 1939: Special appearance of defendant overruled, motion of state to reconsider order of September 18, 1939, quashing information, and state was given leave to file an amended information within five days, a copy of which is to be served upon the defendant.

October 9, 1939: Amended information with proof of service filed.

February 13, 1940: Defendant appeared in court and pleaded not guilty to the amended information, and the cause was thereupon set for trial.

In view of the proceedings had, the challenge to the jurisdiction of the district court in the instant case cannot be sustained.

Our statutes contemplate that upon a complaint in writing charging a defendant named therein with the commission of a felony being filed with a magistrate, he shall proceed to hold a preliminary examination, and, "If upon the whole examination, it shall appear that an offense has been committed and there is probable cause to believe that the person charged has committed the offense, the accused shall be committed to the jail of the county in which the same is to be tried, there to remain until *he be discharged by due course of law,*" etc. (Italics ours.) Comp. St. 1929, sec. 29-506.

Further, "All recognizances taken under this title, together with a transcript of the proceedings, where the defendant is held to answer, shall be certified and returned forthwith to the clerk of the court at which the prisoner is to appear." Comp. St. 1929, sec. 29-509.

The holding of an accused person for trial in the district court at the conclusion of a preliminary examination gives that court jurisdiction. *Nelson v. People,* 38 Mich. 618.

In opposition to the above conclusion the defendant cites *Jones v. Wolfe,* 42 Neb. 272, 60 N. W. 563, as supporting

his contention that, "Where an information is quashed, without conditions, the court is without power or jurisdiction to proceed further with criminal proceedings." In *Jones v. Wolfe, supra,* we have presented the ordinary case of where a bill of exceptions is quashed in this court and we properly held there that, "After a bill of exceptions has been quashed it can be considered for no further purpose in the case in which it was originally filed in this court." But the quashing of the bill of exceptions did not determine the jurisdiction of the court over the appeal.

It will be noted that in its order of September 18, 1939, sustaining defendant's motion to quash the original information, the trial court neither dismissed the proceedings nor discharged the defendant. The situation thus presented may be said to be analogous to sustaining a general demurrer in a civil case, not followed by the dismissal of the action. At all events, it clearly appears from the record presented that the district court by the limitations of its order has, in effect, retained jurisdiction to have a disposal of this case made on the merits in the regular course of proceedings. At least it cannot be said that the mere sustaining of the motion to quash operated as a discharge of the defendant by due course of law, when the trial court refrained from entering such a judgment. On the other hand, the retention of jurisdiction is necessarily implied by the following express provisions of our Criminal Code: "When a motion to quash, or a plea in abatement, has been adjudged in favor of the accused, he may be committed or held to bail in such sum as the court may require for his appearance at the first day of the next term of said court." Comp. St. 1929, sec. 29-1810.

It is obvious that the jurisdiction of the trial court over the person of the defendant, and its power or jurisdiction to proceed further with this criminal proceeding, was not terminated by its order to quash the information entered on September 18, 1939, and this without reference to the terms of court in which the respective orders were entered.

The questions of proper practice in the matter of setting

aside the order of the trial court entered on September 18, 1939, and of permission given the county attorney to file an amended information are not necessary to the disposition of the instant case, and will not be determined.

It clearly appears that, after the overruling of the special appearance filed by the defendant, he appeared and pleaded not guilty to the so-called "amended information." It is not questioned but what the so-called amended information properly charged an offense of which the district court had jurisdiction, and when the accused pleaded the general issue thereto, he thereby waived all defects in the proceedings which might have been excepted to by motion to quash or by plea in abatement. *Green v. State,* 116 Neb. 635, 218 N. W. 432; *Huette v. State,* 87 Neb. 798, 128 N. W. 519; *Olsen v. State,* 114 Neb. 112, 206 N. W. 1.

Under the terms of the record in this case all objections based on proceedings had prior to the completion of the issues to be tried by the plea of not guilty have been waived by the defendant and may not be considered in his behalf.

The matter remaining for our consideration is the determination as to the sufficiency of the evidence to sustain the conviction.

We have carefully considered the evidence and do not find that the conduct of the county attorney complained of as misconduct is of such a character as to justify a reversal on that ground. We also find that the evidence in the record affords ample foundation for the introduction in evidence of a map of the *locus in quo,* and the rule of evidence excluding hearsay was not transgressed thereby.

The defendant presents no objection to the instructions given the jury by the trial court, but he urged that the evidence is insufficient to sustain the verdict.

It is admitted by the evidence that Delphine Turille was fatally injured in an automobile collision on July 12, 1939, on highway No. 2 in Otoe county, while being conveyed by the defendant in his automobile as his guest at the time of the accident. By the instruction with reference to this casualty, given by the court, to which no objections are

made, the trial jury were instructed "that the burden of proof is upon the state to prove by the evidence beyond a reasonable doubt that at the time and place of said collision the said defendant Alfonse Dobrusky was operating the automobile in which the said Delphine Turille was riding, and that the said defendant did unlawfully and wilfully operate said automobile on said highway in a careless, negligent and unlawful manner, and at a rate of speed greater than was reasonable and proper, having regard for the traffic and the use of the road, and the condition of the road, and at a rate of speed such as to endanger the life and limb of any person, and by so doing did cause the death of the said Delphine Turille."

The court further instructed the trial jury with reference to the law applicable to the case, as follows: "All motor vehicles entering or crossing state highways on which stop signs are erectd shall come to a full stop as near the right of way line as possible, before driving onto such state highway, and, regardless of direction, shall give the right of way to vehicles upon said highway."

The trial court also instructed the jury: "The laws of Nebraska further provide: '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) fifty miles per hour under other condits (conditions). (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 crossing an intersection, * * * 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.' "

The fatal accident occurred on highway No. 2, about two

miles west of Nebraska City. The terrain at this point is comparatively level. The highway is paved 20 feet in width. Two hundred feet north of the paved highway is situated the Ed Miller home. A north and south driveway from the highway affords ingress and egress to this home. At a point 1,015 feet east of this driveway a graveled county road, also extending from north to south, intersects highway No. 2. There is a stop sign located on this county road as it enters the highway from the north. Between 11 and 12 o'clock on the night of July 12, 1939, the defendant drove his car eastward over the highway, accompanied by his guest, Delphine Turille, and following at some distance an automobile that was ahead of him, going in the same direction. At about this same time William Schnittker approached highway No. 2 from the north on the county road in his automobile, and came to the stop sign and stopped. As he did, he noticed two cars approaching from the west on the highway, the first of which passed the intersection just as he was stopping. His testimony is that he then shifted into low gear, looked to the west again and saw a car, which was the defendant's, and the second of the two he had previously seen, approaching him then about a quarter of a mile away. He then continued onto the paved highway, crossed to the south side thereof, and was proceeding eastward on the south side of the highway going about 25 miles an hour. His tail lights were burning at this time. About 150 feet east of the road intersection he heard a noise, and the car from the west collided with the left rear portion of his automobile, damaging the same, and thus deflected by the force of the impact defendant's car left the pavement 30 feet further on, and thereafter for 46 or more feet made deep tracks in the north shoulder of the highway, then overturned and came to rest 195 feet east of the point of impact and 80 feet east of where Schnittker's car was stopped. Witness Miller, from his home, noted Schnittker's approach to the highway from the north, saw him stop, saw him start, then turn east on the highway with his tail-lights

burning; noted that, after the Schnittker car had started, he heard this Dobrusky car coming from the west, glanced south down his driveway and saw it go past; later he heard the noise of the accident, and then went down to where the Dobrusky car was lying. There is no evidence in the record of any automobile horn being sounded by the Dobrusky car. We will not attempt a recital of all the evidence introduced. However, the defendant had passed over the highway a few hours previous to the accident. He knew the conditions of the highway and the existence of the road intersection. There is ample evidence in the record, if believed by the jury, that fully establishes that at the time of the accident the defendant was recklessly driving his car at a rate of speed clearly greater than what was reasonable and proper, and in excess of 50 miles an hour; that, by reason of the excessive speed and reckless driving, his speed was not reduced as he approached the road intersection, and his car was so out of control that he failed to pass the automobile ahead of him, whose taillights were burning, but collided with the same, thus occasioning the fatal accident. The evidence as an entirety is ample, if believed by the jury, to sustain their verdict. In the face of the record we are unable to say they are mistaken.

We have carefully considered the matter of newly discovered evidence as presented by the defendant, in its entirety, and the locked brake to which this proof pertains appears rather as the result of the accident than as the cause of it. The entire matter invoked the discretion of the trial court, and we do not find it has been abused.

It follows that the verdict and sentence of the trial court are proper, and the judgment is

AFFIRMED.

IRENE BARKER, APPELLANT, V. SAFEWAY CAB COMPANY, APPELLEE.

299 N. W. 604

FILED AUGUST 1, 1941. No. 31117.

Evidence in the record examined, and *held* to support the judgment of the district court.

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

Gordon Diesing, for appellant.

Gross & Crawford, contra.

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

EBERLY, J.

In this action plaintiff set forth in her petition: "That on or about May 22, 1938, at about 6:00 p. m., plaintiff was a passenger for hire, riding in a Safeway cab, license 1-50511, and driven by Frank Hendrix. That defendant was driving said cab north on highway No. 73, down-hill and following several other cars; that as said defendant drove to the left side of said highway to pass around the car preceding him, the driver of the car in front also pulled to the left of the highway to pass around a car preceding him; that said defendant drove into the left rear of the car in front of him, which was driven by A. E. Nelson, and causing plaintiff to suffer severe bodily injuries as hereinafter more particularly set forth." Following this, plaintiff's petition set forth six specifications of negligence, including the charge that said cab driver was driving down-hill at a speed of approximately 40 miles an hour. Defendant's answer, in effect, denies that the driver of the taxicab was guilty of any carelessness or negligence in the premises contributing to or proximately causing any injuries to plaintiff; "and that the injury, if any received by the plaintiff, was due to her own contributory negligence." At the conclusion of the plaintiff's evidence the

trial court sustained defendant's motion for a directed verdict in its behalf and dismissed plaintiff's action. From the order of the district court overruling her motion for a new trial, plaintiff appeals.

The sole question is whether the proof presented by plaintiff establishes actionable negligence on part of defendant's driver.

The following may be said to be a summary of all the evidence: On Sunday afternoon, May 22, 1938, about 5:30 p. m., on a clear, sunny day, the highway being dry, Frank Hendrix, the cab driver, was driving north on paved highway No. 73, north of Florence, near Omaha, Nebraska. The paved portion of the highway at the place where the accident in suit occurred is about 18 feet wide, with a dirt shoulder on each side, and is a straight north and south road. Hendrix, the driver, with the plaintiff (his sister) riding in the front seat of the taxicab with him as a passenger, was trailing two other cars driving north, number one car (Hanna), number two car (Nelson). These two cars were proceeding along this highway approximately 30 miles an hour. When the cab driver got 30 to 40 feet behind the Nelson car, he blew his horn and started to pass the Nelson car. The west half of the highway was then clear and nothing was coming from the north. About the time Hendrix got to the Nelson car, Nelson suddenly got the same idea to pass the Hanna car in front of him. Without any warning horn from the Nelson car being heard in the taxicab, Nelson pulled to the left and right in front of the taxicab in which plaintiff was riding. Hendrix immediately put on his brakes, swerved to the left, but his right front fender struck Nelson's car on the left rear fender. Hendrix's car went off on the dirt on the west side of the road and the Nelson car went on down the highway. The impact of the two cars last referred to caused the injuries sustained by plaintiff, for which recovery is sought in this action.

As to the actual collision of the cars and the manner of its occurrence, Mrs. Irene Barker, the plaintiff, testified

in part as follows with reference to the driving of the taxicab by her brother, Frank Hendrix:

(On direct examination) "Q. And you had gone three or four miles north of Florence, and then do you remember whether or not you drove down a long hill? A. Yes, I do. * * * Q. And as you were going down the hill about how fast was Hendrix driving the taxicab? A. Well, I would say he was driving between 30 and 40 miles an hour. Q. And were there any other cars in front of your car? A. There were two. Q. And as you got within 40 feet of the rear of this car preceding your car, what did Mr. Hendrix do, the cab driver do? A. Why, he blew his horn and sped up to start to— Q. Did he turn any way? A. He pulled out. Q. Which way? A. To the left. Q. And as he pulled out, did the car in front of you do anything? A. Yes, sir; seemed like he had the same idea as my brother did and seemed like they both pulled out about the same time. Q. And as they both pulled out, about how far to the rear of this car in front of you was the taxicab? A. I would say about 35 or 40 feet. Q. And then as they both pulled out, what happened? A. Well, I don't know. Q. Were you knocked unconscious? A. I was."

On her cross-examination the following testimony was developed with reference to the driver of the taxicab: "Q. And as he got up to about 30 feet, you say, from the car ahead of him, he started to pass this car, didn't he? A. No, I would say about 35 to 40 feet he started to pass the car in front of him, seems like the car in front of him had the same idea to pass the one in front of him. Q. Well, when you got up about 35 or 40 feet, then, first he blew his horn, didn't he? A. Yes, sir. * * * Q. To indicate he was going to go past, I suppose? A. I suppose. Q. Well, any way, that was what he did, wasn't it? A. Yes. Q. Then he was about 35 feet behind this other car when he blew his horn and started to go around? A. Thirty-five or 40, yes. Q. And when he started to go round, Nelson got the same idea to go round in front of the car in front of him, didn't he? A. No, sir; seemed like about

the same time my brother started to go round, Nelson got the same idea. Q. *Did Nelson blow any horn?* A. *I didn't hear any.* Q. Well, Frank was about even with Nelson's rear end when Nelson pulled out, wasn't he? A. Oh, I wouldn't say so. Q. Well, that's what you all said after the accident, wasn't it? A. Well, I don't remember what I said after the accident; I was pretty sick and in bed when the statements were taken. Q. Well, now, that exhibit No. 3, that's your statement, isn't it? A. Yes, this is my signature down here. Q. Did you read this? A. I say, I suppose, I signed it. Q. Without reading it? A. I say I couldn't see. Q. Your signature seems to be in pretty good handwriting all right, doesn't it? A. Just about like I always write, I guess. Q. It says down at the bottom, 'I have read the above report, and it is true.' You didn't say that either, you think? A. It was read to me. Q. Oh, it was read to you before you signed it? A. Yes, sir. Q. Well, now, calling your attention to the third page, I will ask you if at that time you didn't state, 'We were driving towards the north down-grade on a paved highway, there were two cars ahead of us on the highway and all three of us were going quite slow, about 35 miles per hour; there is a center lane on the highway and before Frank started to pass the car he was driving to the right-hand side of this lane;' that's what you said, isn't it? * * * A. Yes, sir. Q. All right, now let's agree to this, and that's what you say now, isn't it? A. Yes, sir. Q. Next paragraph. 'As we got close to this car ahead of us, the road was clear up ahead, and Frank started to honk his horn, signaling that he was going to pass. Frank was driving at that time on the west side of the highway. Just as Frank got close to this car ahead of us, and the front end of our car got about even with the rear of the car ahead of us, this other car shot out to the west side of the highway without any warning, and he apparently wanted to pass the first car;' now, that's the way you told about it right after the accident, wasn't it? A. I don't remember putting it just that way. * * * Q. Well, that's the way

you told about it afterwards, wasn't it, before you had time to figure it out? A. I don't remember of saying it that way. Q. And then you went on and said, 'Frank applied his brakes immediately when this other driver pulled out, but it was too late, and he could not avoid striking the left rear fender of this other man's automobile.' Now, that's about the way the whole thing happened, wasn't it? A. I never knew anything about his putting on the brakes, I didn't know anything about that. * * * (Recross-examination) Q. Mrs. Barker, you remember the occasion when your deposition was taken, don't you? A. Yes, sir. Q. It was taken on March 23, 1940? A. Yes, sir. Q. And your lawyer was there with you at the time? A. Yes, sir. Q. And when the deposition was taken, there was a court reporter writing things down the same as Mrs. Finley is taking what is being said here this morning? A. Yes, sir. Q. And I asked you at that time to tell us how the accident happened, didn't I? A. Yes, sir. Q. And you were not sick that day, you didn't have any bandages on your eye that day, or anything, did you? A. No, sir. * * * Q. Or do you remember just what you did say? A. I remember the distance and I remember you asking me how the cars were passing, I remember that. Q. Well, aren't these the questions and answers when your deposition was taken on March 23: 'Q. Well, what happened at the time of the accident? A. Well, we were going down-hill and there were two cars in front of us, and my brother blew his horn and started to pass this other car, and I would say he was about 30 feet, and this other car took the same notion to pass the one in front of him, and my brother ran into him. Q. How many cars were in front of you? A. Two. Q. How far apart were the two cars, the two cars in front? A. Oh, I don't know. Q. Do you know how close the two cars were together. A. No, I don't. Q. But there were two cars ahead of you? A. Yes, sir. Q. And he came up behind the first one? A. Yes, sir. Q. And blew his horn? A. Yes, sir. Q. And started to go round that first car? A. Yes. Q. And as he started

to go round, the other car started to go round the car ahead of him? A. Yes. Q. Pulled right out in front of him, is that correct? A. It seemed like they both had the same idea at the same time. Q. You are sure that your brother blew his horn all right? A. I am sure. Q. And what did he do? A. After the accident? Q. No, after he blew his horn and started around, what did he do? A. He hit this other car.' And then a little later I asked you this question, referring to this very same accident: 'Q. You made a statement about all this after the accident, didn't you? A. Why, I just don't remember it now. Q. Did you make this statement: "As we got close to this car ahead of us, the road was clear up ahead, and Frank started honking his horn at him, and he was driving fast, and Frank was driving at that time on the west side of the highway. Just as Frank got close this car ahead of us, the front end of the other car got about even with the rear of the car ahead of us, and this other car shot out on the west side of the highway, without any warning, and he apparently went to pass the first car." That is the way it happened, was it?' By Mr. Diesing (Attorney for plaintiff): The plaintiff objects as already asked and answered. That is what she says now. * * * 'Q. Frank applied his brakes immediately when this other car pulled out, but it was too late, and he couldn't avoid striking the left rear fender of the other automobile;' and then you answered, 'Could not avoid striking that other fellow (question mark).' That's what you said when I put the question to you, wasn't it? A. I asked you that to see if that was what you meant, when you said this here. Q. Well, regardless of what you had in your mind or I had in my mind, that's what you said, wasn't it? That was your answer, wasn't it, or do you know? * * * A. I don't know what you mean, if that is supposed to be the same as my first statement? Q. No, I am asking you if that wasn't the answer you made when I took your deposition in March of this year, isn't that correct? A. Yes, sir. Q. Then the next question: 'And Frank applied his brakes

immediately when this other fellow pulled out, but it was too late, and he couldn't avoid striking the left rear fender of the other automobile?' And you answered, 'Couldn't avoid striking that other fellow?' * * * Q. (repeated) 'And Frank applied his brakes immediately when this other fellow pulled out, but it was too late, and he couldn't avoid striking the left rear fender of the other automobile.' Better look at it. (Referring deposition to witness) And then your answer: 'Couldn't avoid striking that other fellow?' * * * A. (No answer.) Q. Then the question 249: 'Any way, the cars came together that way?' And you answered 'Yes;' that's what you testified to, wasn't it, at the time your deposition was taken? A. (No answer). Q. Will you answer my question, please, so I can get it in the record? A. I don't remember what you said. Q. Well, I asked you that question and you made that answer at the time your deposition was taken? A. Well, I still don't remember saying anything about brakes. I don't remember ever saying that my brother put on his brakes, because I don't remember anything about that."

The witness James, whose evidence was originally introduced by plaintiff in the form of a deposition, testified as to how the accident happened, on cross-examination, as follows: "Q. Well, now, when you were driving north on this highway 73 there were two cars in front of you, weren't there? A. Yes, sir. Q. How far apart were the two front cars? A. Well, it looked like they was pretty close together. Oh, I would say 15, 20 feet between the two cars, something like that. Q. And then Frank turned out to the left to start to go round these two cars, didn't he? A. Yes, sir. Q. *Did he blow his horn before he started to go around them?* A. *I believe he did.* Q. These two cars in front of you were on their right side of the road? A. Yes, sir. Q. And Frank was on his right side of the road? A. Yes, sir. Q. *And when he got up behind them he blew his horn and then he started to swing to the left to pass them, didn't he?* A. *Yes, sir.* Q. And then as he swung to the left to pass them, when he was about 40 feet from the second car,

that swung right out in front of Frank, didn't it, to pass the car ahead of it? A. I don't understand. (Question read again) A. Well, when he turned out to pass this car he was about 40, 45 feet behind it, and practically at the same time, maybe just a moment afterwards, the same car—this car that he was going to pass—turned out too. Q. Now, let's go back a little. There were three cars going north on the right side? A. Yes, sir. Q. The first car, you don't know who that was? A. No, sir. Q. Then there was a second car. Do you know whose car that was? A. Yes, sir; that was a farmer. * * * Q. And then there was Frank's car, the one you were riding in? A. Yes, sir. Q. *Then when Frank got up behind Nelson's car, which was the second car, got up about 40 feet behind, he blew his horn, didn't he?* A. *Well, about 45 feet.* Q. *Well, all right, 40 to 45. He blew his horn and then he turned to the left to pass the two cars in front of him, didn't he?* A. *Yes, sir.* Q. And after he blew his horn and as he swung out to pass the Nelson car and the first car, the Nelson car swung right out in front of Frank to pass the first car, didn't he? A. Practically the same time. Q. *After Frank had blown his horn and started to swing, then the Nelson car did the same thing?* A. *Yes.* Q. And they were 40 to 45 feet apart at that time? A. Yes, sir. Q. Now, did this Nelson give any signal or blow any horn that he was going to turn out and pass the car in front of him? A. Well, I didn't see any, no. Q. And then as soon as Nelson pulled out in front of Frank to pass the car in front of him, I suppose Frank put on his brakes, didn't he? A. Well, yes. Q. And the right front part of Frank's car collided with the left side of the Nelson car? A. Left side of the rear end. * * * Q. Now, when Nelson turned out to pass the number one car, the car in front of him, he didn't give any signal that he was going to pass, did he; I mean that he was going to turn out or pass the car? A. Well, not that I know of. * * * Q. And he didn't hold out his hand or anything, that you saw? A. I didn't see a thing. Q. Do you know how many times Frank blew

his horn before he started to pass Nelson's car? A. Well, one time is all I heard. Q. A good loud horn. It was a clear day, was it? A. Yes, sir. Q. Were the windows down in your car? A. Yes, sir. Q. Sunshiny day? A. Yes, sir. Q. And the pavement was dry? A. Yes, sir. Q. Now, the skid marks that you saw, you think they were about 30 feet to 35 feet, is that right? A. Well, to my best judgment, yes. * * * Q. And they started from about the center of the highway? A. Yes, sir. Q. That is, it looked like at some point after Frank had started to pass Nelson's car, the moment he put on the brakes he put them on hard enough so that he made a mark? A. Why, I felt him jerk his car, yes. Q. Well, the first time you felt a jerk was when he put the brakes on hard, and that was after Nelson had turned out in front of him, is that correct? A. That's right. Q. Now, you were not hurt in the accident, were you? A. No, sir." (Italics ours.)

The foregoing evidence tells but one story. The occurrence of an accident is not necessarily proof of negligence. It raises no presumption of negligence. The burden of establishing actionable negligence in the transaction was, by the form of the issues in the instant case, imposed on the plaintiff. The unqualified acceptance of plaintiff's entire evidence does not justify the conclusion that actionable negligence of the driver of the taxicab has been established. On the other hand, the evidence of the plaintiff quoted, as an entirety, not only fails to establish actionable negligence on part of Hendrix, the taxicab driver, but affirmatively establishes the driver of the preceding car as the party at fault whose conduct furnishes the proximate cause of the injuries sustained. The plaintiff testifies to the taxicab approaching the two preceding cars, proceeding in the same direction; the sounding of the taxicab horn; then its turning to the left side of the highway; then the simultaneous turning from the right side of the highway of the last of the preceding cars, which caused the collision and the resulting injuries. Under the circumstances and conditions prevailing at the time and place of the accident,

the following statutory rules of the road were governing:

"(a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right of the roadway until safely clear of the overtaken vehicle. (b) Except when overtaking and passing on the right is permitted; the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle." Comp. St. Supp. 1939, sec. 39-11,102.

Obviously, after the sounding of its horn the taxicab had unquestionable right of way. "Overtaking and passing on the right" was not permissible at the time and place of this accident. It was the statutory duty of the driver of the preceding car being overtaken, when his position on the highway permitted it, to give way "on audible signal" to the right in favor of the overtaking vehicle, and it was likewise the statutory duty of the driver of the overtaken vehicle not to increase the speed of his vehicle until completely passed by the overtaking vehicle. As the result of this double violation of this statute quoted, by the Nelson car, and through no fault of the taxicab driver, an emergency was created, for which the latter was in no degree responsible, and his actions in endeavoring to escape therefrom, as mirrored in plaintiff's evidence, disclose no actionable negligence on his part.

It follows that the judgment of the district court in directing the dismissal of plaintiff's action was in all respects correct, and it is

AFFIRMED.

ROCKY MOUNTAIN LINES, INC., ET AL., APPELLEES, V. ROBERT L. COCHRAN, GOVERNOR, ET AL., APPELLANTS.

299 N. W. 596

FILED AUGUST 1, 1941. No. 31179.

1. **Commerce.** "It is no longer open to question that the states have constitutional authority to exact reasonable fees for the use of their highways by vehicles moving interstate." *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 59 S. Ct. 744.
2. **Constitutional Law.** "The classification of the traffic for the purposes of regulation and fixing fees is a legislative, not a judicial, function. Its merits are not to be weighed in the judicial balance and the classification rejected merely because the weight of the evidence in court appears to favor a different standard." *Clark v. Paul Gray, Inc., supra.*
3. ———. "The determination of the legislature is presumed to be supported by facts known to it, unless facts judicially known or proved preclude that possibility." *Clark v. Paul Gray, Inc., supra.*
4. ———. "In passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis. This is equally the case where the classification, which is one which the legislature was competent to make, is applied to vehicles using the state highways in interstate commerce." *Clark v. Paul Gray, Inc., supra.*
5. **Automobiles.** Substantial equality demands that all enjoying the use of the roads or the benefits of the facilities furnished pay therefor substantially an equal amount for the privileges they really enjoy, irrespective of the method of contribution employed. In the economy of the state it is the ultimate result that is important (the amount received from each), not the means or method by which that result is produced.
6. ———. The imposition by the state of Nebraska of the assessments provided for in Legislative Bill No. 148, Laws 1939, ch. 80, upon units 22, 42 and 43 owned by the plaintiff and involved herein, is not to be deemed illegal because different in form and manner from that imposed on the gasoline units owned by plaintiff corporation, or because other taxes are imposed by the state on the same taxpayer for the use of its highways, if such taxpayer fails to show that the aggregate charge is unreasonable.

7. ———. Reasonability of charges imposed in the form of an excise tax for use of highways is not necessarily controlled or determined by the nature of the carrier's business nor the profits derived by it therefrom.
8. **Statutes.** Legislative Bill No. 148, Laws 1939, ch. 80, examined, and *held* to be independent legislation, as the subject of its provisions was not governed by, embraced in, nor did it form a part of, any other legislation existing at the date of its adoption.
9. ———. An independent act may incorporate within itself by reference provisions of another existing act, and the effect is the same as though the statute or a part adopted had been written into the adopting statute. Nor does such procedure thereby constitute such adopting statute an amendatory enactment.

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

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

Ginsburg & Ginsburg, contra.

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

EBERLY, J.

This is an action under the declaratory judgments act to secure a determination as to the rights, status and relations of the parties under Legislative Bill No. 148 of the 1939 legislative session of the state of Nebraska. Laws 1939, ch. 80. From a decision adjudging the legislation invalid, the defendants appeal.

The plaintiff, Rocky Mountain Lines, Incorporated, is, and at all times mentioned in the amended and supplemental petition was, a corporation duly organized and existing under the laws of the state of Nebraska, with its principal place of business in the city of Lincoln, Nebraska, and is now, and ever since its organization has been, engaged in the business of transporting and carrying property for hire as a common carrier by motor vehicle between points and places in the states of Illinois, Kansas, Iowa,

Missouri, Colorado, Wyoming and Nebraska, over regular and irregular routes within the scope of the authority and order of the interstate commerce commission of the United States. L. L. Nicolay, also a plaintiff herein, is the executive vice-president and general manager of the plaintiff corporation and appears herein in his official capacity only in its behalf.

As preliminary to stating the issues presented in this case, it may be said that this state is now, and for some years past has been, engaged in improving highways by paving and hard-surfacing, as well as discharging the burden of continuous maintenance and repair thereof largely for the use of owners of motor transportation. It expends several millions of dollars annually in such work. The two sources of state taxation from which the necessary public funds are derived to carry on this work are, first, the law which provides for registration of motor vehicles with fees therefor graduated according to carrying capacity and weight. A small part of this fee so charged is used for the administration of the law. The larger part of it is used exclusively to aid in improving and maintaining hard-surfaced highways. The total amount of these fees deducted for enforcement purposes constitutes an exceedingly small part of the total expended by the state in improving and maintaining its highways. This tax was upheld by this court in *Peterson v. Department of Public Works*, 120 Neb. 517, 234 N. W. 95, both as to interstate and intrastate commerce.

The second source of state tax revenue is the law which provides for the motor vehicle fuel tax, which is commonly referred to as the "gasoline tax." As descriptive of this tax, Goss, C. J., employed the following language, which in the main is equally applicable to the present enactment: "The purpose of the act is to raise money to construct and maintain highways. Direct taxation upon the lands affected being undesirable as a means of raising the necessary revenue, the method of charging a tax upon personal property that might be used in the enjoyment of the high-

way, so constructed and maintained, was resorted to. This power was delegated by the people to the legislature by section 1, art. VIII of the 1920 Constitution of Nebraska. The tax is an excise tax. 2 Cooley, Constitutional Limitations (8th ed.) p. 998; *Flint v. Stone Tracy Co.*, 220 U. S. 107." *Pantorium v. McLaughlin*, 116 Neb. 61, 215 N. W. 798.

Both of these statutory provisions are equally applicable to the users of Nebraska highways, whether engaged in intrastate or interstate transportation. In April, 1939, the plaintiff corporation purchased three Diesel motors which were placed in its units 22, 42 and 43. These motors are mounted, one on a Federal chassis, two mounted on Diamond-T chassis. Unit 22 has a 13-ton license; 42 is licensed at 10 tons; and 43 was licensed for 10 tons. These licenses were secured from the state of Nebraska and thereby the Nebraska motor registration act was fully complied with. Under the laws of Nebraska at this time (April, 1939) there was no tax provided for Diesel fuel employed on these Diesel motors as motive power. Diesel fuel was not embraced in the terms of the tax definition of motor fuel as defined by our tax statute. Nevertheless, the trucks were placed in service, competing with gasoline-propelled motor vehicles from which there was being exacted a tax of 5 cents a gallon on the gasoline consumed by them. The undisputed evidence is that the cost of Diesel fuel oil used by plaintiff is about 9 cents a gallon, and that the truck mileage obtained therefrom, as measured by their unit 43, is nine miles a gallon. The nearest comparable unit employing gasoline possessed by the plaintiff was its unit 35 which is propelled by a gasoline motor. This unit employed gasoline as a fuel, for which they paid 13 cents a gallon, 5 cents of which was ultimately received by the state. The mileage obtained by this unit 35 on gasoline so employed was from six to seven miles a gallon. Both interstate and intrastate commerce are here involved, and the facts, if limited to the question of motor fuel oil, evidence a service discriminatory to interests which are entitled to an equality

of treatment at the hands of the state of Nebraska. It is, in principle, not an unimportant question here presented. As observed by this court in *Nelsen v. Tilley*, 137 Neb. 327, 289 N. W. 388: "It cannot be seriously disputed that the motor vehicle industry has grown to huge proportions in both the state and nation. Motor vehicles, once luxuries, are now necessities." A well-considered public policy demands that that which constitutes a present necessity in the ordinary affairs of the people should not be legislatively discriminated against so as to unjustly affect those to which it pertains. To meet this situation, and to preserve a just equality among the users of our highways, there was enacted in 1939 Legislative Bill No. 148, entitled, "An Act relating to motor vehicles; to impose equalization fees upon said motor vehicles, as defined by the laws of this state operating on the public highways therein, propelled by any motor burning fuel not subject to the motor vehicle tax laws of this state; to fix and determine the amount of such equalization fees for the various types of motor vehicles; to provide for the amount, method of payment, collection and distribution of said fees; to direct the department of roads and irrigation to design a license plate to identify said vehicles; and to provide penalties for the violation thereof." Laws 1939, ch. 80. This act was approved, without an emergency clause, on June 8, 1939. The substance of this enactment so far as involved in the present controversy is, as follows: "The owner of any motor vehicle as defined by the laws of the state of Nebraska, or agent of the owner, operating such motor vehicle on the public highways of this state, propelled by any motor, burning fuel not subject to the motor vehicle fuel tax laws of this state, shall be required to pay an annual equalization fee to be paid in quarterly payments, in lieu of the motor vehicle fuel tax, in addition to the registration and license fees applicable to such vehicle, as follows: For a farm, local or commercial truck, as defined by the laws of this state, or a bus, the equalization fee shall be a sum equal to twice the amount of the registration fee applicable to

such vehicle under the laws of this state: Provided, however, that no undue burden shall be imposed upon interstate commerce; and any such vehicle, registered under the laws of any other state and not registered in this state shall have the right, in lieu of the payment of the quarterly equalization fee, to pay an amount equal to one per cent. of the annual equalization fee, which would be applicable hereunder to such vehicle if it were registered in this state, for each day that such motor vehicle is operated in this state * * *."

Under the flat rate as prescribed by this law, there was exacted as an excise tax for the use of the highways of Nebraska, $400 on unit 42, $400 on unit 43, and $520 on unit 22, a total of $1,320.

The appellees challenge the validity of Legislative Bill No. 148 as infringing upon and transgressing federal safeguards and constitutional restrictions, in that it amounts to a tax imposed by a state upon interstate commerce or the means by which interstate commerce is carried on; that this bill makes for an unfair classification and does not operate uniformly upon all members of the class by it created; that it cannot be sustained as an equalization tax; and that exactions of taxes made thereunder bear no relation to the extent and manner of the use of the highway to be made by the interstate carrier. A careful consideration of the admitted facts and law relating thereto will demonstrate that the real scope of these objections under the situation here presented is materially narrowed.

As before stated, the Rocky Mountain Lines is incorporated under the laws of the state of Nebraska, with its principal place of business at Lincoln, Nebraska, where it maintains its docks, home offices, shop and terminal for the trucks. It carries on a transportation business as common carrier of commodities, operating generally in Illinois, Iowa, Missouri, Nebraska, Kansas, Colorado and Wyoming. Its equipment includes 42 units, of which 20 are motors and 22 are trailers. Seventeen of these motors employ gasoline in generating power. The remaining three are

Diesel motors, upon which an excise tax for use of highways was imposed, as already set forth. The validity of the motor vehicle laws of Nebraska are unchallenged so far as the 17 gasoline motors are concerned, and as to the three Diesel motors only so far as the provisions of Legislative Bill No. 148 are here involved.

"It is no longer open to question that the states have constitutional authority to exact reasonable fees for the use of their highways by vehicles moving interstate. *Hendrick v. Maryland,* 235 U. S. 610; *Kane v. New Jersey,* 242 U. S. 160; *Clark v. Poor,* 274 U. S. 554; *Sprout v. South Bend,* 277 U. S. 163; *Morf v. Bingaman,* 298 U. S. 407; *Dixie Ohio Express Co. v. State Revenue Commission,* 306 U. S. 72." *Clark v. Paul Gray, Inc.,* 306 U. S. 583, 593, 59 S. Ct. 744, 750.

As to the validity of the class created by the terms of Legislative Bill No. 148, Laws 1939, ch. 80, which it describes as "any motor, burning fuel not subject to the motor vehicle fuel tax laws of this state, shall be required to pay an annual equalization fee," etc. It may be said it is a conceded principle that "The classification of the traffic for the purposes of regulation and fixing fees is a legislative, not a judicial, function. Its merits are not to be weighed in the judicial balance and the classification rejected merely because the weight of the evidence in court appears to favor a different standard. *Cf. Worcester County Trust Co. v. Riley,* 302 U. S. 292, 299. The determination of the legislature is presumed to be supported by facts known to it, unless facts judicially known or proved preclude that possibility. *Standard Oil Co. v. Marysville,* 279 U. S. 582, 584; *Borden's Farm Products Co. v. Ten Eyck,* 297 U. S. 251, 263; s. c. 11 Fed. Supp. 599, 600; *South Carolina Highway Department v. Barnwell Bros.,* 303 U. S. 177, 191-192; *United States v. Carolene Products Co.,* 304 U. S. 144, 153-154. Hence, in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature

has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis. This is equally the case where the classification, which is one which the legislature was competent to make, is applied to vehicles using the state highways in interstate commerce. *South Carolina Highway Department v. Barnwell Bros., supra,* 187 *et seq.* The legislature must be assumed to have acted on information available to courts * * *." *Clark v. Paul Gray, Inc.,* 306 U. S. 583, 594, 59 S. Ct. 744, 750.

It is to be remembered that the law under consideration is not the equivalent of an income tax levy, but rather it is the fixing of a reasonable compensation for the use of the highway, a facility furnished. As to the gasoline motor truck, the amount paid was contributed by and through the provision of the Nebraska registration law of the state and also through the Nebraska gasoline tax law. The contributions actually exacted thereby amounted to the sum derived from both forms of taxes. Substantial equality demands that all enjoying the use of the roads or the benefits of the facilities furnished pay therefor substantially an equal amount for the privileges they really enjoy, irrespective of the method of contribution employed. In the economy of the state it is the ultimate result that is important (the amount received from each), not the means or method by which that result is produced.

The case of *Interstate Busses Corporation v. Blodgett,* 276 U. S. 245, 48 S. Ct. 230, involves the principle the application of which the facts here invoke. In the *Blodgett* case, which involved the complaint of an interstate user of the highways of Connecticut, it appears that, "In addition to other taxes common to both classes, the owners of motor buses operated in interstate commerce pay in Connecticut, a tax of one cent for each mile of state highway traversed by each vehicle, but the owners of such vehicles engaged in intrastate commerce pay instead a tax on their gross receipts, the proceeds of both taxes being devoted to maintenance of highways. *Held* that a party

complaining of the mileage tax does not establish discrimination against interstate commerce by the mere difference of the taxes, but must prove that in actual practice the tax complained of falls with disproportionate weight upon him."

In addition, the following principles announced by the supreme court of the United States in such *Blodgett* case, are applicable to the questions presented by the present record:

"A state tax of one cent for each mile of highway traversed in the state by any motor bus used in interstate commerce, the proceeds of which are devoted to maintenance of public highways of the state, is not repugnant to the commerce clause of the Constitution, when not unreasonable in amount or discriminatory against interstate commerce.

"Such a charge, when reasonable in itself, is not to be deemed unreasonable because other taxes are imposed by the state on the same taxpayer for the use of its highways, if he fails to show that the aggregate charge is unreasonable."

See, also, *General American Tank Car Corporation v. Day,* 270 U. S. 367, 46 S. Ct. 234; *Travellers Ins. Co. v. Connecticut,* 185 U. S. 364, 22 S. Ct. 673.

It is obvious, under the principles settled by the foregoing precedents, that the imposition by the state of Nebraska of the assessments provided for in Legislative Bill No. 148 upon units 22, 42 and 43 involved herein is not to be deemed illegal because different in form and manner from that imposed on the gasoline units owned by plaintiff corporation, or because other taxes are imposed by the state on the same taxpayer for the use of its highways, if such taxpayer fails to show that the aggregate charge is unreasonable.

In view of the principles announced in the foregoing cases, it is obvious that the legality of an excise tax imposed upon the users in interstate commerce of the public highways of the state for the maintenance thereof is in

no manner dependent on the form in which imposed, or the fact that in some or a different form such a tax has been previously provided for, or whether one or more of such taxes may take the form of a flat tax graduated in accordance with the load capacity of the motor vehicles employed, or a mileage tax measured by the total distance covered, or a "gasoline tax" determined by the amount of motor fuel oil consumed. The determinative test in each case is whether the total of all amounts exacted under all the provisions of law relating thereto in any state is unreasonable in amount or discriminatory against interstate commerce. In the instant case there is no contention that as applied to gasoline trucks the Nebraska laws are unreasonable as to amount or discriminatory in their application.

The evidence in the record as to a comparison between a gasoline truck and a Diesel truck of equal tonnage with respect to the extent of highway occupied by each, the wear and damage inflicted to such highway, and the value of the use thereof as a facility furnished the public, is, from the standpoint of the state, substantially identical as to each.

It would necessarily follow that as reasonable compensation for the use of the place where their business is carried on, each of the users of the public highway should contribute as an excise tax an equal amount. It appears from available statistics that the average mileage covered by 10-ton licensed trucks in Nebraska in 1937 was 55,670 miles, and the average amount of gasoline consumed and paid for in making this average run would involve the payment of a gasoline tax of $397.64. On the basis of this comparison, it is obvious that the flat excise fee exacted from the 10-ton truck of $400 per annum is neither excessive nor discriminatory, and that the legislature has approximated their goal, to wit, a reasonable and just equalization fee between gasoline trucks and Diesel trucks so that each will pay substantially an equal amount for equal accommodations enjoyed within the state of Nebraska.

It will be noted that this is based upon the total payments made by each under all applicable legislation. The tax under consideration cannot be deemed excessive nor discriminatory because it is in the form of a flat rate per annum payable quarterly. This excise tax, considered as a charge, is for facilities furnished by the state, the reasonable value of which is largely determined by the nature and original cost of construction plus expenditures required to maintain the same. These reasonable charges are in no manner controlled or determined by the nature of the carrier's business nor the profits derived by it therefrom.

Justice Cardozo, in discussing a somewhat similar situation presented in *Aero Transit Co. v. Georgia Public Service Commission,* 295 U. S. 285, 55 S. Ct. 709, with reference to legislative employment of a "flat fee," employs the following language: "The fee is not for the mileage covered by a vehicle. * * * The fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed. (Citations) One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may."

We do not overlook plaintiffs' testimony based upon exhibit 1, statement of mileage; exhibit 2, statement of mileage; and exhibit 3, statement of costs. It will be noted that none of these exhibits was offered in evidence. By reason of their absence the statements of the witness based thereon lose much of their otherwise probative force. With reference to the cost study, to which the absent exhibit 3 is devoted, the witness says: "Our truck record is quite a comprehensive record and takes into consideration all trip expense, gas, oil, tolls, public service commission taxes, takes in the wages of the man driving the equipment, the repairs out on the road and in our shop, the tire wear, takes into consideration the depreciation and insurance and the license and overhead. I believe that covers it pretty well and after taking those items into consideration, we

have a total figure and dividing the miles into that total figure, gives us the cost per mile."

We take it from this witness that such cost study embodied all expenditures made in all the states in which business was transacted, but we are not informed as to the expenditures made in Nebraska, and as to the extent the actual receipts exceeded, if at all, the actual expenditures in this state, we have no information. True, certain expenditures made in behalf of the business as an entirety, as charges might be allocated in part to Nebraska, but the method of allocation of such items, if any such there were, and the principle followed in controlling the same are not divulged. In other words, the plaintiff corporation is challenging the Nebraska act because, in view of the total expenses incurred and chargeable in all the seven states in which it operates, with this Nebraska tax added, such business would be carried on at a loss. But plaintiff, in that connection, offers no proof that within the state of Nebraska, considered by itself, its services would be performed without adequate remuneration. It also appears that all units of Diesel type were largely withdrawn from Nebraska, and that thereby plaintiff corporation voluntarily failed to take full advantage of the privileges this law extended. It would seem that plaintiff, in view of the principles announced by Justice Cardozo in *Aero Transit Co. v. Georgia Public Service Commission, supra,* has failed to carry the burden of proof imposed by the nature of the issues presented.

In disposing of questions, in principle almost identical with those here presented, the supreme court of Wisconsin in *State v. Railroad Commission,* 196 Wis. 410, 220 N. W. 390, say, in part:

"Relator's real basis of attack seems to be that it does not have anything left with which to pay dividends after it has paid this ton-mile tax. Manifestly the ability of the relator to make a profit cannot be the factor that determines whether this law constitutes a valid exercise of legislative power. If this were the test, this law would

be valid as to the carrier by motor vehicles who testified that he conducted his business at a profit under this law, while it would be invalid so far as the relator was concerned because it does not make a profit. This is not and cannot be the measure of the power of the state to exact compensation for the use of its highways by those who are conducting a private business for gain over the same. The statute is a valid exercise of legislative power. If the compensation fixed for the use of the highways is such that the relator does not so manage its business as to make a profit, it cannot ask that the state forego its right to compensation for the use of its highways for business purposes, even if it should result in the discontinuance of relator's business. *Erie R. Co. v. Board of Public Utility Commissioners,* 254 U. S. 394, 411, 41 S. Ct. 169, 65 L. Ed. 322, 334. To prevail in this action relator must 'show that the aggregate charge bears no reasonable relation to the privilege granted.' *Interstate Busses Corporation v. Blodgett,* 276 U. S. 245, 48 S. Ct. 230."

A careful consideration of the legislation involved in this litigation, the validity of which is challenged by the appellees on the ground that certain provisions of our Constitution were transgressed in its enactment, convinces us that it is not vulnerable to the objections thus made. The basic charge appears to be that the enactment is amendatory in character, and that in its adoption section 14, art. III of our Constitution, was not conformed to. It is not deemed that these objections are well taken. Read in the light of its title, Legislative Bill No. 148, Laws 1939, was in effect an independent enactment, limited in scope and purpose, and analogous in principle to the legislation before this court in the cases of *Jackson v. Washington County,* 34 Neb. 680, 52 N. W. 169, *State v. Nolan,* 71 Neb. 136, 98 N. W. 657, and *State v. Minor,* 105 Neb. 228, 180 N. W. 84.

Our laws prior to the adoption of this act contained provisions taxing motor fuel oil as therein specifically described. This statutory definition did not include Diesel

fuel oil. This and certain similar products were not within the purview of any of our laws then in force. Legislative Bill No. 148, Laws 1939, as an independent act, supplied the omissions thus existing. Its enactment created a new but strictly limited subject of legislation not previously covered by law. It is therefore to be deemed and treated as independent legislation, for its subject was not governed by, embraced in, nor did it form a part of, any existing legislation. Neither do the references therein contained in any manner affect its essential character.

An independent act may incorporate within itself by reference provisions of another existing act, and the effect is the same as though the statute or a part adopted had been written into the adopting statute. *Richardson v. Kildow,* 116 Neb. 648, 218 N. W. 429; *State v. Moorhead,* 100 Neb. 298, 159 N. W. 412; *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273; *In re Estate of Mathews,* 125 Neb. 737, 252 N. W. 210.

But this procedure in no manner alters or changes the independent nature of the statute so adopting, nor does it accomplish thereby a change into an amendatory enactment. *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273.

The conclusion follows that Legislative Bill No. 148, Laws 1939, is, and must be deemed to be, a valid, independent, legislative enactment, and, as such, binding upon the parties to this litigation, and that the defendants hereinbefore named are entitled to the relief by them sought. It also follows that the district court erred in its findings and decree for the plaintiffs in this case. Therefore the findings, decree and judgment of the district court are reversed, and the cause is remanded for further proceedings in harmony with this opinion.

REVERSED.

ALBERT E. WETENKAMP, APPELLEE, V. HELEN B. WETENKAMP, APPELLANT.
299 N. W. 491

FILED AUGUST 1, 1941. No. 31108.

1. **Divorce.** Condonation is forgiveness, express or implied, for a breach of marital duty, with the implied condition that the offense shall not be repeated. Forgiveness sufficient for condonation is complete if there is a voluntary resumption of the marital relations.
2. ———. If condonation occurs, and the offense is not repeated, it deprives one thereafter of seeking a divorce for the condoned offense, for it operates as a complete bar to a suit for divorce upon the same ground.
3. ———. Ordinarily, condonation of a known offense does not warrant an inference that all offenses have been forgiven, and does not bar divorce for an offense not known to the injured party at the time of condonation.
4. ———. Condonation may be applied to acts of cruelty, but it stands upon a somewhat different basis than cohabitation after knowledge of adultery, for cruelty as a ground of divorce is a continuing course of conduct which grievously wounds the mental feelings and destroys the peace of mind so that it nullifies the legitimate ends of matrimony. The effort to endure unkind treatment as long as possible is commendable, but the repetition of the same cruel and harsh conduct, showing a resumption of the former course of conduct, thereby revokes condonation, and the original cause of divorce is revived.

APPEAL from the district court for Douglas county: HERBERT RHOADES, JUDGE. *Affirmed.*

Floersch & Floersch, for appellant.

Abrahams, McGrath & Frenzer, contra.

Heard before PAINE, CARTER and MESSMORE, JJ., and SPEAR and FALLOON, District Judges.

PAINE, J.

Petition for absolute divorce was filed on January 31, 1940, on the ground of extreme cruelty. Petition alleged parties were married at Plattsmouth, Nebraska, on September 4, 1920. One child, Betty Jeanne, 18 years of age, was the result of said marriage. There was a reconcilia-

tion of the parties, at the request of the defendant, and upon condition that the acts of cruelty referred to in the plaintiff's petition should not be repeated, they began living together on February 5, 1940, but notwithstanding such express conditions, and in violation thereof, plaintiff charges that defendant was guilty of renewed and repeated acts of extreme cruelty, of the same kind and character as those set out in the plaintiff's petition, and the plaintiff left her finally on March 17, 1940.

On April 6, 1940, the plaintiff filed a supplemental petition, setting out the reconciliation and the repetition of acts of cruelty of the same nature and kind as alleged in the original petition, all without excuse or provocation, and charges that by reason thereof the defendant revived the original offenses mentioned in the original petition, wherefore plaintiff renewed the prayer of the original petition.

On April 17, 1940, application was made for temporary support money, and on April 20, 1940, upon a hearing thereof, it was ordered by the court that the plaintiff pay to the defendant $65 monthly for the support of herself and the minor daughter, Betty Jeanne, and also $25 advance payment upon attorney's fee, and plaintiff was enjoined from changing the beneficiary in a life insurance policy in the sum of $2,500 upon his life, in which the wife was designated as beneficiary, and from drawing upon, or borrowing upon, or cashing in said policy until further order of the court.

On May 25, 1940, plaintiff filed an amendment to his petition, setting up that shortly after their marriage the defendant began a studied, uniform, and systematic course of cruel and inhuman conduct, consisting in nagging, fault-finding, charging that plaintiff did not earn enough money to support her, that he was no good, worthless, and a failure, although plaintiff was steadily employed and supported his wife; that the defendant continued such nagging during the night, and at times at the plaintiff's place of employment, flying into a rage and violently abusing and berating the plaintiff, struck at him, and simulated fainting spells,

all of which has been resumed and repeated since a reconciliation was effected.

Defendant filed her answer and cross-petition to the plaintiff's petition, supplemental petition and amendment thereto. She admits the marriage, and that Betty Jeanne is the issue of said marriage, and that on February 5, 1940, being shortly after the filing of the original petition, the parties became reconciled and the plaintiff returned to the defendant and cohabited with her as man and wife at their home until March 17, 1940, at which time the plaintiff left the home and has not returned, all of which defendant alleges condones all of the charges set out in plaintiff's petition.

For a cross-petition, defendant alleges that she has been a good and faithful wife, but that he has been guilty of extreme cruelty towards her; that he has carried on an affair with another woman, upon whom he has lavished his affection and earnings, in disregard of his marital duties; that plaintiff is an able-bodied man, and she believes earns about $150 a month; that defendant is without means of support, and asks that plaintiff's petition for divorce be dismissed, that she be given the custody of their minor child, and plaintiff be ordered to support their minor child, and that plaintiff be enjoined from changing the beneficiary in a policy of insurance hereinbefore described, but in said answer and cross-petition the defendant did not ask for a divorce, but only for support money.

A reply was filed, denying the allegations of the cross-petition. Trial was had, and a decree was entered, finding that the allegations of the petition, supplemental petition and amendment thereto are true; that the plaintiff has at all times conducted himself towards the defendant as a faithful and devoted husband, but that the wife, disregarding her marital duties, and without any excuse or provocation therefor, has been guilty of repeated acts of cruelty towards the defendant, of such a kind and character as to materially impair his peace of mind, his physical health, and which destroyed the legitimate objects of matrimony.

The court finds that, shortly after the filing of the original petition, the plaintiff returned to the defendant, upon condition that said acts of cruelty should not be repeated, and that defendant should thereafter adopt a kind and considerate attitude toward the plaintiff; that notwithstanding the express conditions, the defendant, in violation thereof, has been guilty of renewed and repeated acts of extreme cruelty, and that by reason thereof the defendant revived the original offenses complained of by plaintiff.

The court finds that the one child, Betty Jeanne, the issue of the marriage, was 19 years old at the date of the decree, and grants her custody to the defendant, who is a suitable and proper person.

The court finds that plaintiff is entitled to an absolute decree of divorce, but awards $1,500 as permanent alimony to the defendant, to be paid in equal monthly payments of $50 each until the whole sum is fully paid. Defendant's attorneys are allowed $100 in addition to the $25 heretofore awarded them, and defendant is allowed her court costs, with the exception of witness fees. The plaintiff is enjoined from changing the beneficiary in the life insurance policy of $2,500 heretofore mentioned, or from borrowing upon it, or cashing it in, until the sum of $1,500 permanent alimony is paid in full, whereupon the injunction in regard to said life insurance policy shall terminate, and plaintiff shall have every right and privilege under said policy thereafter.

The decree further provided that the household goods and furnishings be awarded to the defendant, except the personal effects of the plaintiff, and that he is declared to be the owner of the 1938 Ford automobile, and, finally, that the cross-petition of the defendant be dismissed.

Motion for new trial was duly filed by the defendant, and the same was overruled, and the defendant appeals.

As grounds relied upon for a reversal of this decree, the defendant charges that marital relations should continue so long as both parties live, and such relations should not

be dissolved except upon adequate statutory grounds. Defendant charges that condonation of the defendant's wrong, which was not subsequently repeated, bars the husband from obtaining a divorce on said grounds; that where plaintiff charges certain acts of cruelty committed against him, and thereafter freely cohabits with his wife, he will be held to have condoned such offenses, as such condonation is forgiveness for the past upon condition that the wrong shall not be repeated.

The evidence of plaintiff is that for the first five years of their marriage they got along fairly well, but that in 1925 he caught the defendant in their own home sitting on the lap of a man who was a boarder and a roomer at their house, and he compelled him to leave, and thereafter the defendant treated him cruelly; that she would curse him, calling him names which should not be printed in this opinion, she would go into fainting spells, claiming she was going to die, accuse him of misconduct with other women, she wanted to fight him, would grab the newspaper out of his hand, pull the covers off his bed, try to beat him, and threatened to kill him; that when he would try to set her down she would scream and yell, claw him, break dishes; that she told him she did not know why she ever married him, that he was so low that he was unfit to live with. One time she ran to the bathroom and got a bottle of carbolic acid and told him she would drink it and "end it all." Plaintiff claimed that most of their arguments were started by her; that all this made him extremely nervous and he developed a bad case of stomach trouble. He said that five or six weeks after he filed his petition for divorce he went back to living with his wife, as his mother acted as "kind of an arbitrator," and wanted them to go to living together again, and he agreed to try it again for 30 days and see if conditions would improve.

When he was packing his tools out in the garage to leave on March 17, 1940, his daughter came out and tried to get him to stay. He told his wife he was going to leave, and kissed her before he left. He testified that his earnings

would hardly ever go over $150. He sometimes worked on cars at home nights, and if his wife would ask him to put on screens, or mow the lawn, and he did not get it done that night or the first Sunday, she would start nagging. The plaintiff is shop foreman at the Russell Motor Company, and takes care of all service work that comes in, or sees that the mechanics take care of the work; his job is supervisory, and he stays at work until everything in the shop is cleaned up.

The defendant testified that she lives at 2879 Camden avenue, Omaha. When they lived on Spencer street her brother-in-law and two sisters boarded with them, and then later on a young man that Elmer brought to the home boarded with them. She would ask plaintiff to put up storm windows, or take down the screens, or mow the lawn, and he would not do it right away, and she would have to ask him two or three times, and he would call that nagging. When she would want him to sit down and talk over finances, he would say, "Well, there you go nagging again." She said she had been very much upset over some of Elmer's actions, and reprimanded him, but she would not say she cursed him. She denied that she attempted suicide, or kicked him in the head. The first time she became suspicious of him was a year ago last August when her daughter was in the hospital, and she became aware that he was going out a little more than he should, and sometimes he would stay out until 2 o'clock. The day before Christmas last year (1939) when they were in Peoria, Illinois, for Christmas he wired some woman in Omaha flowers.

Mrs. Albert Wetenkamp, the mother of plaintiff, testified that she lives on a farm near Plattsmouth. She said she was sorry to say that Helen is of a high-strung, nervous disposition, and inclined to nag more than she felt she should; was always reproving him in an unkind way. One Christmas morning, when she was visiting at their home, defendant nagged Elmer for two or three hours because he did not go to church that morning. The defendant is a Catholic, and the plaintiff became a Catholic when they

were married, or shortly before. After the petition for divorce was filed, she called her son and told him she thought they ought to try and live together and try to adjust things. She testified she did everything in her power to bring them back together, because she does not believe in separations.

The bill of exceptions is long, and contains the evidence of many friends and neighbors, and to review this cumulative evidence would extend this opinion to an undue length.

It is the defendant's contention that the condonation of the wife's wrongs not subsequently repeated will bar the husband from obtaining a divorce.

This case involves a study of the subject of condonation, which is forgiveness, express or implied, for a breach of marital duty, with the implied condition that the offense shall not be repeated. Forgiveness sufficient for condonation is complete if there is a voluntary resumption of the marital relations. *Massie v. Massie,* 202 Ia. 1311, 210 N. W. 431; *Anderson v. Anderson,* 89 Neb. 570, 131 N. W. 907. A full disclosure of all previous misconduct is not necessary for condonation. If condonation occurs, and the offense is not repeated, it deprives one thereafter of seeking a divorce for the condoned offense, for it operates as a complete bar to a suit for divorce upon the same ground. *Griffith v. Griffith,* 77 Neb. 180, 108 N. W. 981. Ordinarily, condonation of a known offense does not warrant an inference that all offenses have been forgiven, and does not bar divorce for an offense not known to the injured party at the time of condonation. See 17 Am. Jur. 250, sec. 198.

"Condonation is forgiveness for the past upon condition that the wrongs shall not be repeated. It is dependent upon future good conduct, and the repetition of the offense revives the wrong condoned; and condonation of extreme cruelty may be avoided by abusive language and the use of opprobrious epithets." *Anderson v. Anderson,* 89 Neb. 570, 131 N. W. 907. See, also, *Heist v. Heist,* 48 Neb. 794, 67 N. W. 790.

The rule that subsequent ill treatment is a breach of the

condonation of cruelty, and revives the offense, has been applied in the case of *Riddick v. Riddick,* 112 Neb. 813, 201 N. W. 557. Many cases on this point may be found in 98 A. L. R. 1359, in the annotation on the revival of condoned cruelty.

It has been held that voluntary cohabitation after continuing acts of cruelty cannot be considered in the same sense in which it would be after an act of adultery, for the effort to endure unkind treatment as long as possible is commendable, but the repetition of the same cruel and harsh conduct, showing a resumption of the former course of conduct, thereby revokes condonation, and the original cause of divorce is revived. 17 Am. Jur. 257, sec. 210; *Mosher v. Mosher,* 16 N. Dak. 269, 113 N. W. 99, 12 L. R. A. n. s. 820, 125 Am. St. Rep. 654; *McNamara v. McNamara,* 93 Neb. 190, 139 N. W. 1045; *Hartshorn v. Hartshorn,* 104 Neb. 561, 178 N. W. 186; *De Vore v. De Vore,* 104 Neb. 702, 178 N. W. 621.

In the case at bar, an experienced trial judge saw all of the witnesses, and carefully listened to their testimony, and finally reached the conclusion that an absolute divorce to the husband was a preferable solution of the difficulties.

The trial court is vested with sound discretion in determining whether a divorce from bed and board, or an absolute divorce, shall be granted, and in a majority of the cases an absolute divorce is to be preferred. *Hild v. Hild,* 135 Neb. 896, 284 N. W. 730; *Swanson v. Swanson,* 137 Neb. 699, 290 N. W. 908; *Phillips v. Phillips,* 135 Neb. 313, 281 N. W. 22; *Sutherland v. Sutherland,* 132 Neb. 558, 272 N. W. 549.

The wife was granted $1,500 alimony, to be paid in monthly instalments guaranteed by a lien on a life insurance policy, and this was proper under the evidence, for "Even though the petition of the wife is denied, and an absolute divorce granted the husband, yet in such a case the wife may be granted reasonable alimony, under the restrictions of section 42-318, Comp. St. 1929." *Phillips v. Phillips, supra.*

In October, 1940, motion for suit money *pendente lite* and for temporary injunction was filed by the defendant's attorneys and argued, and this court granted the following items to be paid by the plaintiff: $20 for defendant's filing fee in this court; $5 for defendant's appeal bond; $5.55, cost of transcript; not to exceed $40 for defendant's brief; not to exceed $100 for the bill of exceptions; which altogether amounted to the sum of $170.55, or so much thereof as might be necessary. In addition thereto, the defendant was allowed the sum of $40 a month as temporary support money for herself.

Because the original decree of the district court is hereby affirmed, which granted to the defendant $50 a month until the sum of $1,500 was paid, payments to begin with the date of the decree, which was September 20, 1940, it is hereby ordered that the temporary payments of $40 a month heretofore made by the plaintiff be allowed as a credit upon the alimony granted in the original decree of $1,500. It is further ordered that attorneys for the defendant be granted $100 fee in this court.

AFFIRMED.

RAYMOND A. GORDON, APPELLEE, V. ODA GORDON ET AL., APPELLANTS.

299 N. W. 515

FILED AUGUST 1, 1941. No. 31130.

1. **Wills.** The right of election of a surviving husband or wife to take under the will of the deceased, or to take by inheritance, is purely statutory, and the manner and conditions prescribed in sections 30-107 and 30-108, Comp. St. 1929, must be strictly followed, to avail a survivor of such right of election.
2. **Homestead.** In the first paragraph, a will provided generally that all of the just debts of the testator, including burial expenses and costs of administering his estate, should first be paid. *Held,* that this usual and ordinary paragraph in a will is not such a clear and unequivocal statement as the law requires to impress a lien for such debts upon a homestead of the value of less than $2,000.

3. ———. An allowance made by the probate court to the widow is a debt against the estate of her deceased husband, but such allowance cannot be satisfied out of the homestead left by the deceased when it is of less value than $2,000.
4. **Executors and Administrators.** A homestead of less value than $2,000 cannot be disposed of at administrator's sale for the payment of debts against the estate of the decedent, and a license granted by the district court purporting to authorize such a sale is purely void.

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

Field, Ricketts & Ricketts and *Sterling F. Mutz,* for appellants.

Mockett & Finkelstein, contra.

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

PAINE, J.

This is an action filed by Raymond A. Gordon, the only surviving child of Harry A. Gordon, deceased, to quiet in the plaintiff the remainder-fee title to certain real estate in which deceased had a homestead interest, which he claimed could not be sold to pay debts of the estate. Plaintiff admits, however, that his interest is subject to the life estate of the widow. Decree for the plaintiff, and defendants appeal.

The decree finds that the plaintiff, Raymond A. Gordon, is the son of Harry A. Gordon, who died testate June 10, 1932, in Lincoln, leaving as his only heirs said plaintiff, who was a son by a prior marriage, and his widow, Oda Gordon.

At the time of his death, Harry A. Gordon and Oda Gordon, his wife, lived upon certain fractional lots in block 30 in Dawson's addition to South Lincoln, which property was the homestead of said Harry A. Gordon, and the fee title thereof stood in his name. The value of such homestead was less than $2,000.

On March 17, 1936, the widow, Oda Gordon, filed a petition to probate said estate. The will being duly allowed,

she was appointed executrix, and filed her bond. Said will devised the fee title in said homestead property to plaintiff, and a life estate to the widow.

Thereupon, the widow filed a notice, wherein she attempted to renounce the provision made for her in the will, and to elect to take her share of the estate under the statutes of Nebraska.

The answer admits the facts alleged in paragraphs 1 to 7 of the plaintiff's petition, and the fifth paragraph of the petition sets out that on December 3, 1936, the executrix filed an application for a license to sell the real estate to pay debts, one of the bills being for the funeral expenses in the sum of $330, and another bill was $175 for the widow's allowance in the sum of $25 a month. She alleged in her petition that her life estate therein was free from the debts and costs of administration, but that the remainder interest therein of the plaintiff was subject to the above indebtedness, together with court costs, fee of executrix, and attorney fees. She alleged the personal property was worth less than $200, and that it was all exempt.

An order to show cause was duly issued, and publication made thereof, and license to sell granted, and the property sold March 5, 1937, for $1,010, the bid being assigned to Robert S. Stauffer, a defendant herein, to whom the property was duly conveyed by deed of the executrix.

On July 15, 1937, said Stauffer gave a mortgage for $700 upon said property to the Nebraska Central Building & Loan Association, a defendant herein.

The plaintiff charges that the purported election of the widow to take under the statute instead of under the will was not in strict accordance with the statutory provisions as found in sections 30-107 and 30-108, Comp. St. 1929. This court said in *Billiter v. Parriott,* 128 Neb. 238, 258 N. W. 395, that the right of election is purely statutory, and the manner prescribed of exercising that right is a condition upon which the right rests. The trial court found that the election was not in conformity with the statute, and was void. The defendants in their brief state that they

have no quarrel with this ruling, and admit that whatever title the widow took was derived solely from the will.

The errors charged in the appeal in this case are founded upon these propositions of law advanced by the defendants: (1) The homestead of the deceased is purely a creature of statute, and vests a right in the widow which is under her exclusive control, and does not vest a homestead right in the children of the deceased; (2) the widow who has a homestead interest in real estate has a right to terminate the entire homestead right, by abandonment, election to partition, or other appropriate waiver; this may be done without the consent of the children; (3) if the son claims under the will, he takes title subject to the conditions precedent to the vesting of title in him, such as a provision that the decedent's debts shall be first paid.

We will first examine with some care section 40-117, Comp. St. 1929, which reads as follows: "If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from whose property it was selected, in the survivor, for life, and afterwards in decedent's heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor, by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife or either of them previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter."

We find that Shepard's Citators show that this statute has been cited in more than 34 opinions of this court, and referred to some 19 times in discussions in the Nebraska Law Bulletin.

In *Lewis v. McAdams*, 130 Neb. 62, 263 N. W. 480, it is said: "It is not questioned that the life estate and remainder are free from the debts of the decedent and surviving spouse existing at the time of decedent's death." "Under the statute, the remainder descends by will or by inheritance free from the debts of the deceased title-owning

spouse and the debts of the surviving spouse that were contracted prior to the death of the title-owning spouse."

To the same effect is the holding in *United States Nat. Bank v. Simonds,* 133 Neb. 42, 274 N. W. 187, wherein it holds that the homestead vests on the testator's death in the heirs and devisees, and is not subject to the payment of any debt contracted by, or existing against, testator at the time of his death.

In discussing this question, Dean Foster, in 3 Neb. Law Bulletin, 386, said: "On the death of the homestead owner the right to the use and enjoyment of the premises passes to the surviving spouse. In many states, this is the extent of the right of such survivor under the homestead acts. The Nebraska statute and the Nebraska decisions go much further. The interest of the surviving spouse is transferable. It may be mortgaged or conveyed. It is not lost by an abandonment of the premises or by a change in the character of the use of the premises or by the remarriage of the spouse. In short, this interest is a life estate in the land. In being a freehold estate, the right of such surviving spouse differs from and transcends all other homestead rights heretofore dealt with."

We have a somewhat similar case in *Abboud v. Boock,* 137 Neb. 652, 290 N. W. 713. A license was granted to sell real estate to pay legacies. The surviving husband objected to granting a license to sell that portion in which he claimed a homestead right. This court held that the trial court erred in granting the license to sell the real estate.

Applying these decisions to the case at bar, the father owned this property in fee, with no debts outstanding, and occupied it with his wife as their homestead. Upon the death of Harry A. Gordon, the widow was given a life estate by the will, and the plaintiff, a son by the first marriage, was vested with a fee title, subject to the life estate. This remainder-fee of Raymond A. Gordon was not subject to be sold for the debts of the estate existing against the husband previous to his death.

Now, on the other hand, the defendants insist that the will itself directs that the debts and costs of administration shall be paid, and that section 30-231, Comp. St. 1929, reads: "If the testator shall make provision by his will, or designate the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they shall be paid according to the provisions of the will, and out of the estate thus appropriated, or so far as the same may be sufficient."

It is true that in the will, which is exhibit No. 1, on page 19 of the bill of exceptions, we find: "Item one (1) I hereby direct that all my just debts; the expenses of my last sickness and burial, and the expenses of administering my estate be first paid."

The plaintiff contends that this is but one of the usual superfluous clauses contained in wills, for the statute provides for the payment of costs and expenses; that the testator may, in addition, by clear and unequivocal statements, impress a lien to pay such debts, but that in the case at bar there is no language which under the statute impresses any lien on this homestead to pay debts, funeral expenses, or expenses of administering the estate.

A very similar provision was found in the will in *Luckenbill v. Bates,* 220 Ia. 871, 263 N. W. 811, 103 A. L. R. 252, but the Iowa court held: "A general direction in a will to the executors to pay all just debts, together with expenses of burial and administration, does not have the effect to subject to the claims of creditors of the decedent property exempt as a homestead to decedent and his descendants." (103 A. L. R. 252.)

"By provision in his will the individual may charge his homestead property with the payment of debts. However, an intention to charge debts upon the land is not derivable from a general direction in the will that the testator's debts be paid. Nor will the use of merely formal phrases make a devise of homestead property subject to the payment of debts. To do this, the language employed in the will must be unequivocal and imperative." 26 Am. Jur. 104, sec. 164.

See, also, annotations, 103 A. L. R. 259, and 44 L. R. A. n. s. 1177.

In the next place, let us consider the widow's allowance of $25 a month, amounting to $175.

"The allowance made by the probate court under the Nebraska probate code to the widow and minor children of a deceased husband is a debt against the estate which cannot be satisfied or made out of the homestead left by the deceased. Even although the homestead is the only property left by the deceased, it cannot be sold to furnish the allowance." Dean Foster, 3 Neb. Law Bulletin, 401. See *In re Hadsall,* 82 Neb. 587, 118 N. W. 331, citing Thompson, Homestead and Exemptions, sec. 546, which says: "The authority of the probate court over it (the homestead) is limited to segregating it from that part of the decedent's estate which is subject to administration. When that is done, its jurisdiction ceases." See *Cooley v. Jansen,* 54 Neb. 33, 74 N. W. 391.

"Several opinions of this court assist us in the disposition of the case. 'The law is settled that, where a husband and wife reside upon a homestead and the wife dies, the homestead character of the land continues and the surviving husband, although he may have no children or dependents residing with him, may still retain the homestead as such.' *Dougherty v. White,* 112 Neb. 675, 200 N. W. 884." *Abboud v. Boock, supra.*

The effect of a license to sell a homestead of less than $2,000 was fully discussed by Commissioner Oldham, concurred in by Commissioners Ames and Letton, in the case of *Bixby v. Jewell,* 72 Neb. 755, 101 N. W. 1026, wherein the court stated: "A homestead of less value than $2,000 cannot be disposed of at administrator's sale either for the discharge of incumbrances thereon or for payment of debts against the estate of the decedent, and a license granted by the district court purporting to authorize such a sale is absolutely void."

In the case at bar, the father of the plaintiff had a homestead interest in this property, but the plaintiff is not

claiming the property as a homestead, but claims it as a new estate in him under the law of Nebraska. In a similar case our court said: "Under our statute, when the holder of the legal title of the homestead dies, the law creates new estates, a life estate in his widow and an estate in remainder in his children and heirs. It is immaterial whether the widow and children continue to occupy the premises. Their estates do not depend upon the occupancy thereof after the death of the holder of the legal title, but vest in them absolutely on his death." *Naiman v. Bohlmeyer*, 97 Neb. 551, 150 N. W. 829.

The plaintiff is entitled to the remainder-fee title, clear of debts against the estate, and clear of any claims filed against the estate of his father.

In the case of *Bartels v. Seefus*, 132 Neb. 841, 273 N. W. 485, our court stated in an opinion prepared by Judge Carter: "In *Shearon v. Goff*, 95 Neb. 417, 145 N. W. 855, we said: 'During the life of the owner of the fee of a homestead the exempt character of the property depends upon its occupancy as a homestead; but upon the death of the fee-holding spouse a new title is created which vests, *eo instante*, in the survivor for life, individually and unconditionally, free from the right of the children of either spouse to a division of the income therefrom.' "

While these questions are difficult, and expression in some opinions may not be as clear-cut as it should be, we have reached the conclusion that the first paragraph in the will, giving a general direction to pay his debts, did not place a lien upon the homestead for the payment of debts against the estate of Harry A. Gordon.

There appear to be but two claims set out by the executrix in her petition for license to sell the homestead to pay debts—first, her widow's allowance, and second, the funeral bill. Such debts are not enforceable against the homestead.

We have carefully examined several cases relied upon by the defendants. A number of their cases we have cited from in the opinion, and others, such as *Brownell v. Stoddard*, 42 Neb. 177, 60 N. W. 380, *Godman v. Converse*, 43

Neb. 463, 61 N. W. 756, *Weddle v. Specht,* 97 Neb. 693, 151 N. W. 160, *In re Estate of Combs,* 117 Neb. 257, 220 N. W. 269, *McManus v. Farrell,* 130 Neb. 69, 264 N. W. 144, and *Lehman v. Wagner,* 136 Neb. 131, 285 N. W. 124, we found were not applicable to the facts in the case at bar.

In the decree of the trial court, Judge Shepherd found that the real estate was a homestead of less value than $2,000, and that it was not subject to the payment of any debts of the estate of the deceased, nor subject to the payment of the costs of administration, nor yet for the payment of the widow's allowance; that the sale under license to sell to pay debts is null and void, and that the mortgage given the building and loan association is null and void as to the fee title interest of the plaintiff, and, finally, that the fee title is quieted in plaintiff, subject only to the life estate of the widow.

We have reached the conclusion that no prejudicial errors have been pointed out, and that the decree of the trial court is right, and it is

AFFIRMED.

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

JOHN MCARTHUR, APPELLANT, V. FRANK C. THOMPSON, APPELLEE.

299 N. W. 519

FILED AUGUST 1, 1941. No. 31165.

1. **Judgment.** "When a decree or judgment is made by consent of the parties, the court does not inquire into the merits or the equities of the case. The only questions to be determined by it are whether the parties are capable of binding themselves by consent, and whether they have actually done so. These two facts appearing, the court orders the judgment or decree to be entered." 14 Standard Ency. of Procedure, 919.
2. ———. A judgment by consent constitutes the agreement of the parties, and is simply made a matter of record by the court at their request. Although purporting to be, it is not, strictly speaking, the act of a court, but rather the act of the parties to the suit. This feature imposes some restrictions upon the

right to amend, and upon the right to appeal from such a judgment. It is not a judgment upon the merits.

3. ———. A "consent judgment" is treated as an agreement of the parties, and given greater force than an ordinary judgment, and the court is ordinarily without power to open or modify the same over the objection of one of the parties thereto.

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

Walker & McArthur, for appellant.

Max Kier, contra.

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

PAINE, J.

In an equity suit for the dissolution of a partnership, an accounting of partnership transactions, and for the sale by receiver of the three restaurants owned by the partnership, the plaintiff and defendant by agreement arrived at a settlement, and the court entered a supplemental decree in accordance therewith.

More than two months after the entry of this final decree, upon motion of the defendant alone, and over the objections of the plaintiff, the trial court entered an order amending such supplemental decree, which had been entered by consent of all parties. Plaintiff's motion for a new trial being overruled, he appeals from the order of the court modifying, amending, and changing the supplemental decree over plaintiff's objection.

It will be necessary, in order to have a clear understanding of the matter in dispute, that we present very briefly the facts leading up to the matter which is now contested.

John McArthur, plaintiff, and Frank C. Thompson, defendant, were equal partners in the ownership of three prosperous restaurants in Lincoln, each called Hotel D'Hamburger, occupying three separate locations. They had a sharp disagreement, in which there were claims made against each other, and charges of shortages, and of ex-

cessive withdrawals from the assets of the partnership, and suit was filed for an accounting, and finally a receiver was appointed, and a long and bitter trial resulted.

It is set out in the findings and decree of the court, dated April 10, 1940, that there were many disputes and differences between the partners, one being as to the form and manner of bookkeeping, and the court finds that McArthur's drawings from the firm are $3,483.89 in cash and a shortage of $196.38, or a total of $3,680.27, which should be charged against McArthur.

McArthur had agreed to pay the defendant $6,000 for a one-half interest in the business, of which he paid $3,000 in cash, and gave a demand note for the balance of $3,000, with interest at 4 per cent., which with interest makes a total charge against McArthur of $5,189.77, during the period of McArthur's operation, from September 9, 1937, to March 31, 1938. From April 1, 1938, to May 19, 1938, neither partner was in sole charge.

It was found by the court that from May 19, 1938, to August 28, 1939, was Thompson's period of operation, and that the total drawings of Thompson were $4,199.97, and one-half of the unidentified drawings of $433.70, and a cash shortage of $1,738.81 charged against Thompson, showing a total amount charged to Thompson of $6,372.48. Adding this to unsigned tapes of sales not included of $1,868.11, and advancements of $1,378.90, plus one-half of the unidentified drawings of $437.55, makes the total charged to Thompson's account of $10,057.04. Deducting the total amount with interest charged to McArthur, of $5,977.32, leaves a difference of $4,079.72, of which Thompson owes McArthur one-half, or $2,039.86.

The court further found the bill of $3,000 of John C. Shepard for making the audit is far too high, and allows him but $1,700, and allows the receiver, H. D. Lunsford, $900, and Frank Barrett for services to the receiver, $300, and directs the receiver to sell all partnership property at public auction within 30 days and report his proceeds into court.

This is a very inadequate summary of the decree of April 10, 1940, which is more than ten pages in length.

On April 13, 1940, there was filed an application by the plaintiff and defendant, setting out that they had agreed upon terms of settlement, and asking the court to modify the decree of April 10, 1940, and to order the receiver to deliver to the plaintiff all of the assets in his hands, and that no judicial sale be made, and that the receiver and his bondsmen be discharged, and on said 13th day of April, 1940, a supplemental decree was entered, modifying the decree of April 10, the same being a consent decree, entered by agreement of the parties, and finding that the defendant has sold his entire interest in the three Hotel D'Hamburger restaurants to plaintiff, who has paid the defendant the agreed consideration, and the receiver is to deliver to plaintiff all partnership assets, this supplemental decree concluding all matters between the parties.

Thereafter it was discovered that the Beatrice Creamery Company owed the partnership the sum of $346.24, the same being for rebates on ice cream not paid to the receiver. On June 20, 1940, the defendant filed a motion in the district court, asking that the court amend the final supplemental decree entered April 13, 1940, to provide that the defendant shall now receive $173.12, being one-half of the rebates due from the Beatrice Creamery Company.

The defendant attached to said motion, as exhibit A, a stipulation, which was the full agreement entered into by the parties on April 11, 1940, which resulted in the consent decree of April 13, 1940, being entered.

It appears there was one paragraph therein which read as follows: "It is further stipulated and agreed that if there are any rebates, refunds, cash discounts, or other moneys owing from any parties to the partnership not having been previously obtained by the receiver, one-half of said sum, if any, shall be paid to the defendant Frank C. Thompson."

No mention whatever had been made of this written agreement in the final supplemental decree of April 13,

1940, and it was in no way made a part of the consent decree, and exhibit A, containing it, was not attached to said final decree, which was entered upon the joint motion of plaintiff and defendant.

On June 21, 1940, the plaintiff filed objections to the defendant's motion, and charging that the stipulation set out in the defendant's motion just filed is not a part of the records in this case, and the relief based thereon cannot be obtained by motion; that the stipulation, exhibit A, annexed to defendant's motion, was secured by fraud of the defendant, as appears from affidavits offered in support hereof; that the issues with respect to said fraud are the subject-matter of a separate lawsuit presently to be filed, as shown by affidavits tendered herewith; that the court is without jurisdiction to determine the rights of plaintiff and defendant to the funds now in the hands of a third party and not a party to this action.

It is further charged that the motion of the defendant represents an attempt by the defendant to take advantage, by summary process, of a fraud perpetrated by him upon the plaintiff, upon the receiver appointed by the court, and upon the accountant appointed by the court to audit the partnership affairs, and upon the court itself, as shown by affidavits of said receiver, accountant, and plaintiff, wherefore plaintiff prays that the motion of the defendant be overruled at defendant's costs.

In support of this motion, there are attached many affidavits, the one of George A. Kurk showing that prior to May 12, 1938, no rebate was allowed to Hotel D'Hamburger for ice cream, but that on May 12, 1938, Frank C. Thompson agreed with affiant that he would purchase all of the ice cream from the Beatrice Creamery Company; that the price to be paid should be $1.10 a gallon, and that 20 cents would be refunded on each gallon so purchased, and pursuant to such oral agreement there was paid to Frank C. Thompson ice cream rebates listed in the affidavit by months, and amounting to the following sums: For the months of May to December, 1938, $224.65; for January

to July, 1939, the sum of $179.60; for the months of September, October and November, 1939, the sum of $123.60; for the months of March to May, 1940, the sum of $144.25, making a total sum of $672.10.

Affiant Kurk further testifies that, when he tendered the check for ice cream discount for August, 1939, to Frank C. Thompson, Thompson instructed him to hold it until further instructions from Thompson, and therefore the Beatrice Creamery Company did hold said ice cream discount, and did not pay the same to H. D. Lunsford, receiver of Hotel D'Hamburger; that the money in the hands of the Beatrice Creamery Company represents a part of the ice cream discount earned between August, 1939, and April, 1940.

H. D. Lunsford states in his affidavit that he was wholly unaware that any ice cream discount was payable from the Beatrice Creamery Company to said business, and that none was paid to him as receiver.

John C. Shepard, auditor, in his affidavit states that he carefully audited the books of Hotel D'Hamburger, and that nowhere in said books does it appear that any ice cream discount was being collected by the defendant, or had been paid by the Beatrice Creamery Company to the defendant, Thompson. He said that during his examination of the business he was informed by plaintiff that a discount on milk and cream was being paid by the Beatrice Creamery Company, although same was not anywhere shown in the defendant's records, and that he obtained information from said company and charged the same in his audit; that he called Frank C. Thompson, defendant, into his office and asked whether there were any other discounts than the milk and cream discounts payable on the partnership business, and that Frank C. Thompson told affiant that the milk and cream discount was the only discount of any kind ever earned or paid to the partnership, and affiant swears that he never knew of the ice cream discount paid by the Beatrice Creamery Company until several days after the entry of the supplemental decree.

The affidavit of John McArthur states that he is plaintiff, and that, for the purpose of buying out defendant's interests, he entered into negotiations with Coburn Campbell, who was at that time attorney for the defendant, and that said Coburn Campbell told him that he had asked his client, Frank C. Thompson, whether there were any other discounts or rebates aside from that on milk and cream, and that Frank C. Thompson said he did not know of any other discounts or rebates, and that, in reliance on said statements, affiant signed the stipulation attached to defendant's motion.

Affiant further says he agreed to pay, and did pay, to the defendant, Frank C. Thompson, $2,000 for the entire right, title and interest of Frank C. Thompson in said partnership business, under the belief that all of the money and assets of said partnership that came into defendant's hands during the period covered in this accounting had been discovered and taken into account, and in reliance on said belief made the settlement mentioned; that since said settlement he has learned that in May, 1938, before any difficulty developed between the partners, Frank C. Thompson had negotiated a secret agreement with the Beatrice Creamery Company, whereby said company agreed to pay to Frank C. Thompson a discount, or rebate, of 20 cents a gallon on all ice cream purchased from said Beatrice Creamery Company, and that between May, 1938, and August, 1939, the said Frank C. Thompson actually collected from the Beatrice Creamery Company on such ice cream rebates some $700, which he failed to record in the books, and concealed from the affiant, as well as from the defendant's own attorney.

Affiant further states that the Beatrice Creamery Company still holds rebates for the period between August 29, 1939, and April 13, 1940, in the sum of $346.24, which is payable to the partnership; that immediately upon learning these facts the plaintiff notified the Beatrice Creamery Company that he claimed all of the accumulated ice cream discounts of $346.24, because the defendant had collected

more than $700 for which he had failed to account; that the attorney for the Beatrice Creamery Company, T. S. Allen, informed affiant that the Beatrice Creamery Company would commence an interpleader action and tender the ice cream discount in its hands into court, and affiant attaches to his affidavit the duly verified petition which T. S. Allen proposes to file in the district court for Lancaster county as attorney for the Beatrice Creamery Company; that the affidavit of Coburn Campbell, former attorney for defendant, verifies the statements in the affidavit of plaintiff.

In opposition thereto appears the affidavit of Frank C. Thompson, defendant, in which he states that he has read the affidavits of George A. Kurk, H. D. Lunsford, John C. Shepard, and John McArthur filed herein, and states that the rebates paid to him by the Beatrice Creamery Company were placed in the funds of the partnership heretofore existing under the name of Hotel D'Hamburger, and none of those was diverted to the personal use or benefit of the affiant, and that all of said rebates were fully accounted for and included in the shortages charged to the defendant, and that at the time the stipulation was entered into it was known by both parties that there were additional rebates, and for that reason it was specifically provided in said stipulation of settlement that the plaintiff should receive one-half thereof.

In opposition to the affidavit of the defendant, Thompson, an additional affidavit is filed by John McArthur, plaintiff, in which he says that, when specific items of cash shortage were pointed out, Thompson admitted that each of said charges represented funds taken by him from the partnership, and nowhere recorded or accounted for in any of his records, and that there was no such thing as a partnership account; that he put a part of the partnership funds in his personal bank account; that the entries listed in the books which were introduced in evidence as bank deposits were not bank deposits at all, but merely a designation of sums which should have been deposited, and that said

Thompson further admitted on cross-examination that he took sums totaling $1,700 from the partnership business without making any kind of entry in any of his records.

Affiant objects to amending the supplemental decree to enable defendant to collect the proceeds of a fraud deliberately perpetrated, and the evidence in respect to which requires the examination of evidence and facts never before the court prior to the filing of defendant's motion; that affiant is anxious to have opportunity to bring into court the persons whose affidavits he has offered, and exhibits and records to substantiate his claim, and to have the opportunity to cross-examine parties furnishing affidavit for defendant.

On August 20, 1940, the trial judge entered his final order, saying that on June 22 and June 29, 1940, the matter came on for hearing upon the motion of the defendant, Frank C. Thompson, for an order amending the supplemental decree so as to provide that defendant Thompson is to receive one-half of the rebates held by the Beatrice Creamery Company. The court finds that the stipulation produced definitely refers to unknown rebates owed to the partnership, and there are rebates in the amount of $346.24 held by the Beatrice Creamery Company, and that, pursuant to said stipulation, one-half of said sum, or $173.12, was payable to Frank C. Thompson, and that the decree heretofore entered on April 13, 1940, should be modified so as to contain the provisions of this stipulation. It is ordered that the decree heretofore entered be modified, and that Frank C. Thompson be adjudged the owner of, and entitled to receive, the sum of $173.12 from the Beatrice Creamery Company.

Motion for a new trial was filed, setting up that the court had no jurisdiction over the subject-matter, had no jurisdiction over the Beatrice Creamery Company, the holder of the fund in dispute, because the supplemental decree of April 13, 1940, was based on a joint application of plaintiff and defendant, and because the court erroneously has now decided that the stipulation upon which the defendant

relies should have been included in the supplemental decree of April 13, when in fact said stipulation was not before the court, because the court thereby has made a new settlement and agreement between the plaintiff and defendant by granting defendant the relief he prays for, and by ignoring the uncontradicted evidence that the relief merely secures to the defendant the fruits of a fraud perpetrated on the plaintiff by him.

On October 15, 1940, the motion of the plaintiff for an order vacating and setting aside the order of the court made August 20, 1940, and granting plaintiff a rehearing thereon being submitted, the court overruled the motion.

To summarize the whole matter, the facts as set out in affidavits of plaintiff, although disputed in part by the defendant, indicate that the defendant has already received in past years rebates on ice cream in the approximate sum of $672.10, and the trial court order of August 20, 1940, gives to the defendant $173.12 in addition, or a total of $845.22 which the defendant will receive, while the plaintiff will receive but $173.12.

The plaintiff, as grounds for reversal, charges that (1) the court erred in granting defendant the relief prayed, because same was opposed by the uncontradicted evidence; (2) the court erred in permitting new issues to be raised by motion and tried by affidavit, over plaintiff's objections, after a consent decree had been entered and same had been fully performed and the judgment thereof satisfied; (3) the court erred in changing a consent decree over the objections of plaintiff.

This subject is discussed generally in several paragraphs in 14 Standard Ency. of Procedure. A paragraph on page 913 reads as follows: "A judgment by consent constitutes the agreement of the parties, made a matter of record by the court at their request. Although purporting to be, it is not, strictly speaking, the act of a court, but rather the act of the parties to the suit. This feature imposes some restrictions upon the right to amend, and upon the right to appeal from such a judgment. It is not a judgment

upon the merits. Such a judgment is not identical with a judgment by confession, but the effect of both is very much the same."

A paragraph on page 919 reads: "When a decree or judgment is made by consent of the parties, the court does not inquire into the merits or the equities of the case. The only questions to be determined by it are whether the parties are capable of binding themselves by consent, and whether they have actually done so. These two facts appearing, the court orders the judgment or decree to be entered."

A paragraph on page 922 says: "A court has power to open or vacate a consent judgment where adequate grounds exist therefor. But in the absence of such grounds, such a judgment can only be modified, changed, or set aside by the consent of all the parties thereto."

Many courts have had questions involving the force of a consent decree before them. We will cite only a very few of a very large number.

"A decree by consent cannot be appealed from, error cannot be assigned on it, a rehearing cannot be granted and it cannot be set aside by a bill of review. *Armstrong v. Cooper,* 11 Ill. 540; *Galway v. Galway,* 231 Ill. 217, 83 N. E. 154; *Mooney v. Valentynovicz,* 262 Ill. 355, 104 N. E. 645." *McDonald v. Shimeall,* 282 Ill. 42, 118 N. E. 399. See, also, *Clark v. Charles,* 55 Neb. 202, 75 N. W. 563.

A "consent judgment" is treated as an agreement of the parties, and given greater force than an ordinary judgment, and the court is without power to open or modify, except upon certain grounds. *Keach v. Keach,* 217 Ky. 723, 290 S. W. 708.

"If parties have the authority, a consent judgment cannot be changed, altered, or set aside without the consent of the parties to it. The judgment, being by consent, is to be construed as any other contract of the parties. It constitutes the agreement made between the parties and a matter of record by the court, at their request. The judgment, being a contract, can only be set aside on the ground of

fraud or mutual mistake." *First Nat. Bank v. Mitchell,* 191 N. Car. 190, 131 S. E. 656. See, also, *Weaver v. Hampton,* 201 N. Car. 798, 161 S. E. 480; *Horning v. Saginaw Circuit Judge,* 161 Mich. 413, 126 N. W. 650.

"Decrees are frequently entered on consent of the parties; and where this practice has been followed, the fact should be recited in the decree. Having been entered, such a decree is binding on the consenting parties; it cannot be reviewed except on a showing that consent was obtained by fraud or that the decree was based on mutual error. A consent decree is as much a final decree and as conclusive upon the parties as is a decree which has been rendered after a hearing on the merits." 19 Am. Jur. 280, sec. 407.

"The judgment in this case was the final ascertainment of the right by consent of the parties to the suit, and cannot be changed by any subsequent order of the court without like consent. *Seiler v. Union Mfg. Co.,* 50 W. Va. 208, 40 S. E. 547." *United States Construction Co. v. Armour Packing Co.,* 35 Okla. 177, 128 Pac. 731.

"The bill shows that after the parol agreement was made, the parties, in pursuance of it, appeared in court, and had a judgment rendered in the cause for the plaintiff. The rendition of that judgment put an end to the previous parol agreement on the subject. For the terms of that judgment, we must look to the records alone of the court that rendered it. The plaintiff is estopped from saying that the judgment does not accord with the previous parol contract." *State Bank of Indiana v. Young,* 2 Ind. 171, 52 Am. Dec. 501.

A consent decree is not, in a strict sense, a judicial sentence. It is in the nature of a solemn contract, and is so binding as to be absolutely conclusive upon the consenting parties, and it can neither be amended nor in any way varied without a like consent, nor can it be reheard, appealed from, or reviewed upon a writ of error. *Schmidt v. Oregon Gold Mining Co.,* 28 Or. 9, 26, 40 Pac. 406, 1014, 52 Am. St. Rep. 759.

"A judgment by consent is regarded as in the nature

of a contract or binding obligation between the parties thereto, * * * and * * * is a waiver of errors and irregularities; and when such consent judgment embraces matters or extends to relief not involved within nor responsive to the issues in the case, it, with respect to such matters and relief, no doubt partakes more of the character of a voluntary agreement between the parties than of a judgment of the court determining a controversy between real litigants." Freeman, Judgments (3d ed.) 372, sec. 330.

"Courts have the general power of entering judgment by consent of the parties for the purpose of executing a compromise and settlement of an action. When made by consent, it is presumed that the judgment is made in view of the existing facts, and that these facts are within the knowledge of the parties. Although judgments by consent are in effect contracts of parties, acknowledged in court and ordered to be recorded, such judgments have been regarded as adverse judgments. It is clear that a judgment by consent is different and distinct from a judgment by confession." 31 Am. Jur. 105, sec. 458.

"The fact that a judgment is rendered by consent gives it neither less nor greater force or effect than it would have had it been rendered after protracted litigation, except to the extent that the consent excuses error and operates to end all controversy between the parties. In this connection, it has been declared that a judgment by consent estops the parties from denying the facts it purports to establish. On the ground that where a judgment is rendered pursuant to a previous parol agreement the rendition of the judgment puts an end to the agreement, it has also been held that the party in whose favor the judgment is rendered is estopped from saying that it does not accord with the previous contract." 31 Am. Jur. 107, sec. 463.

In the case at bar, the district court had finally completed the trial of a bitterly contested case, and on April 10, 1940, entered all of its findings, on all points involved, in a decree of ten pages in length, as it appears in the transcript, and concluding portion providing that the receiver should sell all of the property.

Three days later the parties, having mutually agreed upon a full and complete settlement upon all matters between them, filed an application to modify the decree of the court, setting out that the plaintiff has paid to the defendant the full consideration, and that the defendant has transferred all of the property to plaintiff, and that all the creditors have been paid, and the plaintiff has released his judgment of record, and this application ended with a prayer that, these things having all been done by the parties, the court enter a supplemental decree, directing receiver to deliver to plaintiff all the assets in his hands, and thereupon on the same day the court entered a short supplemental decree in strict accordance therewith, carrying out the exact settlement as made by the parties, vacating the provision in the former decree providing for sale of the property, and directing receiver to transfer all of the property to the plaintiff. This decree, entered by written consent and upon application of the parties, constituted but the formal approval of the court of the exact terms they had agreed upon, and which had been carried out, and this was not only final between the parties, but was binding upon the trial court.

In the opinion of this court, if either party wished to modify this consent decree, it could not be done by the court on motion of one party and over the vigorous objections of the other, and the action of the court so taken on August 20, 1940, was beyond the power of the court, and is hereby set aside and held for naught.

REVERSED.

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

NEBRASKA CENTRAL BUILDING & LOAN ASSOCIATION, APPELLEE, V. YELLOWSTONE, INC., ET AL., APPELLEES: STATE OF NEBRASKA, APPELLANT.

299 N. W. 474

FILED AUGUST 1, 1941. No. 31177.

1. **Corporations.** The secretary of state has statutory authority, under section 24-1722, Comp. St. 1929, to dissolve a domestic corporation for nonpayment of occupation taxes due the state of Nebraska.
2. ———. The term "corporate dissolution" signifies the termination of corporate existence in law and in fact, ending its capacity to act as a body corporate and necessitating liquidation.
3. ———. The secretary of state is not empowered to levy occupation taxes against a corporation which he has dissolved for any year subsequent to such dissolution.

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

Walter R. Johnson, Attorney General, and *Robert A. Nelson,* for apellant.

Field, Ricketts & Ricketts, contra.

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

PAINE, J.

The question is presented to this court for the first time, where a corporation had been dissolved by the secretary of state, in accordance with section 24-1722, Comp. St. 1929, and a notation made in his corporation records that such corporation is dissolved for nonpayment of occupation tax, can the state collect taxes for subsequent years? The state claims that, after such dissolution, corporation taxes are due for all years up to and including 1940, in the sum of $5.75 per annum, or a total of $51.75. The trial court found for the plaintiff, and decided that there was but $5.75 due for the one year of 1932, and that this amount was a prior lien to the plaintiff's mortgage.

The plaintiff alleged that the Yellowstone, Inc., executed

a mortgage to the plaintiff and appellee on an apartment house in Lincoln on August 14, 1931, for $7,000, the mortgage covering lot 11, block 3, Woodsview addition to Lincoln, Nebraska; that a foreclosure proceeding was brought thereon, and a decree entered for the amount due of $7,524, with interest at 10 per cent. from June 7, 1938. Thereafter a title examiner raised the question whether or not the Yellowstone, Inc., was a dissolved corporation, and whether the lien of the state of Nebraska for unpaid corporation taxes was outstanding, and to clear the title this second foreclosure action was brought, and the state of Nebraska was made a party, the purpose of the foreclosure being to clear the title of the lien for corporation taxes.

The state of Nebraska filed an answer, in which it set up its liens for the years 1932 to 1940, inclusive, in the amount of $5.75 per annum, or a total of $51.75, and alleged that the lien therefor was prior to any right, title or interest of plaintiff, and is subject only to the state, county, and municipal taxes. Comp. St. 1929, sec. 24-1722.

To this, the plaintiff filed a reply, admitting that the corporation occupation taxes for the years 1932 and 1933 are a prior lien against the mortgaged premises, but specifically denying that any occupation taxes are due and owing to the state of Nebraska for the years 1934 to 1940.

After briefs were filed and arguments made, the trial court found that all defendants defaulted except the state of Nebraska; that the mortgage was duly executed; that a previous foreclosure has been had, and that constructive service has been had upon all of the defendants, in accordance with the provisions of section 24-113, Comp. St. Supp. 1937.

The court finds that the merchantability of the plaintiff's title under the foreclosure above mentioned, which was concluded according to law, has been questioned on the ground that the secretary of state had no power to legally dissolve the corporation for nonpayment of occupation taxes, but had authority only to suspend its activities during the period of tax default.

The trial court also found that the last annual report filed by the Yellowstone, Inc., was filed in the office of the secretary of state on January 15, 1931, showing the shares of capital stock outstanding and the ownership thereof, and that there was due to the state of Nebraska delinquent occupation tax for the year 1932, which is a prior lien upon the above described real estate, and that the secretary of state of Nebraska duly dissolved said corporation according to law.

The court concludes that there is due the state of Nebraska for the year of 1932 the sum of $5.75 only, and directs that, in default of the payment thereof, the mortgaged premises be sold.

The state of Nebraska filed a motion for new trial, giving eight errors for a reversal, and it is principally presented in this court on the ground that the judgment of the court is contrary to law. The state of Nebraska maintains that, when the secretary of state makes the entry that a corporation is dissolved under section 24-1722, Comp. St. 1929, it is not absolutely dissolved, but that a *quo warranto* action must be brought by the attorney general, as provided in section 24-1717, Comp. St. 1929, before the corporation is absolutely dissolved; that these two statutory provisions must be construed together, and that it appears that it was the intention of the legislature that the entry by the secretary of state on the corporate records of his office did not work an absolute dissolution of the corporation, but that this could only be had after a judicial determination in an action brought by the attorney general, as provided by section 24-1717, Comp. St. 1929, or by the voluntary act of the stockholders.

We are cited to the case of *State v. Sperry & Hutchinson Co.*, 94 Neb. 785, 144 N. W. 795, in which this court held that, when a corporation had been declared delinquent, it could be reinstated if it paid the secretary of state the full amount of his fee and a penalty demanded by him, and it is argued that the dissolution by the secretary of state is not, therefore, an absolute dissolution, but merely a sus-

pension of the corporation's right to perform corporate functions until such time as a reinstatement takes place, as it is a general law that forfeitures are not favored in law, but this was allowable only by the specific terms of section 4261, Cobbey's Ann. St. 1911, which section has now been repealed.

"The intent of the legislature to so terminate the corporate charter must be very plainly expressed in the statute. It may not be enough to merely state that the delinquent corporation's charter shall be void, or that its default shall operate as a revocation or annulment of its charter, or to employ other terms which, at best, disclose a legislative purpose to make a failure to report or to pay the corporation fees a ground for a judicial or administrative declaration of forfeiture." 16 Fletcher, Cyclopedia of Corporations, 750, sec. 7997.

In the case of *State v. Sperry & Hutchinson Co., supra,* it was found that the corporation had done business three years without paying any tax, and it thereupon paid the tax to the secretary of state for each year it was delinquent, and while it paid less than the correct amount, it was held that fact would not sustain a judgment of ouster against the corporation.

This decision was entered in 1913, under the law then in force, to wit, section 4261, Cobbey's Ann. St. 1911, but that law, passed in 1909, has been repealed, and that particular provision is not in the present law.

The case of *Havens & Co. v. Colonial Apartment House Co.,* 97 Neb. 639, 150 N. W. 1011, involved the construction of the occupation tax act of 1909, as did the case of *Weekes Grain & Live Stock Co. v. Ware & Leland,* 99 Neb. 126, 155 N. W. 233. Under the law as it then existed, it was the duty of the governor of the state by proclamation to declare that the charter of such delinquent corporation shall be forfeited unless the payment of said occupation tax should be made by a date certain.

Now, in reference to the claim of the state that section 24-1717, Comp. St. 1929, provides that the attorney gen-

eral may bring an action to forfeit the charter of a corporation, it appears to us that that section is only applicable in a case where the failure to pay this corporation tax is wilful and intentional, and such cases would rarely arise, but those appear to be the only kind of cases to which this section refers.

If the secretary of state has declared the corporation dissolved, how can the state assess any taxes after it has denied the corporation the right to do any business? See *Hurd v. Meyer*, 259 Mich. 190, 242 N. W. 882.

An examination of the present law, as found in section 24-1722, Comp. St. 1929, shows that it provides: "Upon the failure of any domestic corporation to pay its occupation tax within ninety days after the mailing of the registered letter correctly addressed to the last known address of the corporation, the secretary of state shall dissolve the corporation and make such entry and showing upon the records of his office."

We find that no lien attaches for any year except 1932, and the judgment of the trial court was right, and is hereby

AFFIRMED.

LEE CARD, APPELLANT, V. ANNA ROSE GEORGE ET AL., APPELLEES.

299 N. W. 487

FILED AUGUST 1, 1941. No. 31051.

1. **Attorney and Client.** Except as provided by statute, an attorney has no lien for services performed by him.
2. ———. Section 7-108, Comp. St. 1929, does not provide for attorney's lien on real estate owned by client.
3. **Fraudulent Conveyances.** A creditor whose claim has not been reduced to judgment and who has neither a general nor specific lien is not entitled to attack a transfer of property as being fraudulent as to creditors.
4. **Executors and Administrators.** When claim has been allowed by probate court, creditor is in position of judgment creditor.

APPEAL from the district court for Dawes county: EARL L. MEYER, JUDGE. *Affirmed.*

Lee Card, pro se.

Charles A. Fisher, contra.

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

KROGER, District Judge.

In its inception this was an action to foreclose an attorney's lien. To the original petition a demurrer was sustained and thereupon an amended petition was filed praying that a certain transfer of real estate be set aside as fraudulent as to creditors and particularly as to the plaintiff, and praying that plaintiff's claim be established as a lien on said real estate and his lien foreclosed. From a judgment denying the relief prayed for plaintiff appeals.

The record discloses that Lee Card, an attorney at law residing at Chadron, performed some professional services for one Margaret E. Kurt during the years 1936 to 1938, inclusive, for which services he was never paid; that Margaret E. Kurt died on the 25th day of June, 1938, and that on the 19th day of June, 1938, by warranty deed, she conveyed all of her real estate to her daughter Anna Rose Kurt George; on the 16th day of May, 1938, Lee Card, the plaintiff, executed an instrument which is designated "Affidavit for Attorney's Lien," in which instrument he claimed an attorney's lien on the real estate owned by Margaret E. Kurt, which instrument was filed with the county clerk of Dawes county on the 16th day of May, 1938. It was this claimed lien which plaintiff sought to foreclose in his original petition.

The record discloses beyond dispute that Margaret E. Kurt possessed no property at the time of her death, nor were there any debts save the expense of her last sickness and whatever her indebtedness might be to the plaintiff. No administration of her estate has been had or asked for. Upon this state of facts the appellant insists that a court

of equity should set aside the transfer as being fraudulent as to creditors, impose on said real estate a lien for his services, order the amount found due paid, and in default of payment that the premises be sold for the satisfaction of such lien.

At the outset it is apparent that the plaintiff never at any time had a lien on the real estate of Margaret E. Kurt.

Section 7-108, Comp. St. 1929, gives an attorney a lien for a general balance due upon any papers of his client which have come into his possession in the course of his employment; upon money in his hands belonging to his client, and upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.

Except as provided by statute, an attorney has no lien for services performed by him.

The statute does not give an attorney a lien upon any real estate belonging to his client and the claimed lien in this case was a nullity. The record further shows that the plaintiff was not a judgment creditor of Margaret E. Kurt.

This court has held: "A creditor whose claim has not been reduced to judgment, and who has neither a general nor specific lien on his debtor's property, is not entitled to have such property impounded as security for the claim, nor is such creditor entitled to an injunction restraining his debtor from disposing of some or all of his property." *Brumbaugh v. Jones,* 70 Neb. 786, 98 N. W. 54. To the same effect is the holding of this court in *First State Bank v. Kastle,* 118 Neb. 630, 225 N. W. 776.

Appellant argues, however, that Margaret E. Kurt transferred all of her property before her death and that at the time of her death she was insolvent, and that therefore it would be a useless thing to administer her estate and have his claim presented and acted upon in the probate court, and cites the case of *Scheve v. Vanderkolk,* 97 Neb. 204, 149 N. W. 401, as supporting his position.

On the general question thus raised it might be said that

there are a number of states which hold as contended for by appellant, but this court is committed to the rule that before the transfer can be attacked one must be a judgment creditor or have a general or specific lien on the property. Where, as here, the debtor dies before the claim is reduced to judgment, the creditor must ask to have the estate administered and his claim allowed in the probate court before he is in the position of a judgment creditor.

The case of *Scheve v. Vanderkolk, supra,* was one where the provisions of the "Bulk Sales Law" were involved and was disposed of with particular reference to that act and is not controlling here.

The record disclosing that appellant was neither a judgment creditor nor the holder of a general or specific lien, the judgment of the trial court was correct and is

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1941

PRUDENTIAL INSURANCE COMPANY, APPELLEE, V. GEORGE A. NORALL, ADMINISTRATOR, APPELLANT.

300 N. W. 349

FILED OCTOBER 10, 1941. No. 31182.

Mortgages. Record examined, and the decree of the trial court confirming a sale of real estate is affirmed with leave to redeem.

APPEAL from the district court for Phelps county: LEWIS H. BLACKLEDGE, JUDGE. *Affirmed.*

Hamilton & Landis, for appellant.

Wilber S. Aten, Clinton B. Nasby, Harold M. Peyton and *Joseph H. Sauer, contra.*

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

SIMMONS, C. J.

Defendant appeals from an order of confirmation of a sale in a mortgage foreclosure. Plaintiff moves to dismiss the appeal. This motion is overruled and the cause considered on its merits. The question is: Did the trial court err in confirming the sale?

The premises were sold on August 19, 1940, and on objection the sale was set aside and a new sale ordered. Pending the second sale unsuccessful attempts were made to sell the land at private sale. The second sale was had October 21, 1940. The bid, made by a third party, was

$3,555, that being the approximate amount then due on the decree, including costs. Objection to confirmation was filed based upon the claim that the sale price was inadequate. Hearing upon motion for confirmation was had. Plaintiff's witnesses show the value of the land to be from $3,000 to $4,000. Defendant's witnesses fix the value as high as $6,000. One witness fixes the value at from $50 to $75 an acre. The exact number of acres in the tract is not clear from the evidence. This witness, however, stated that it would be hard to get $4,500 for the land. There is evidence of a hope for higher prices based on increased rains and the possibility of irrigation of a part of the tract. However, in the language of the trial court, "Nobody here is offering more. No record of anybody who will give more." Under similar circumstances, this court has on many occasions declined to set aside an order of confirmation.

"An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale." *Equitable Life Assurance Society v. Buck,* 138 Neb. 203, 292 N. W. 605.

The decree of the district court is affirmed, with leave to the defendant to redeem within thirty days from the issuance of the mandate.

AFFIRMED.

NELLIE S. TRAILL, APPELLEE, V. ERNEST H. OSTERMEIER, JR., APPELLANT.

300 N. W. 375

FILED OCTOBER 10, 1941. No. 31166.

1. **Pleading.** "Pleading affirmative matters in an answer, which amount to no more than a denial of plaintiff's cause of action,

will not necessitate a reply." *Peaks v. Lord*, 42 Neb. 15, 60 N. W. 349.

2. **Stipulations.** The parties may, by stipulation, dispense with such of the pleadings as therein designated, and the effect of the stipulation in this case was to dispense with the filing of a reply, had one been otherwise required, and no objections may thereafter be based on its absence.
3. **Automobiles.** Evidence in the record examined, and so far as conflicting evidence of negligence and contributory negligence of the parties to the litigation was concerned, it was properly submitted to the trial jury by the district court, whose instructions thereon are approved.
4. **Animals.** The owner of a domestic animal is responsible for negligence in its keeping whereby damage is occasioned to person or property lawfully on a public highway, if the accident occurring was one which the owner could reasonably have anticipated.
5. **Automobiles.** Where hogs are kept in a defectively fenced hog lot, adjacent to a much-traveled, hard-surfaced highway, and where such hogs escape therefrom, and their owner, after notice thereof, fails to return them to confinement, and thereby in the nighttime they are permitted to wander in and along such highway, it is a question of fact for the jury as to whether the owner of the hogs could have reasonably anticipated that they, thus at liberty, would collide with an automobile lawfully traveling upon such highway.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

H. G. Wellensiek, for appellant.

Herbert F. Mayer, contra.

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

EBERLY, J.

This is an action for damages occasioned to an automobile of the plaintiff on November 19, 1939, while, it is alleged, it was lawfully driven along public highway No. 281, near Grand Island, Nebraska, by its driver, James Traill, plaintiff's son, in "a careful, cautious and prudent manner, at a lawful rate of speed, and with headlights burning, and

observing said highway in a reasonable and prudent manner, considering said highway and the traffic thereon," when three of the hogs of defendant herein, weighing between 150 and 175 pounds each, suddenly ran up and out of the road ditch situated alongside of the highway on which plaintiff's automobile was being driven, and directly into the path of plaintiff's automobile, and colliding with said automobile and damaging the same and causing injuries to the occupants thereof, described and set forth in the petition. It was further alleged "that, prior to said hogs coming up upon the traveled portion of said highway, said hogs were not visible to said James Traill nor could they have been seen by a reasonably prudent person under similar circumstances, and that said James Traill, in the exercise of ordinary care and prudence, did not know their presence to be there and had no reason to believe said hogs to be there." The petition further alleged said hogs were upon said highway, with knowledge of the defendant, and were unattended by him for more than three hours prior to the accident; that the defendant had carelessly and negligently failed to keep said hogs restrained to his premises and, though amply warned of the situation, "defendant negligently and carelessly failed to take possession of said hogs * * * but permitted and suffered his said hogs to wander about along the roadsides and along the highway hereinbefore mentioned after dark at their will, knowing full well of the usual and customary traffic upon said highway No. 281 at the point of the accident hereinbefore mentioned, and without giving any heed thereto and without giving any warning to the public."

In his answer, the defendant, first, admits that the plaintiff had an accident with said automobile on highway No. 281, on or about November 19, 1939, while the car was being driven by her son, James Traill, with the full knowledge and consent and acquiescence of plaintiff, and denies generally the allegations in plaintiff's petition contained; second, denies specifically that said accident and the alleged damages sustained were caused by the negligence of the

defendant; third, in the fourth paragraph of the answer is pleaded and set forth as the defense of contributory negligence, the following: "4. Alleges that, at the time of the accident, the said James Traill was driving the automobile of the plaintiff with her full knowledge, consent and acquiescence; that he was driving in a careless, reckless and negligent manner, and at a high rate of speed; that he failed to have said automobile under proper control; that he failed to keep a proper lookout for any obstacles on the public highway; that he failed to stop said automobile to avoid the accident; that he failed to turn said automobile to avoid the alleged collision; that he had a clear and unobstructed view of the public highway at the time of the accident, and that said accident and the damages resulting therefrom were due entirely to his carelessness and negligence."

The instant action was first commenced in the county court for Hall county, Nebraska, and the petition and answer hereinbefore set forth in substance were first filed in that court. A trial duly had in the county court resulted in a judgment in favor of the plaintiff and against the defendant for the sum of $395 and costs of suit. Thereupon the defendant executed an undertaking for appeal, and prosecuted such appeal from said judgment by lodging a proper transcript of the same, together with the proceedings had in connection therewith, in the district court for Hall county. On July 25, 1940, the parties to this proceeding caused to be filed in the district court for Hall county a stipulation in writing, executed by both parties, and duly entitled in this proceeding, "That the above entitled case shall be tried in the district court of Hall county, Nebraska, on the pleadings filed in and the transcript of the county court of Hall county, Nebraska, appealed from, and that the filing of new pleadings in this court is hereby waived." The cause was tried in the district court, pursuant to the stipulation, and judgment was there entered in favor of the plaintiff. From the order of that court overruling his motion for a new trial, the defendant appeals.

Appellant contends that, there being an absence of a reply, all allegations of new matter contained in his answer will be taken as true, and in this condition the pleadings will not sustain the judgment. He cites *Williams v. Evans*, 6 Neb. 216, and *Penn Mutual Life Ins. Co. v. Sweeney*, 132 Neb. 624, 273 N. W. 46.

From a careful examination of the fourth paragraph of defendant's answer, which we have heretofore set forth herein, with the allegations of plaintiff's petition, disregarding mere form, but giving full effect to the substance of the statements contained in each, it fairly appears that, though matters are pleaded in the answer in affirmative form, in substance and legal effect they amount to no more than a denial of plaintiff's cause of action. The situation here presented invokes the application of the rule well established in this jurisdiction: "Pleading affirmative matters in an answer, which amount to no more than a denial of plaintiff's cause of action, will not necessitate a reply." *Peaks v. Lord*, 42 Neb. 15, 60 N. W. 349. See, also, *Gruenther v. Bank of Monroe*, 90 Neb. 280, 133 N. W. 402; *In re Estate of Kamrath*, 114 Neb. 230, 206 N. W. 770; *Neslund v. Kinnan*, 129 Neb. 339, 261 N. W. 832.

The situation suggests the application of another rule which would obviate defendant's challenge based on the necessity of filing a reply. This case was first tried in the county court and appellant was the appealing party. The code provisions regulating appeals contemplated that in the district court procedure would be followed in all respects in the same manner as though the action had originated in such court. In the instant case this Code would have required the filing of a new petition, a new answer, and, if a reply be necessary because of the allegations in the answer, a new reply. Comp. St. 1929, secs. 21-1305, 21-1306; *Moline, Milburn & Stoddard Co. v. Hamilton*, 56 Neb. 132, 76 N. W. 455.

The stipulation necessarily eliminated compliance with the statutory provisions referred to, and by necessary implication rendered unnecessary the filing of a reply. The

legal effect of a stipulation has been stated as follows: "The parties may, by stipulation, dispense with such of the pleadings as are therein designated, and may dispense altogether with pleadings and submit the case on an agreed statement of facts." 60 C. J. 53. The effect of the stipulation in this case was to dispense with the filing of a reply, had one been otherwise required, and no objections may thereafter be based upon its absence. *Goodenow v. Foster,* 108 Ia. 508, 79 N. W. 288; *Reich v. Cochran,* 74 Hun, 551, 26 N. Y. Supp. 443.

The question of whether the driver of the damaged automobile was guilty of contributory negligence in the driving of the automobile at the time and place of the accident was, under all the evidence in the record, properly a question for the trial jury. It was submitted to them by the trial court, by instructions which we approve, and their determination under the facts and circumstances disclosed by the record is binding upon this court.

It is contended by appellant, however, that "It is not unlawful for domestic animals to be at large on a highway, and the owner of domestic animals straying on the highway and coming into collision with an automobile is not liable for the resulting damage, since such an accident is one that could not reasonably have been anticipated by the owner, even if he was negligent in failing to maintain secure fences." So far as this contention may depend on surrounding circumstances, it may be said that the defendant for a number of years has lived adjacent to highway No. 281 and for seven years or more has been engaged in raising hogs. Highway No. 281, on which the accident occurred, is a hard-surfaced, well-traveled highway extending in a northerly direction from Grand Island, Nebraska. Defendant's farm home is on this highway, six miles north of Grand Island. His hog lot embraced some 25 acres and in it immediately prior to the accident he kept 84 hogs. It was fenced with 22-inch woven hog wire, with three barb wires on top; but at one place in the hog lot fence the defendant had removed the three strands of barb wire to

permit the passage of his cows over the same, thus leaving only the 22-inch woven wire to restrain the hogs, which subsequent events proved insufficient. At about 4:45 p. m. of the day of the accident the defendant was informed that his hogs had escaped from the hog lot and were on the public road. He immediately went out to the road, rounded up twelve head of hogs and returned them to the hog lot, driving them in or through the surrounding fence where he had created the passageway for his cows, and where the 22-inch woven wire fence had been "sagged down" by the escaping hogs. He thought he had returned all hogs that had escaped, but he made no count of the hogs in the lot, and three were still at large. His testimony is: "Q. Did you count your hogs after Menagh warned you they were out? A. No. Q. Did you make any effort to check up if you had all the loose hogs in? A. Made an effort when I was out there to bring ones in he told me about. I investigated and didn't see any more. Q. You are convinced now you didn't have them all? A. Yes; I didn't have them all. Q. Do you know how many you were short? A. No; I don't. Q. You know you were those three short, but you don't know how many more than three? A. No."

The situation presented a case in which the following observations of Evans, J., in *Stewart v. Wild*, 196 Ia. 678, 195 N. W. 266, are enlightening: "It is the fundamental law of the highway that it is subject to the use of the traveling public, and that it must be kept free from such obstructions as are not incident to its use for travel. Whatever endangers travel thereon, and whatever is not incident to the lawful use or care of the highway, becomes, ordinarily, a nuisance and a public peril. In the days of the ox-drawn vehicle, it may be conceded that the presence of a hog upon the highway would not present any imminent danger of a collision with the vehicle. In the later day of the swifter moving horse-drawn vehicle, the presence of a hog at large became an increased danger, though more readily avoidable than in the still later day of the motor vehicle. In these days of general travel by motor vehicle,

we see no room for saying, as a matter of law, that the presence of a hog at large upon the highway does not suggest danger of collision with traveling vehicles. If it could be said, as a matter of law, that the instincts of a hog stimulate him to an avoidance and escape from an approaching vehicle, there might be some room for debate. But it could as well be said, and doubtless more plausibly, that, by the universal verdict of general observation, his instincts and natural tendencies are in the other direction, and that he will more probably, if not certainly, pass in front of a moving vehicle, at whatever time or place it comes within the short radius of his locomotion."

When, added to the natural danger of the roadway, there is the sudden appearance thereon of the panic-stricken hog, from the concealing darkness, momentarily outlined by the confusing glare of the approaching headlights of the oncoming automobile, what was prepared as a path of safety has indeed become a place of peril. This is a necessary result of the use of an instrumentality of transportation which an advancing and progressive civilization has adopted. All men possess this knowledge and are bound to accommodate themselves to the changes effected. As a matter of public policy they must be deemed with reference thereto to have anticipated the natural consequences of the negligence they permit themselves to commit, and necessarily assume full responsibility for their lack of due care.

In *Heist v. Jacoby*, 71 Neb. 395, 98 N. W. 1058, we held, in the absence of statute authorizing a recovery, that, where "One whose sole fault is the permitting of young hogs of 60 to 100 pounds weight to go at large upon his own premises, so that they wander across the highway to a neighbor's cornfield, and in running back frighten a passer's horses," there could be no recovery for injuries to "the passer's equipage and person produced by such fright." This, for the reason that "An accident, such as happened, is not, ordinarily, to be anticipated from the mere fact of leaving young hogs at large." This reason, so stated, under present conditions, is wholly inapplicable to the instant acci-

dent. It is an accepted maxim that "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself." Broom's Legal Maxims (5th ed.) 113. So, in *Schindler v. Mulhair*, 132 Neb. 809, 273 N. W. 217, this court, without however discussing the point here under consideration, sustained a recovery of damages sustained by plaintiff "resulting from a collision between an automobile in which she was riding, and which was being operated by her husband, and a horse which was on the public highway, and which horse belonged to the defendant," and which horse the petition alleged "the defendant negligently and wrongfully permitted to be loose, unhitched, untied, and unguarded on the said highway." In the opinion it is stated: "So far as the record is concerned, we are required to consider it as established that negligence was present in permitting the horse to be upon the highway at the time and place and under the circumstances shown."

In *Drew v. Gross*, 112 Ohio St. 485, 147 N. E. 757, the following language was employed, which is applicable to the facts in the instant case:

"The owner of a domestic animal is responsible for negligence in its keeping whereby damage is occasioned. The principal test, as to whether the owner is or is not negligent, is whether he could or could not reasonably have anticipated the occurrence which resulted in the injury. It is a question of fact for the jury whether an owner of horses who turns them loose unattended into a field adjacent to a much-traveled highway in the nighttime, the fence of which field is in such defective condition that the horses may easily stray out onto the highway, could have anticipated that one of the horses would stray out onto the highway and collide with an automobile thereon.

"The owner of live stock is chargeable with knowledge of the propensities of his live stock and is bound to know that horses or cattle when placed in an inclosure where the fence is so defective that they may easily pass out of the inclosure and onto adjacent property will probably do so. * * *

"A statute is not always required to establish the duty of ordinary care. The duty may arise from statute, or it may arise from ordinance, from contract, or from the relation of the parties. Apart from specific statute the law imposes upon every person the duty of using his own property so as not to injure his neighbor. As conditions change and modes of life alter, the duty to observe ordinary care in the use of one's own property, while not altering in its essentials, will alter in its details. What ordinary care demands depends always upon the circumstances of the case, an important factor among which is the fact whether the injury could or could not have reasonably been anticipated from the acts done or left undone by the defendant. When the state was established it was not in general unsafe to permit domestic animals to run at large in the highway outside of the confines of municipalities, and damages from so doing could not generally be reasonably anticipated. With the growth of traffic, particularly automobile traffic, the situation is changed, but the duty to observe ordinary care remains the same. This duty in modern times requires that the owner of live stock exercise ordinary care not to let his live stock out onto a much-traveled highway, because under our modern traffic conditions he can reasonably anticipate that if the live stock stray onto such a highway they are apt to damage persons or property." See, also, *Stewart v. Wild,* 196 Ia. 678, 195 N. W. 266; *Klenberg v. Russell,* 125 Ind. 531, 25 N. E. 596; *Fox v. Koehnig,* 190 Wis. 528, 209 N. W. 708, 49 A. L. R. 903.

We note the challenge to the correctness of the amount of recovery, and the contention that the cost of repairs was the proper measure of damages in the instant case. In view of the evidence actually received at the trial, the instructions given by the trial court properly submitted that question to the determination of the jury.

It follows, therefore, that, no substantial error appearing, the judgment of the trial court is correct, and is

AFFIRMED.

GRACE G. REAVIS, APPELLEE, V. STATE OF NEBRASKA, APPELLANT: PAWNEE ROYALTY COMPANY, APPELLEE.
300 N. W. 344

FILED OCTOBER 10, 1941. No. 31174.

Constitutional Law. Where the state had given a contract to sell school-land, and agreed to give a deed in fee simple when the contract was paid in full, the fact that after said contract of sale was given the Constitution of Nebraska was amended, making it illegal to deed away mineral rights on school-land, would not prevent the state from conveying said land under the terms of the original contract.

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

Walter R. Johnson, Attorney General, and *Robert A. Nelson,* for appellant.

Joseph C. Reavis, Jean M. Johnson and *John C. Mullen,* for appellee Reavis.

Archibald J. Weaver, for appellee Pawnee Royalty Company.

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

PAINE, J.

This was an action in equity brought by Grace G. Reavis against the state of Nebraska and the Pawnee Royalty Company, a copartnership, to set aside an oil and gas lease issued by the state of Nebraska to the Pawnee Royalty Company upon real estate owned by the plaintiff. The trial court held that the state did not reserve any rights under the deed to plaintiff, and therefore canceled the oil and gas lease given to the Pawnee Royalty Company by the state of Nebraska. The attorney general appeals.

The petition recites in detail how the plaintiff became the owner of a certain 40 acres of land in Richardson county, Nebraska, by deed from the state of Nebraska, and that she gave an oil and gas lease thereon December 21,

1938, and that thereafter the state of Nebraska claimed to have an interest therein, and also gave an oil and gas lease thereon.

The plaintiff makes the state a party to this litigation by virtue of the fourth subdivision of section 27-319, Comp. St. Supp. 1939.

Plaintiff prays that the lease given by the state, as above set out, be canceled and held for naught.

The Pawnee Royalty Company, a copartnership, composed of W. A. Guinn and B. G. Guinn, filed a separate answer, setting out that plaintiff, claiming to be the owner in fee simple of 40 acres of land, gave said company an oil and gas lease thereon; that thereafter said company was advised that the state of Nebraska claimed ownership of any oil and gas located thereon, and upon application the state also issued to the Pawnee Royalty Company an oil and gas lease, dated March 25, 1940. Said company prays the court to determine which is the true owner of said land, and direct to which alleged owner the royalties due by the production of oil and gas should be paid by the Pawnee Royalty Company.

The evidence, including many exhibits, discloses that on February 6, 1882, George E. Dorrington purchased the northeast quarter of the southwest quarter of section 16, township 1, range 16, in Richardson county, Nebraska, for the price of $7 an acre, or $280, paying $28 cash and giving a note, exhibit No. 1, to the state of Nebraska in the sum of $252, with interest at the rate of 6 per cent., payable January 1, 1902, the interest being payable annually.

D. D. Reavis is the husband of the plaintiff, and testified that he had charge of all the transactions for his wife, and that she purchased this 40 acres from Edwin S. Towle in June, 1909, paying $4,000 for the 40 acres, the plaintiff receiving an assignment of the contract of purchase of this 40 acres of school-land from the state of Nebraska, and after she received the assignment of the contract of purchase she secured an extension of payment of said agree-

ment from the state of Nebraska through the county treasurer of Richardson county, Nebraska. This extension was secured through a long distance telephone conversation with the commissioner of public lands and buildings at Lincoln. Mr. Reavis, acting for the plaintiff, told the commissioner he desired to get an extension of the contract which the state made with George E. Dorrington in February, 1882, and he was assured that the extension would be made, and he paid the interest on the school-land contract each year to the county treasurer, and finally secured a deed from the state of Nebraska on November 13, 1922, signed by the governor, secretary of state, and commissioner of public lands and buildings.

The deed, which is exhibit No. 2, recited that it was made in pursuance of law, in accordance with the sale made by the state to George E. Dorrington on February 6, 1882, for the sum of $280, and the original note, exhibit No. 1, was marked paid in full, and surrendered with the deed, the deed being recorded in book J, page 260-A, in the office of the commissioner of public lands and buildings, and being recorded in Richardson county on November 18, 1922, in book 88 of deeds at page 548.

The state of Nebraska in its answer and cross-petition admits that the 40 acres were common-school land given it under the enabling act of congress, and also admits that the 40 acres were sold to George E. Dorrington on February 6, 1882, but that said contract by its terms lapsed and was in default on the day of the execution of the deed to Grace G. Reavis, and that at the time of the execution of the deed it was provided in section 20, art. III of the Constitution of Nebraska of 1920: "The salt springs, coal, oil, minerals or other natural resources on or contained in the land belonging to the state shall never be alienated, but provision may be made by law for the leasing or development of the same."

The state also claims that at the time the extensions of the contract were entered into on January 13, 1902, and on January 13, 1908, section 72-209, Comp. St. 1929, was

in force, having been enacted in 1899, and that this section reads as follows: "At the time of maturity of any sale contract, upon application by the holder thereof, the board of educational lands and funds is hereby empowered to make an extension of the time of final payment of not less than five years nor more than ten years from the date of such maturity if, in their judgment, the interests of the school fund will be best served thereby and if all interest due thereon has been paid;" and that under this section an extension of a contract for the purchase of school-land could only be made upon application to, and action by, the board of educational lands and funds, and that, where a contract provides the form of notice and application, the same must be in accordance therewith. 17 C. J. S. 929, sec. 450.

The state insists that this court has held that the sale of educational lands is prohibited, except in certain instances specified in section 72-209, Comp. St. 1929, and that the power of the board of educational lands and funds to lease or sell school-lands only exists in so far as it is directed or permitted by the legislature. *Fawn Lake Ranch Co. v. Cumbow,* 102 Neb. 288, 167 N. W. 75.

Our attention is called by the state to the case of *State v. Tanner,* 73 Neb. 104, 102 N. W. 235, being an action in ejectment, holding that it is not competent for the legislature to provide for the disposition of school-lands otherwise than as authorized and directed by the Constitution.

Under authority of the Constitution and act of the legislature as construed in these two decisions, the state claims that a contract for the purchase of school-land could not be extended except by act of the board of educational lands and funds, and that said contract terminated on January 13, 1918.

The state contends that, while Grace G. Reavis continued in possession and paid up the purchase price, no rights existed under the contract issued to George E. Dorrington, and that the act of the board of educational lands and funds in issuing such deed to plaintiff was a new and independent

contract, and that under the constitutional provision in force at that time, and hereinbefore set out, the state of Nebraska had no power to issue a deed without reserving in the state the mineral rights on said land, and that this court must grant to the state the relief asked for in its cross-petition, to wit, that the oil and gas lease executed by Grace G. Reavis on December 21, 1938, to the Pawnee Royalty Company be canceled and held void.

It was found that the George E. Dorrington contract had been lost, and the best evidence of its contents was other contracts issued by the state of about the same date, being surrendered contracts, as the board of educational lands and funds did not begin recording such contracts until May 31, 1887.

The language in exhibit No. 26, being a contract issued to John S. Kirkpatrick, of Broken Bow, provided: "In case the second party, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually and at the times above limited, and shall strictly and literally perform all and singular the agreements and stipulations aforesaid, after their true tenor and intent, then the first party will cause to be made and executed unto the second party, his heirs or assigns (upon request to the board of educational lands and funds and the surrender of this contract), *a deed conveying said premises in fee simple.*"

Has the state a right to change the terms and conditions of the written contract it entered into on February 6, 1882, with George E. Dorrington, who assigned his interest in said contract to Edwin S. Towle, who in turn assigned his interest to the plaintiff?

We do not believe it has, for section 16, art. I, Constitution of Nebraska, 1875, reads: "No bill of attainer, ex post facto law, or law impairing the obligation of contracts * * * shall be passed."

In the discussion of a similar school-land lease, this court said that, while the legislature may change or modify the remedy, it cannot deprive the party of a substantial

right, and held that the new statute was void as to school-land contracts then existing under the Act of 1879. *State v. McPeak,* 31 Neb. 139, 47 N. W. 691.

The law provided how one of these school-land leases should be forfeited. If the purchaser was in default of payment of interest for one year, the commissioner of public lands and buildings could cause notice to be given to such delinquent lessee or purchaser that, if such delinquency was not paid within 90 days from the date of the service of such notice, his lease or sale contract would be declared forfeited by the board of educational lands and funds.

Mr. Sullivan, the secretary of the board, testified in response to question: "Q. Have you ever found anything in that—in your office to indicate or state that the contract entered into by the state of Nebraska with Mr. Dorrington in February, 1882, was forfeited? A. No."

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

The state sold the land under contract, the required cash payment being made. The state never canceled said contract, but accepted all payments of interest and principal, and the contract provided that, upon payment in full, the premises should be conveyed in fee simple.

The trial court found: "The court finds that under the evidence the defendant, the state of Nebraska, recognized the title of the plaintiff under the contract and assignments and in effect waived any forfeiture that the defendant, the state of Nebraska, might have; that it did not reserve any rights under the deed it delivered to the plaintiff and in effect affirmed the contract of 1882 and is bound thereby."

This finding of the trial court was right, for the state could not refuse to carry out its contract to give a deed

for the land sold, even though after the contract was given the Constitution of Nebraska was amended, making it illegal to deed away mineral rights on school-land. The state was required to deed exactly what it had contracted to sell.

The state contracted to sell this land, and to give a title in fee simple, which contract was legal. The deed was made in strict compliance with the contract, and the state is bound by it. The restriction written into the Constitution, being section 20, art. III, in 1920, does not apply.

AFFIRMED.

LIZZIE FISCHER ET AL., APPELLEES, V. ALBERT WILHELM ET AL., APPELLEES: HENRY WILHELM, APPELLANT.
300 N. W. 350

FILED OCTOBER 10, 1941. No. 31042.

1. **Parent and Child.** The legal inference arising from the advancements of money by a parent, when wholly unexplained by evidence, is that they were by way of gift and not by way of loan.
2. **Appeal.** A judgment of an equity court, where the court is the trier of facts, unsupported by any competent evidence but based solely on speculative evidence, cannot stand.

APPEAL from the district court for Madison county: CHARLES H. STEWART, JUDGE. Opinion on motion for rehearing of case reported in 139 Neb. 583. *Former judgment of affirmance vacated and judgment of district court reversed.*

Wagner, Wagner & Albert, for appellant.

M. S. McDuffee and *Moyer & Moyer, contra.*

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

MESSMORE, J.

This is a partition action before this court on motion for rehearing. The original opinion is reported in 139 Neb. 583, 298 N. W. 126.

The deceased father owned a real estate mortgage. The land evidenced by the mortgage was deeded by the mortgagor to the personal representative of the deceased's estate. This action involves the interest of a son, defendant Henry Wilhelm (hereinafter referred to as appellant), in that it is claimed certain amounts, as set out in the petition, constitute an indebtedness owing by him to the estate. The will provided for deductions to be made out of the interest of certain heirs (children of the deceased) for moneys advanced during testator's life. The will was silent, in this respect, with reference to appellant. The nine children share equally, with the exception of the deductions and certain bequests. The action was filed February 15, 1939. John Wilhelm, the father, died testate July 2, 1936.

The allegation of the petition upon which recovery is sought against appellant is: Appellant was indebted to his father, John Wilhelm, in the sum of $1,350, with interest thereon. The county court of Platte county, Nebraska, entered an order, directing the administrator to list said indebtedness as an asset of the estate. From this order Henry Wilhelm appealed to the district court. By answer he alleged a gift and denied indebtedness to the estate; further alleged that the cause of action for the alleged debt, if a debt, accrued prior to June 1, 1920, more than 16 years prior to the death of John Wilhelm, and is barred by the statute of limitations of Nebraska; that appellant has been a resident of Colorado since March 15, 1918, and that such action is barred by the statute of limitations of Colorado. Both the statutes of limitations of the states of Nebraska and Colorado are properly pleaded. No reply was filed.

The district court decreed that appellant was entitled to share equally with the other heirs at law, and that he owned a one-ninth interest in said estate; that he was indebted to such estate in the sum of $1,350, which, with interest, now totals $2,771.50; and that this amount should be set off against his share in the land. He appealed from that part of the decree charging his share with the alleged debt,

predicating error in that the judgment of the court is not sustained by the evidence and is contrary to law.

The evidence upon which plaintiffs seek to recover consists of three photostatic copies of checks, viz.: Exhibit 1, dated February 16, 1917, for $350; exhibit 2, dated January 6, 1920, for $500; exhibit 3, dated March 3, 1920, for $500, and photostatic copies of two letters, exhibit 4a, written by appellant to his father, not dated, and mailed at Fleming, Colorado, as shown by the envelope, exhibit 4b, and received by his father at Humphrey, Nebraska. The date stamped on the envelope is not legible, and the stipulation in the record fails to disclose its date. The letter contains a request for $600, needed to purchase a horse and feed, and to take care of other obligations. The son offered to give a note and pay interest, or whatever was required by the father. Exhibit 5a is a letter, written April 4, 1920, in which appellant thanks his father for the money, and states that "as soon as we have it we will return you every cent of it." Whether or not this letter constitutes an acknowledgment of the check, dated March 3, 1920, is speculative. In any event, there is no mention of the checks in either of the letters. Why the checks were given or for what purpose is not shown. There is no apparent connection between the checks and the letters; they might represent a separate and independent transaction. Therefore, the proof of appellant's indebtedness to his father and the amount, if any, is wholly speculative and conjectural.

In *Johnson v. Ghost,* 11 Neb. 414, 8 N. W. 391, it was held: "The legal inference arising from advances of money by a parent to his child, when wholly unexplained by evidence, is that they were by way of gift, and not by way of loan. And the force of this inference is not weakened by the fact of the son having given to his father a statement in the form of an account of the several sums so advanced to him." In the instant case there is not even evidence of a statement in the form of an account, given by the son to the father, showing sums advanced to him.

The most that can be said is that there are photostatic copies of three checks and two letters, with no apparent connection between the checks and letters, to show the indebtedness claimed.

The testimony of Rose Wilhelm, a daughter, who lived with her father in Humphrey, was stipulated. It consisted of conversations between the daughter and father, wherein the father told the witness that she should keep the checks and letters; that she would probably need them. This testimony was objected to, under the statute as to a conversation with a deceased person by one having an interest in the result of the action. Subject to the objection, it was stipulated that the father, at the time he stated to Rose that she should keep the checks and letters, also told her that he did not have the promissory note of Henry Wilhelm, and the checks would be evidence of the debt. Both objections to the competency of this testimony were overruled.

Section 20-1202, Comp. St. 1929, provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness. * * *"

The witness, Rose Wilhelm, is one of the heirs at law of the deceased, and her share in the estate, under the residuary clause of the will, will be increased if the plaintiffs are successful in this litigation. Her testimony shows that it relates to conversations and transactions had with her deceased father. The only remaining question is: Was the adverse party (appellant) a representative of the deceased, within the meaning of section 20-1202, Comp. St. 1929. All nine heirs, children of the deceased, and the administrator with the will annexed are parties to the partition action; all of the nine heirs have a direct legal interest in the result of this litigation, and all of them are representatives, in a sense, of their deceased father. See *Broeker v. Day*, 124 Neb. 316, 246 N. W. 490.

In the case of *Brown v. Forbes,* 1 Neb. (Unof.) 888, 96 N. W. 52, the court quoted the following from *Wamsley v. Crook,* 3 Neb. 344: "It seems to be the settled rule of law that the word representative as used in the statute was intended by the lawgiver to designate the person or party who succeeds to the rights of the deceased, whether by purchase, descent or operation of law." The court held: "One claiming as heir is the representative of a deceased person, within the meaning of section 329, Code of Civil Procedure (Comp. St. 1929, sec. 20-1202)." See, also, *Kroh v. Heins,* 48 Neb. 691, 67 N. W. 771; *Holladay v. Rich,* 93 Neb. 491, 140 N. W. 794.

We hold the testimony of Rose Wilhelm to be incompetent and that the objections to her evidence should have been sustained. The burden of proof is on the plaintiffs to prove, by a preponderance of the evidence, that appellant was indebted to his father's estate. It is obvious that the remaining evidence, as hereinbefore set out, is speculative and conjectural.

Section 20-1925, Comp. St. 1929, provides in substance, that appeals in equity are for trial *de novo* in this court, and it is the duty of the court to reach an independent conclusion, without reference to the findings of the district court.

"A verdict unsupported by any competent evidence, but based solely upon speculation and conjecture, cannot stand." *Securities Investment Corporation v. Krejci,* 132 Neb. 146, 271 N. W. 287. This rule likewise applies to a judgment of the trial court in an equity case, where the court is the trier of facts.

The opinion rendered in this case May 16, 1941 (139 Neb. 583, 298 N. W. 126), properly disposes of the question of competency of the testimony given by Rose Wilhelm, and is set aside and vacated in so far as such opinion is in conflict with this decision. The decree of the trial court, holding that appellant is indebted to his father's estate, is reversed.

REVERSED.

PLATTE VALLEY BANK, APPELLANT, V. J. J. FRANTA, APPELLEE.

300 N. W. 347

FILED OCTOBER 10, 1941. No. 31184.

1. Appeal. "A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded." *Garfield v. Hodges & Baldwin*, 90 Neb. 122, 132 N. W. 923; *Trute v. Holden*, 118 Neb. 449, 225 N. W. 238.
2. ———. Record examined, and *held* to require that the verdict be set aside and plaintiff be granted a new trial.

APPEAL from the district court for Saunders county: HARRY D. LANDIS, JUDGE. *Reversed.*

Charles H. Slama, for appellant.

William T. Gleeson, contra.

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

ELLIS, District Judge.

This is an action in which plaintiff below, appellant here, sought to recover judgment on two promissory notes against J. J. Franta and his son Joe C. Franta.

When the trial commenced, both defendants were resisting, but during the course of the trial Joe C. Franta's offer to confess judgment was accepted, judgment against him was entered forthwith, and the trial proceeded between plaintiff and defendant J. J. Franta. The jury returned a verdict in favor of the defendant.

From the overruling of plaintiff's motion for new trial plaintiff has appealed. The plaintiff's contention is that the verdict is so clearly wrong and against the weight of the evidence that plaintiff is entitled to a new trial and that the trial court erred in not granting a new trial.

Each of the notes in suit bears an indorsement of interest paid as follows: "Jul 31 1934 Paid int to 7/26/34." The action was commenced on July 31, 1939. Both notes were

signed by Joe C. Franta and J. J. Franta, the signatures being in that order.

The answer of the defendants was a joint one in which the defendants pleaded the statute of limitations on behalf of both defendants, and on behalf of the defendant J. J. Franta pleaded the defense of accommodation maker. During the course of the trial J. J. Franta abandoned his defense of accommodation maker so that the only issue submitted to the jury was whether said defendant had paid the interest as indicated by the last indorsement on each of the notes, which indorsements alone avoided the bar of the statute of limitations.

In proof of its cause of action the cashier of plaintiff testified that the indorsements in question were placed on the notes by himself and that the payments of interest indicated were made by J. J. Franta in person with a check on his personal checking account. The amount of the interest accrued to date indicated by the indorsements was $21.

This witness also testified that J. J. Franta had made payments of interest on these notes on April 24, 1934, and of principal and interest on the debt on January 26, 1934, the latter date being the date of one of the notes in suit, which were renewal notes.

The plaintiff also offered in evidence the bank's ledger sheet showing the personal checking account of the defendant on which there appeared debits of the amounts of the January and April payments and a debit of $21 under date of August 1, 1934. The cashier testified that the transaction of July 31, 1934, occurred so late in the day and after the books had been closed that the debit of the check against the defendant's account was run on the next day.

The plaintiff also offered in evidence the bank's "Teller's Cash Journal" for August 1, 1934, which showed the various transactions of that day's business and showed under and among the items of interest received "J. C. Franta 21 —." The cashier testified that credits for interest received

were always entered on the journal in the name of the first signer on the note on which the interest was paid.

The record discloses no impeachment of either the testimony of the plaintiff's cashier or the records mentioned above.

Opposed to this evidence of the plaintiff was the denial by the defendant that he paid the interest represented by indorsements on the notes. He also testified that he did not know whether his son paid this interest. He did not know or remember whether he made the payments on January 26, 1934. He admitted that he had received his canceled checks with statements of his balance from the bank several times since January, 1934.

The son testified that he did not pay the interest and that he was not in the bank on July 31, 1934.

It thus appears that, on the one hand, we have the positive testimony of the cashier that the defendant personally made the payment of interest as indorsed on the note and the corroboration of this testimony by the records of the bank showing receipt of the interest plus the debit on defendant's personal checking account of an item in the amount of that interest. On the other hand, we have only the uncorroborated and categorical denial of the defendant that he made the payments of interest in question.

In this situation the plaintiff urges that the verdict of the jury is so clearly wrong and against the weight of the evidence that this court ought to set it aside and grant plaintiff a new trial. The defendant responds by urging that the evidence created an issue for the jury and that their verdict ought not to be disturbed if and because the reviewing court comes to the conclusion that it would have decided differently on the same facts.

It requires no citation of precedent to create a reluctance on the part of this court to set aside the verdict of a jury. On the other hand, numerous decisions of this court not only afford precedent for doing so, but make clear the duty of the court to do so, where the verdict is manifestly wrong and to sustain it would result in gross injustice,

thereby destroying confidence in and bringing reproach upon the whole system created and maintained for the purpose of doing justice between litigants.

"It is, of course, for the jury to determine the weight and sufficiency of the evidence. But when it appears that the jury have failed to respond truly on the real merits of the controversy and to administer substantial justice to the parties in the case, and that the conclusion reached by the jury is, upon the record as made, manifestly wrong, then the court should not hesitate to set aside the verdict that the case may be resubmitted to another jury." *Trute v. Holden,* 118 Neb. 449, 225 N. W. 238.

"This court may be reluctant to disturb the findings of a jury, nevertheless, it has never refused so to do, where to sustain the verdict palpable injustice would result. At an early period this court said: 'To justify an interference with the findings of a court or jury, the preponderance of evidence must be clear, obvious and decided; but when the preponderance is so great, it is the duty of the reviewing court to correct the mistake.' *Fried v. Remington,* 5 Neb. 525." *Stewart v. City of Lincoln,* 114 Neb. 362, 207 N. W. 511.

From a careful consideration of the record before us, we cannot believe that the verdict in question was the result of careful and impartial consideration and weighing of the evidence, and are compelled to the conclusion that its basis must have been something which implicitly denied the plaintiff that consideration of its case by the jury to which every litigant is entitled.

The language of this court in the early case of *Fried v. Remington, supra,* is especially appropriate: "In the case at bar, we think the preponderance of evidence against the finding is so clear, obvious and decided, that the finding and judgment cannot be sustained upon any principle of right, justice or morality."

We conclude that the plaintiff is entitled to have the verdict set aside and an opportunity to have its case submitted to another jury.

REVERSED.