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REPORTS OF CASES

DECIDED BETWEEN
JULY 7, 1944 AND APRIL 20, 1945

IN THE

Supreme Court of Nebraska

SEPTEMBER TERM, 1944,
AND JANUARY TERMS, 1944, 1945.

VOLUME CXLV

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1945

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By WALTER D. JAMES, 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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BAYARD H. PAINE, Associate Justice
EDWARD F. CARTER, Associate Justice
FREDERICK W. MESSMORE, Associate Justice
JOHN W. YEAGER, Associate Justice
ELLWOOD B. CHAPPELL, Associate Justice
ADOLPH E. WENKE, Associate Justice

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HOMER L. KYLE	Assistant Attorney General
H. EMERSON KOKJER	Assistant Attorney General
ROBERT A. NELSON	Assistant Attorney General
EDWIN VAIL	Assistant Attorney General
CARL H. PETERSON	Assistant Attorney General

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	Residence of Judge
First	Johnson, Nemaha, Pawnee and Richardson.	Virgil Falloon	Falls City
Second	Cass, Otoe and Sarpy.	Thomas E. Dunbar	Neb. City
Third	Lancaster.	Jefferson H. Broady John L. Polk Ralph P. Wilson Harry Ankeny	Lincoln Lincoln Lincoln Lincoln
Fourth	Burt, Douglas and Washington.	Charles Leslie James M. Fitzgerald Herbert Rhoades Francis M. Dineen Arthur C. Thomsen Willis G. Sears William A. Day Henry J. Beal James T. English	Omaha Omaha Tekamah Omaha Omaha Omaha Omaha Omaha Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Lovel S. Hastings Harry D. Landis	David City Seward
Sixth	Boone, Colfax, Dodge, Merrick, Nance and Platte.	Louis Lightner Frederick L. Spear	Columbus Fremont
Seventh	Fillmore, Nuckolls, Saline and Thayer.	Stanley Bartos	Wilber
Eighth	Cedar, Dakota, Dixon and Thurston.	Sidney T. Frum	South Sioux City
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton and Wayne.	Lyle E. Jackson Fay H. Pollock	Neligh Stanton
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps and Webster.	Frank J. Munday Edmund P. Nuss	Red Cloud Hastings
Eleventh	Blaine, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	Ernest G. Kroger William F. Spikes	Grand Island St. Paul
Twelfth	Buffalo, Custer, Logan and Sherman.	Eldridge G. Reed	Kearney
Thirteenth	Arthur, Banner, Cheyenne, Dawson, Deuel, Keith, Kimball, Lincoln and McPherson.	J. Leonard Tewell Isaac J. Nisley	Sidney North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins and Red Willow.	Charles E. Eldred	McCook
Fifteenth	Boyd, Brown, Holt, Keya Paha and Rock.	Dayton R. Mounts	Atkinson
Sixteenth	Box Butte, Cherry, Dawes, Sheridan and Sioux.	Earl L. Meyer	Alliance
Seventeenth	Garden, Morrill and Scotts Bluff.	Claibourne G. Perry	Gering
Eighteenth	Gage and Jefferson.	Cloyde B. Ellis	Beatrice

PRACTICING ATTORNEYS

Admitted since the Publication of Volume 144

WILLIAM W. SPEAR
CARL R. LAWRITSEN
JAMES C. DOTY
HAROLD L. HUNT
JANE E. MOYER
GEORGE ROBERT MUCHMORE
RAYMOND SIMON
EDWARD FEEHAN
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STEWART S. BLOSS

REVISED RULES

OF THE

Supreme Court

OF THE

State of Nebraska

1945

In force September 1, 1945

MEMBERS AND OFFICERS

OF

SUPREME COURT, 1945

Robert G. Simmons ..... Lincoln
Chief Justice

Bayard H. Paine ..... Grand Island

Edward F. Carter ..... Gering

Frederick W. Messmore ..... Beatrice

John W. Yeager ..... Omaha

Ellwood B. Chappell ..... Lincoln

Adolph E. Wenke ..... Stanton
Associate Justices

George H. Turner ..... Fairbury
Clerk and State Librarian

Walter D. James ..... McCook
Reporter

Elbert M. White ..... Burwell
Deputy Clerk

Elizabeth Mallalieu ..... Lincoln
Deputy State Librarian

REVISED RULES

of the

SUPREME COURT OF NEBRASKA

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I

PRACTICE IN SUPREME COURT

1. **Procedure on Appeal.**

a. **Perfecting of Appeal.** Every appeal shall be deemed perfected on filing of notice of appeal in the office of the clerk of the district court, accompanied by a docket fee of $20, as required by section 25-1912, R. S. 1943.

b. **Docketing of Cause.** Upon forwarding such docket fee and such notice of appeal to the clerk of this court, the clerk of the district court shall accompany the same with a certificate setting forth the names of all of the parties to the cause in the district court and their relation to the case as they appeared in that court. The clerk of this court shall thereupon docket the case designating the party or parties having filed notice of appeal in the court below as appellant or appellants, and all other parties as appellees.

c. **Appeal from Special Tribunals.** In an appeal from an order of the State Railway Commission or other tribunals from which an appeal can be taken direct to this court the procedure shall be similar to that provided for in appeals from the district court.

d. **Cross-appeal.** The filing of an appeal shall vest in an appellee the right to a cross-appeal. The cross-appeal need only be asserted in appellee's brief in the manner provided by Rule 8b 4.

e. **Attorneys of Record.** The attorneys of record and guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians ad litem of the same parties in this court, until others are retained or appointed, notice thereof served on the adverse party and proof of such service filed in this court.

2. **Original Actions.**

a. **Leave of Court Required.** An original action may not be commenced except by leave of court.

b. **Procedure.** The procedure in an original action shall be the same as in the district court, except as otherwise ordered.

3. **Costs and Security for Costs.**

a. **Docketing Fee.** Docket fees shall not be required in cases arising under the Workmen's Compensation or Unemployment Compensation laws. Advance payment of docket fees shall not be required in habeas corpus cases, disciplinary proceedings, or in criminal cases where an affidavit of poverty has been filed under the provisions of section 29-2306, R. S. 1943. In all other cases, payment of docket fees in advance shall be made as required by section 33-103, R. S. 1943.

b. **Security for Costs.** An appeal will be dismissed upon motion and notice for failure to comply with section 25-1914, R. S. 1943, unless additional time for compliance be granted for good cause shown.

4. **Transcripts.**

a. **Contents.** The transcript shall contain: (1) The pleadings upon which the case was tried; (2) the judgment, decree or final order sought to be reversed, vacated or modified; (3) the instructions given or refused by the trial court, if the appellant intends to assign error in the giving or refusal thereof; (4) a copy of the supersedeas bond, if any, given in the district court, or, if none has been given, a recital of the fact that a bond for costs was given and approved in the district court, or a deposit made as required by section 25-1914, R. S. 1943; and (5) such other parts of the record as the party appealing may desire to include therein.

b. **Form.** The transcript shall be neatly and securely bound at the top and be paged at the bottom. Notes shall be placed on the left margin of each page of the transcript identifying the portion of the record contained on that page. An index shall be supplied referring to the initial page of

each item contained in the transcript. Such index shall constitute the first page thereof.

c. **Supplemental Transcript.** After the original transcript is filed in the clerk's office, any party may without leave of court file a supplemental transcript containing any matters omitted from the original transcript. After filing, no change in the original or supplemental transcript shall be made or papers added to or withdrawn therefrom without leave of court. All supplemental transcripts must be filed prior to the day the cause is submitted to the court, unless leave of court be first obtained.

5. **Writ of Error.** Upon filing of petition in error and transcript of record and proceedings in criminal cases, the clerk of this court shall issue and transmit to the district court a writ of error as provided in section 29-2306, R. S. 1943. If suspension of sentence has been allowed, the writ of error shall so state. The judge of the district court will thereupon admit the defendant to bail in proper cases, requiring him to appear in that court when the case is remanded to that court after affirmance or reversal.

6. **Suspension of Sentence.**

a. **Capital Cases.** In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it shall be the duty of the clerk to enter the constitutional suspension of sentence upon the journal and he shall immediately transmit to the officer charged with execution of the sentence a certified copy of such suspension.

b. **Criminal Cases Other Than Capital.**

(1) An application for suspension of sentence in other criminal cases made to this court must be in writing and may be included in the petition in error.

(2) If execution of the sentence is suspended by this court, and no application is made in the district court to be admitted to bail, the defendant, if not in the custody of the

sheriff, will be taken and remain in his custody until the case in error be disposed of, or he is admitted to bail.

(3) Application to give bail upon written motion and notice as above, must be made to the district court, or a judge thereof, who will fix the amount of bail required and determine as to the sufficiency of sureties. In the absence of all the judges of the district court from the district, such application to admit to bail may be made to this court, or a judge thereof. The bond will require the defendant to prosecute the proceedings in error without delay and to appear in the district court when the cause is remanded and abide, do and perform the final judgment in the case.

(4) Ten days after the receipt of the writ of error, without suspension of sentence, the district court will, in felony cases, cause the sentence to be executed. During the said ten days this court will hear an application for suspension of sentence upon written motion and notice. Good cause must be shown for neglect to make application with the filing in this court of the transcript and petition in error.

(5) In cases of conviction of misdemeanor, an application for suspension of sentence should be made to the district court under the provisions of section 29-2302, R. S. 1943.

7. **Bill of Exceptions.**

a. **Index.** The bill of exceptions shall have an index forming the first page thereof. The index shall show (1) the initial page of the direct, cross and further examination of each witness, and (2) as to depositions and other exhibits, the initial page where identified, offered, received and found.

b. **Body.** The bill of exceptions shall be paged and the questions therein numbered consecutively. The name of each witness and whether the examination is direct, cross or redirect, shall be stated at the top or in the margin of each page of the testimony. All depositions, exhibits or papers contained in the bill must, when practicable, be in-

serted immediately following the rulings of the court thereon.

c. **Filing.** The bill of exceptions must be filed in the district court and certified by the clerk of such court, and when so filed and certified, may be filed in this court at any time prior to the submission of the case.

d. **Case Stated.** The parties may by agreement state the case to be presented to this court on appeal. The case stated shall briefly recite the facts out of which the questions of law arise and also any substantial conflict in the evidence as to any fact involved. It shall separately identify and quote the rulings of the court complained of with so much of the record as will fully show the law question involved in such ruling and the exceptions and contentions of the parties thereon. The case stated shall constitute the bill of exceptions. It must be allowed and certified by the judge who tried the case, filed with the clerk of the district court, made a part of the record of the district court as in other cases, and included therein when the transcript of the record is filed in this court.

8. **Briefs, Preparation.**

a. **Brief of appellant, plaintiff in error, or plaintiff in an original action.**

1. **Order and Contents of Brief.** The brief shall contain the following matters in the order herein set forth:

(1) Index;
(2) Statement of questions involved;
(3) Statement of the case;
(4) Assignment of errors;
(5) Propositions of law;
(6) Statement of facts; and
(7) Argument.

2. **Preparation.** The matters enumerated above shall be set out in the brief in the manner hereinafter indicated.

(1) **Index.** The index shall consist of (a) a sub-

ject index, with page references, including where the separate questions are presented and discussed, and (b) a case, statute and text index, with page references, with the cases alphabetically arranged.

(2) **Statement of Questions Involved.** The statement of questions involved shall briefly and precisely set forth the principal question or questions to be decided.

(3) **Statement of the Case.** Except in original actions, the statement of the case shall contain in the order indicated:

(a) The kind of action or nature of the case;

(b) The issues actually tried in the court below; and

(c) How the issues were decided and what judgment or decree was entered by the trial court.

In original actions, it shall state the issues before the court. In setting forth this statement, appropriate page citation shall be had to every pleading, judgment or order to which reference is made.

(4) **Assignments of Error.** Assignments of error relied upon for reversal and intended to be urged in the brief shall be separately numbered and paragraphed, bearing in mind that consideration of the cause will be limited to errors assigned and discussed. However, the court may, at its option, notice a plain error not assigned.

(5) **Propositions of Law.** Propositions of law shall be separately numbered and paragraphed, in heavier type, and shall state concisely and without argument or elaboration the legal propositions intended to be urged. Only those propositions shall be stated which are presented and discussed in the argument. Each proposition of law shall be followed by a list of authorities cited in support thereof. Preference in citation shall be given to those deemed most important and controlling. No authorities shall be cited under

any proposition that are not quoted from or otherwise discussed in the argument in connection therewith.

(6) **Statement of Facts.** The statement of facts shall be made in narrative form and shall consist of the substance of so much of the record, with appropriate reference, as is necessary to present the case.

(7) **Argument.** The argument shall present each question separately. In connection with each question discussed, such propositions of law shall be presented as will best set forth the contentions of the party. Authorities relied upon shall be quoted or otherwise discussed. A party may, in connection therewith, make such further statement of facts, or quotation from the record, as he deems necessary properly to present the question, supporting such facts by appropriate reference to the record.

3. **General Rules.** In the preparation of the brief, the following general rules shall be observed:

(1) References to the transcript shall be made by setting forth in parenthesis the capital letter T followed by the page of the transcript, as for example, (T26). In original actions, references shall be made to the pleading and page thereof.

(2) References to interrogatories in the bill of exceptions shall be made by setting forth in parenthesis the page and question number in the bill of exceptions, as for example, (165:926), the number preceding the colon representing the page of the bill of exceptions and the number following representing the number of the interrogatory.

(3) References to exhibits in the bill of exceptions shall be made by setting forth in parenthesis the capital letter E, followed by the number of the exhibit and the page of the bill of exceptions where the exhibit was offered and received or refused, and the page where the exhibit is found, as for example, (E5:92,95).

(4) Every reference to a reported case shall set forth the title thereof, the volume and page where found, and the tribunal deciding the case. If the cited opinion is long, it shall also refer to the page where the pertinent portion of the opinion is found. Nebraska cases shall be cited by the state reports, but may include citation to such other reports as may contain such cases.

(5) If a statute of the state is relied upon, it must be cited from the last published revision or compilation of the statutes, or supplement thereto, if contained therein; if not contained therein, to the session laws wherein contained, or the legislative bill as enacted.

(6) Citations to textbooks, encyclopedias and other works shall give the title, edition, volume number, section and page where found.

b. **Brief of appellee, defendant in error, or defendant in an original action.**

1. **Order and Contents of Brief.** The brief shall contain the following matters in the order herein set forth:

(1) Index;

(2) Statement of questions involved, if appellant's statement thereof is not accepted as correct;

(3) Statement of the case, if appellant's statement thereof is not accepted as correct;

(4) Propositions of law;

(5) Statement of facts, if appellant's statement is not accepted as correct; and

(6) Argument.

2. **Preparation.** The brief shall be prepared under the same rules as the brief of appellant.

3. **Remittitur.** If a party desires to avail himself of the provisions of the statute with reference to remittitur, a special assignment of error thereof may be made in the brief of appellee, or a cross-appeal may be taken.

4. **Cross-Appeal.** Where the brief of appellee presents a cross-appeal, it shall be set forth in a separate division of the brief. This division shall be headed "Brief on Cross-Appeal" and shall be prepared in the same manner and under the same rules as the brief of appellant.

c. **Reply Brief.** The reply brief shall be prepared in the same manner as the brief of appellee. The answer of appellant to any cross-appeal shall be set forth in a separate division of the reply brief, and shall be headed "Answer to Brief on Cross-Appeal."

d. **Brief on Rehearing.**

1. **Order and Contents.** The brief shall contain the following matters in the order herein set forth:

(1) Index;
(2) Motion for rehearing;
(3) Statement of questions involved;
(4) Propositions of law; and
(5) Argument.

2. **Preparation.** The index, statement of questions involved, propositions of law and argument shall be made in the same manner and under the same rules as the brief of appellant.

3. **Motion for Rehearing.** The motion for rehearing shall set forth in separate paragraphs wherein it is claimed the court erred, pointing out specifically any claimed mistakes or inaccuracies in statements of fact or law in the opinion, and pointing out wherein it is claimed that the court failed to consider any questions involved upon appeal, if such claim is made.

9. **Briefs, Printing and Taxation.**

a. **How Printed.** All briefs shall be printed on unglazed white book paper on pages 6½ inches wide and 9½ inches long, trimmed size; and the printed matter shall be 24 picas wide and 42 picas long. The type used in the printing may be 12 point but not smaller than 11 point, except

that exhibits may be printed in smaller sizes when necessary. Italic type may be used on citations.

b. **Form of Cover.** The cover and heading of each brief shall show the number and title of the case, the county from which the case was brought, the name of the trial judge, the names of counsel filing the brief, and shall also indicate in whose behalf the brief is filed.

c. **Failure to Comply.** The clerk shall refuse to file any brief not prepared in accordance with this rule and shall immediately notify counsel of the objections thereto.

d. **Cost of Printing.** When the parties or their attorneys shall furnish their printed briefs in conformity to the rules of this court, it shall be the duty of the clerk to tax a printer's fee at the rate of 90¢ per page for the first 75 pages embraced in a single copy of the same, and 70¢ for each page in excess thereof, against the unsuccessful party, to be collected and paid to the successful party as other costs. The amount charged as costs shall in no event exceed the actual cost of printing. Costs shall not be taxed for printing of a reply brief except such part as is an answer to a cross-appeal, nor for printing briefs unless printed, served and filed in conformity with the rules of this court.

e. **Costs, When Taxable.** Costs for briefs shall be taxed when served and filed within the time originally fixed as brief day, or, if an extension of brief day has been procured, within the time fixed by such extension.

10. **Briefs, Filing and Service.**

a. **Time of Service.**

(1) **Civil Cases.** In all civil cases, except advanced cases and cases arising under the Workmen's Compensation Act or the Unemployment Compensation Act, appellant shall file his brief and proof of service thereof on the appellee within one month from the date the transcript is filed.

Within one month after the appellant has served and filed his brief, the appellee shall serve his brief on the ap-

pellant and file the same, together with proof of service thereof, with the clerk of this court.

Within ten days after the appellee has filed his brief, the appellant may serve and file a reply brief.

(2) **Workmen's Compensation Cases and Unemployment Compensation Cases.** In workmen's compensation cases and unemployment compensation cases brief day shall be on the twentieth day after the appeal is perfected. The appellee shall serve and file his brief within twenty days after appellant's brief has been served and filed.

(3) **Criminal Cases.** In criminal cases the plaintiff in error shall file his brief, together with proof of service upon the Attorney General, within one month from the date the appeal is docketed. The state shall serve and file its brief within one month after the brief of plaintiff in error has been served and filed.

(4) **Advanced Cases.** In advanced civil cases, brief day for both appellant and appellee shall be the same as in other cases unless a definite time be fixed by the court in its order of advancement.

(5) **Original Actions.** Brief day in original actions shall be fixed by order of court.

b. **Method of Service.** Service may be made either upon the party or an attorney of record. It may be made either by (1) personal service or (2) registered mail. Proof of service may be shown by affidavit of the person making service or by receipt of the party served.

c. **Filing.** Fifteen copies of each brief so prepared by either party, together with proof of service of the same on the opposite party, shall be filed in the clerk's office.

d. **Amicus Curiæ.** Briefs of Amicus Curiæ may be filed without leave of court in any case before it is placed upon the Call. After the case is on the Call leave of court must be obtained. In all cases such briefs must be served upon all attorneys of record and proof of service thereof submitted before the same may be filed.

e. **On Rehearing.** Where a rehearing has been granted or oral argument allowed upon the motion for rehearing, either party may file additional briefs. Fifteen copies of each brief so prepared and served, together with proof of service, shall be filed in the clerk's office not less than one week before the case is submitted. Unless the filing of such briefs shall have been ordered by the court, they shall not be taxable as costs.

11. **Motions, Except Motions for Rehearing.**

a. **Form of Motion.** All motions shall be in writing.

b. **Notice of Hearing.** Motions, other than motions for rehearing, shall, except under special circumstances, be noticed for hearing at 9:00 o'clock a. m. on the first day of a regular session. A motion and notice of hearing shall be served on the adverse party, or his attorney of record, at least three days before the hearing. The motion, notice and proof of service shall be filed with the clerk at least two days prior to the hearing.

c. **Form of Notice.** The notice herein provided for shall conform to the provisions of section 25-910, R. S. 1943, and shall be accompanied by a copy of the motion with copies of all affidavits which are to be used upon the hearing.

d. **Service of Motion and Notice.** The motion and notice shall be served in the same manner as provided by rule 10b for the service of briefs.

12. **Sittings of the Court.** The regular sessions of this court at which oral arguments may be had will begin on the third Monday in September, and the first Monday of October to June, inclusive, at 9:00 o'clock a. m., standard time.

13. **Submission of Cases.** All civil cases shall be regarded as regularly reached for submission ten days after appellee's brief is due. The court will designate by the Call what cases shall be submitted and the time of hearing, having reference to the order in which such cases were docketed. Advanced cases and cases in which rehearings have been granted will have priority.

14. **Notice of Submission of Cases.**

a. **Call.**

(1) The Call is a list of cases to be submitted at each session of the court. A copy will be mailed to the attorneys of record in such cases at least ten days before the date set for submission.

(2) Cases on the Call will not be continued except upon motion and a showing of necessity.

b. **Proposed Call.**

(1) The Proposed Call is a list of cases scheduled to be called for submission at the session next after the Call. A copy will be mailed to the attorneys of record at the same time as the Call.

(2) Cases upon the Proposed Call may be continued only by order of the court. Application therefor may be made by stipulation of the parties, or upon motion and notice, subject to objection.

Oral argument will not be allowed on this motion.

15. **Defaults.** Whenever the brief of appellant is not on file by brief day the judgment will be affirmed or the proceedings dismissed, unless, on sufficient showing, it is otherwise ordered by the court. When default has been made by the appellee and the brief of appellant is on file, with proof of service thereof within the time provided for by Rule 10, he may proceed ex parte. The hearing of a case will not be delayed by default of either party in serving or filing briefs, unless, for good cause shown, it is otherwise ordered.

16. **Advancement of Cases.** Criminal cases, cases arising under the Workmen's Compensation Act or Unemployment Compensation Act, and cases previously before the court on appeal, will stand advanced for hearing without motion. The court will likewise advance on motion cases within the original concurrent jurisdiction of this court, which have been instituted in the district court and brought to this court by appellate proceedings, and cases in which a case

stated has been prepared and filed in accordance with subdivision d of Rule 7. The court may also on motion advance other cases if they involve questions of great public interest, or cases where, if not advanced, the litigation may be moot or fruitless.

Oral argument will not be allowed on this motion.

17. **Cases Involving Constitutional Questions.** A party presenting a constitutional question must file a written notice thereof with the clerk at the time of filing his brief.

18. **Oral Argument.**

a. **Argument of Cases.** In the oral argument of a case, the time allowed on each side shall not exceed thirty minutes, unless the time be extended by the court for special reasons. The application for allowance of additional time must be made in writing and prior to the issuance of the Call.

b. **Argument of Motions.** Oral arguments when allowed on a motion, other than a motion for rehearing, shall be limited to five minutes on each side.

19. **Motions for Rehearing.**

a. **Form.** All motions for rehearing in cases brought to this court by appeal or error proceedings must be printed and may be filed at any time within twenty days from the filing of the opinion or rendition of the judgment in the case. Such motion must specify distinctly the grounds upon which it is based and include the brief in support thereof, which shall be prepared as nearly as possible in accordance with Rule 8. In all cases fifteen copies must be filed with the clerk.

b. **Oral Argument.** Oral argument on a motion for rehearing will be allowed on the written request of any party to the appeal. Unless otherwise ordered, oral arguments on motions for a rehearing will be limited to ten minutes for each side. Such oral arguments may be heard by any three or more members of the court to be designated by the Chief Justice. Written requests for oral arguments on

motions for a rehearing must be served on opposing attorneys of record at least three days prior to such hearing, unless oral argument is stipulated. Such hearings will be held on the Saturday following each regular sitting of the court, unless otherwise ordered. All oral arguments must be heard on the first hearing date following the filing of the motion for rehearing on which they could properly be heard, except upon stipulation of the parties or special order of court for good cause shown. All motions for rehearing in which requests or stipulations for oral arguments are not filed will be considered submitted as of the next hearing date following their filing.

c. **Original Actions.** Where the error assigned is that the court erred as to the legal principles involved or in its application of the law to the facts, the foregoing provisions shall apply; but as to all other assignments the motion must be made as provided by section 25-1143, R. S. 1943, and may be typewritten.

d. **Filing Refused if Record Withheld.** If the party tendering a motion for rehearing has taken the record from the office of the clerk, such motion shall not be filed until the record is returned. This provision, however, shall in no wise extend the time for filing such motion for rehearing.

20. **Unnecessary Costs.** When unnecessary costs have been made by either party, the court will upon application, order the same to be taxed to the party making them, without reference to the disposition of the case.

21. **Mandates.**

a. **Issuance.** No mandate will issue in any case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless ordered by the court or stipulated by the parties.

b. **Stay Pending Appeal to United States Supreme Court.** Parties desiring to prosecute proceedings to the Supreme

Court of the United States, either by appeal or certiorari, may make application within twenty days from the date of the filing of the opinion for an order staying the issuance of the mandate. If granted, the court may require the giving of bond as a condition therefor.

c. **Motion to Recall Mandate.** A motion to recall mandate must be noticed and served as provided in Rule 11. Such motion must be supported by a showing that no action has been taken upon the mandate by the trial court. Objections may be filed on or before the date of submission of the motion. The motion shall not be subject to oral argument.

II

ADMISSION OF ATTORNEYS

1. **Admission of Attorneys; Time of Examination; Filing of Application.** Examination of applicants for admission to the bar will be held on the third Monday of June and the second Monday of November of each year; provided, however, that the commission may hold examinations at such other times and at such places as the commission, or a majority thereof, shall deem advisable, and may eliminate the November examination in any year. The applications of candidates for such examinations shall be filed with the clerk of this court as provided in Rule 2.

2. **Application and Showing; Certificate of Sponsors; Character Affidavits.** An applicant for admission to the bar must be a citizen of the United States and must show that he is a bona fide resident of the State of Nebraska at the time of filing his application. Each applicant shall at least four weeks before the day set for examinations file with the clerk of this court a written request, subscribed by himself, for admission, together with his personal affidavit, as to his age, residence and time and place of study,

or admission and period of practice in courts of record in another state or a territory, and the certificate or affidavit of at least two citizens of good standing in the community where the applicant resides, or formerly resided, that they are well acquainted with him and that he is of good reputation in that community and that they believe him to be of good moral character, and such other information and certificates as the bar commission shall require.

3. **Admission on Examination; Showing by Applicant and Preceptor; Educational Qualifications; Reputable Law School; Law Office Study.** Each applicant for admission upon examination shall, in addition to making the showing set out in Rule 2, make proof by his own affidavit, and by the affidavit or certificate of his preceptor or preceptors that he has regularly and attentively studied law under his or their personal direction or supervision in a reputable law school or in the office of a practicing attorney, or partly in such school and partly in such office, for a period of at least three years, at least one year of which office study shall have been passed in a law office in this state: provided, also, that each applicant shall prove either by school, college or teacher's certificate or diploma or in such manner as shall be required by the bar commission, that prior to his study of law he has had preliminary education, other than legal, equivalent to that involved in the completion of a high school course accredited by the State Department of Public Instruction and shall have received credit for two years' work in a duly accredited college or university. A reputable law school within the meaning of this rule for admission to the bar is one on the approved list of the standardization agency of the American Bar Association. Where credit for law school work is sought by a student who has not completed the course required by his school for graduation, such credit shall be allowed provided such student has acquired 90 per cent of the credit hours required for graduation. Where credit is sought for a portion of the required study, a year's credit shall be allowed for the acquisition of each one-third of the total credits required by the school for graduation. No person seeking

admission on a showing of completion of a college course of not less than three years in a reputable law school, but who has failed to graduate by reason of failure to attain sufficient credits shall be eligible to an examination until he shall make a showing satisfactory to the bar commission of at least four months' additional study, either in a law school or as a registered office student. If it be shown by the affidavit of the applicant that his preceptor is dead, or that for other satisfactory reasons his certificate cannot be obtained, there may be substituted therefor the certificate of any member in good standing of the bar of this state who may be personally cognizant of the facts. Study in an office shall be for at least 40 weeks in a year and not less than 20 hours in a week, but credit shall not be given to any student either in law school or law office for more than one year of study in any continuous period of 52 weeks.

4. **Other Proof of Character; Qualifications of Applicant; Report of Committee on Inquiry.** None of the facts required for qualifying an applicant for admission shall be conclusively established by the foregoing proof, but the applicant shall in his application give the names and addresses of at least three persons other than those whose certificates he presents, of whom inquiry can be made in regard to the applicant's character and other qualifications, and in counties wherein character committees have been appointed by the Supreme Court applicants must obtain the certificate of such character committee. The secretary of the commission shall also secure a report on each applicant for admission to the bar from the Committee on Inquiry of the Nebraska State Bar Association of the jurisdiction in which such applicant resides.

5. **Fees; Payment and Disbursement; Per Diem of Bar Commission.** Each applicant, except applicants seeking admission on a foreign license, shall with his application pay the clerk $25.00 in addition to any registration fee theretofore paid. A practicing attorney from another state or territory seeking to be admitted generally in this state shall

pay a fee of $50.00, of which $25.00 shall be paid to the National Conference of Bar Examiners for investigating and reporting upon the applicant. The clerk shall enter all sums so received in a book of account kept for that purpose, showing date and name of applicant and shall pay the same out on order of the Chief Justice, in payment of the necessary expenses of bar commissioners, and to the clerk of the Supreme Court for each oath and certificate of admission issued to an applicant $1.50. Each member of the state bar commission conducting a bar examination shall receive his necessary expenses and $25.00 per day while actually engaged in the performance of his duties.

6. **Admission from Another State or a Territory; Special Admission; General Admission.** Any practicing attorney in the courts of record of another state or territory, having professional business in either the Supreme or district courts of this state, may, on motion to such court, be admitted for the purpose of transacting such business, upon taking the required oath. Any such attorney having become a resident of this state, desiring to be admitted to practice generally in the courts of this state must make his application as required by these rules and present proof by satisfactory certificate that he is a licensed practitioner in a court of record of another state or a territory and had, at the time of his admission, qualifications equal to the present requirements in this state as prescribed in these rules, or that he has practiced law five full years under license in any state or territory within ten years next preceding the date of his application.

7. **Registration at Commencement of Study; Form; Failure to Register; Change of Preceptor; Fee; Cancellation of Registration.** Every applicant for admission upon examination basing his application in any part upon office study of law in this state must at the beginning of such study have been registered in the office of the clerk of this court as such a student; Provided, that students pursuing law studies in schools of law or colleges of law which schools or colleges are members of the Association of American Law

Schools and are on the approved list of the standardization agency of the American Bar Association shall not be compelled to file application with the bar commission more than 30 days next preceding their application for admission by motion upon graduation. The commission may cancel the registration of any person who is not morally and mentally prepared to be admitted to practice upon completion of law studies. With such registration, the applicant shall pay to the clerk the sum of $5.00, which amount shall go into the account provided for by Rule 5. In case of any change of preceptor, school, or other circumstances of registration, the applicant shall notify the clerk immediately. After registration, the commission shall at least once a year thereafter by examination satisfy itself that the applicant is diligently and in good faith pursuing the study of law, and if the commission be not so satisfied, or if at any time determines that the student has become or is any way unfit or improperly qualified to become a member of the bar, it may cancel such registration. The commission shall omit the preliminary and intermediate examinations of those applicants who are students in schools of law or colleges of law which schools or colleges are members of the Association of American Law Schools and are on the approved list of the standardization agency of the American Bar Association. The commission shall prescribe a course of study for registrants to which it shall conform its examinations. The commission may cancel the registration of a student unless in the office of a reputable attorney who has been in the active practice of law for at least five years prior to such registration, or if the commission finds that the student is not complying with the rules of this court for admission, and may cancel registration if more than three students are registered under any one attorney or firm of attorneys. The bar commission may waive failure to register at commencement of study upon good cause shown other than ignorance of this rule. The commission shall also cancel the registration of a student if he has not presented himself for examination within five years from the date of his registration. Such canceled registration may, however, be reinstated by the bar commission upon good

cause shown. In addition to all of the proof of compliance with the rules for admission herein set forth, members of the bar commission shall make annual personal investigation and inspection of all registered office students.

8. **Bar Commission; Appointment; Duties.** The court will, on or before the opening of the September term in each year, appoint a commission composed of seven persons, learned in law, to conduct examinations for the ensuing year. The clerk of the Supreme Court shall be ex officio one of the seven commissioners and secretary of the bar commission, and one commissioner shall be selected from each Supreme Court judicial district. The commission so appointed shall, prior to the examinations, examine the proofs of qualifications filed in accordance with the foregoing rules, and may make such further investigations as to the qualifications of any applicant as it shall deem expedient. On the day appointed, it shall commence the examination of applicants upon the principles of the common law, equity, criminal law, statutes and practices of this state and the subjects embraced in the course of study outlined by the state bar commission and upon the subject of legal ethics. The method of conducting the examinations shall be left to the discretion of the commission, it being expected that the commission will, in the conduct of such examinations, and in the investigation of the qualifications of applicants take care that no person shall be recommended for admission who has not in all particulars shown himself to be well qualified.

9. **Bar Commission; Reports.** As soon as practicable, after the conclusion of the examination, the commission shall make a written report to the court of its conclusion, and all persons who shall be recommended for admission by a majority of the commissioners shall thereupon be admitted to practice, on taking the oath prescribed by law.

10. **Rejection of Applicant; Further Examination.** If an applicant fail in a final examination, he may be admitted to not more than two subsequent examinations. For each of

such examinations the applicant shall pay to the clerk of the Supreme Court a fee of $25.00 and make such showing as to additional study as may be required by the commission. No part of the fees required by this rule, or by Rule 5, shall be refunded in case of final rejection of the applicant. No person who fails on his third examination shall be eligible to another examination until he requalifies by a full three-year course of study in law in the office of a practicing attorney or in a reputable law school.

11. **Graduates of Local Colleges of Law.** Graduates of the College of Law of the University of Nebraska and Creighton College of Law shall make application and present proofs of qualifications and take examination in the same manner as other applicants.

12. **Bar Commission; Rules and Regulations.** The bar commission is authorized to make, subject to the approval of this court, such rules and regulations as it shall deem necessary or expedient to carry out the intent and purposes of these rules.

13. **Bar Commission; Administration of Oaths; Power of Subpœna.** Each member of the bar commission is hereby authorized to administer oaths for the Supreme Court in any proceeding before the bar commission or matter relative thereto, and shall have power in such matters to subpœna witnesses and take depositions.

State Bar Commission

Charles H. Kelsey.....Norfolk
Harry L. Norval.....Seward
George A. Healey.....Lincoln
O. E. Shelburn.....Alma
Bern R. Coulter.....Bridgeport
Charles F. Bongardt.....Omaha
George H. Turner, Secretary.....Lincoln

III

DISCIPLINARY PROCEEDINGS

1. **Nature of Proceedings; Purpose.** Proceedings for discipline of attorneys shall be considered civil in their nature, and for the purpose of protecting the public and the good name of the members of the bar of the State of Nebraska. They may be instituted against any person who has been licensed to practice in the courts of the State of Nebraska.

2. **Institution of Proceedings; How Entitled; Who May Bring; Leave of Court Required.** Proceedings for discipline of attorneys may be instituted and prosecuted in the name of the State of Nebraska on the relation of the Nebraska State Bar Association, or on the relation of any other person, if leave of court be first obtained. Leave may be granted to a private person to file proceedings as relator only upon a prima facie showing of probable grounds for disciplinary measures, and only after the matter has been submitted to the appropriate Committee of Inquiry, and reviewed by the Advisory Committee. Proceedings may also be instituted by order of the Supreme Court.

3. **Institution of Proceedings; Complaint; Docketing of Cause.** Proceedings shall be initiated by the relator filing a verified complaint setting forth the grounds thereof with reasonable definiteness. The complaint shall be filed with the clerk of the Supreme Court, who shall then docket the cause as an original proceeding in the Supreme Court.

4. **Service and Proof of Service; Manner; Registered Mail; Publication of Notice; Contents.** Service upon the respondent may be had by serving upon him a copy of the complaint and notice of the time for answer in the same manner as service of summons is had in civil proceedings in the district courts of the state; in which case it shall be proved by the official return of the officer making such service. Service shall be deemed to have been waived if the respondent shall sign a written receipt for a copy of the com-

plaint and notice. Service may likewise be had by the mailing by the clerk of this court of a certified copy of said complaint and notice by registered mail to the respondent at his last known address; and in that event the official return card of the United States mail, signed by the respondent, acknowledging receipt of the envelope containing the copy of said complaint and notice, shall be deemed sufficient proof of service. In the event that it shall appear by affidavit that personal service cannot be had upon the respondent and that letters to the respondent's last known address are returned unclaimed, service may be had upon the respondent by publication of notice four successive weeks in some legal newspaper published in the county wherein the respondent last resided. Such notice shall state that complaint for disciplinary action has been filed in the Supreme Court of Nebraska against the respondent and shall give the date of filing and the time within which respondent is required to answer.

5. **Answer; Time of Filing; Extension.** The answer of the respondent shall be filed within 20 days after service of notice and a copy of the complaint, or within 20 days after service by publication, as hereinbefore provided, shall have been completed. For cause shown the court may extend the time to answer.

6. **Default; Answer Tendering No Issue; Disposition of Cause.** If no answer be filed within the time liimited therefor, or if the answer tender no issue of fact or of law, the matter may be disposed of by the court on its own motion or on a motion for judgment on the pleadings.

7. **Reference; Taking of Testimony; Report of Referee.** Upon the filing of an answer raising an issue of fact the court shall refer the matter to a member of the bar as referee. It shall be the duty of such referee to fix an early date for hearing, notify the relator and the respondent or their respective attorneys of record, and without delay to hear such testimony as may be introduced under the pleadings. The referee shall have all powers of a referee in civil actions in the courts of Nebraska. The referee shall ob-

serve the rules of evidence applicable in civil actions in the district courts of the State of Nebraska. He shall have a competent shorthand reporter present who shall take in shorthand and transcribe in typewriting all oral evidence adduced at the hearing had before the referee. The referee may continue the hearing from time to time as circumstances may require, but shall not delay his proceedings unless justice and equity so require.

The referee shall make a written report stating his findings of fact and recommendations. The typewritten record of the proceedings shall have attached to it all of the exhibits offered at the hearing, and shall be certified by the referee; and the referee shall promptly transmit to this court his report, together with such record so certified.

Upon the filing of an answer raising an issue of law only, the court may in its discretion refer the matter to a member of the bar as referee for such service in relation thereto as the court may by its order of reference direct.

8. **Motion for Final Judgment; Exceptions to Report.** Within 10 days after the filing of such report, either party may file written exceptions to such report. If no exceptions are filed, the court in its discretion may consider the findings final and conclusive, and on motion shall enter such order as the evidence and law require.

9. **Briefs; Time of Filing and Service; Hearing of Case.** If exceptions be filed to the findings or report of the referee, printed briefs and arguments shall be filed and oral arguments made in the Supreme Court as required by the rules of this court in civil cases. The party filing exceptions to the findings and report of the referee shall serve and file his brief within 30 days after the filing of such report and the brief of the adverse party shall be served and filed within 30 days thereafter. The case shall thereupon be placed upon the Call for hearing.

10. **Disposition of Case; Orders.** The court may disbar, suspend, censure or reprimand the respondent and take such other action as shall by the court be deemed appropriate.

11. **Motions for Rehearing; Time of Filing.** Either relator or respondent may file a printed motion for rehearing at any time within twenty days from the filing of the opinion or rendition of the judgment of the court.

12. **Costs; Security; Taxation.** No initial fee shall be required of either party, but upon motion of the respondent the court may require security for costs from any relator other than the Attorney General of the State of Nebraska or the Nebraska State Bar Association. Costs may be taxed by the court as the court shall see fit.

13. **Attorney General; Duties.** The Attorney General shall prosecute in any case which shall be referred to him by the Supreme Court and shall have the right to appear and take such part in the prosecution of any action for disciplinary measures as he may think fit to take, at any stage of the proceedings.

14. **Modification of Sentence; Time of Application; Procedure.** No application for modification of judgment or for reinstatement shall be made prior to the expiration of one year after the final order in such proceedings shall have been entered, except in cases where the only service upon respondent has been by publication, and no appearance has been made by respondent, and except where the application is made under the terms of sections 25-2001 to 25-2009, Revised Statutes of Nebraska, 1943. Copies of every such application shall be furnished the relator, the Attorney General, the chairman of the district Committee of Inquiry which exercised original jurisdiction and the chairman of the Advisory Committee of the Nebraska State Bar Association, any one or more of whom may appear and resist such application within 20 days thereafter. Any other persons may likewise appear upon obtaining leave of court and make such resistance. The court may overrule such an application without a hearing if justice and equity require it.

If the application or the showing in resistance thereto shall require the taking of evidence, the matter may be re-

ferred to a referee and the proceedings shall be the same as in the case of original disciplinary proceedings.

15. **Contempt; Powers Over Attorney.** These rules shall not interfere with the power of the courts of the state to punish for contempt, nor shall they deprive the courts of any other powers over attorneys which they now possess.

IV
INTEGRATION OF THE BAR

For the advancement of the administration of justice according to law, and for the advancement of the honor and dignity of the legal profession, and encouragement of cordial intercourse among the members thereof, for the improvement of the service rendered the public by the Bench and Bar, there is hereby organized, created and formed the NEBRASKA STATE BAR ASSOCIATION.

ARTICLE I.

Name.

The name of this association shall be NEBRASKA STATE BAR ASSOCIATION.

ARTICLE II.

Membership.

1. **Qualifications.** Those persons who, on January 1, 1938, are residents of this State and are licensed to practice law in this State, and those who shall thereafter become licensed to practice law in this State and are residents of this State, shall constitute the membership of the Nebraska State Bar Association.

2. **Statement Required; Change of Address.** Each member shall, within sixty (60) days from the effective date of these Rules, file with the secretary of the State Bar Association a statement setting forth his business address and his residence address, and the judicial district within which his principal office is located. He shall notify the secretary in writing of any subsequent change in address.

3. **Non-Resident Attorneys; Governmental Employees.** Where it appears that non-resident attorneys in good standing are engaged in the practice of law within the State of Nebraska, wholly in the employ of the United States Government or some federal governmental agency or corporation on a salary basis, and who participate in no other way in the active practice of law, it is not required that they shall comply with the requirements as to registration under these rules.

ARTICLE III.

Classes of Membership.

1. **Division of Classes.** Members of the State Bar Association shall be divided into two classes; namely, active members and inactive members.

2. **Active Membership.** The class of active members shall include all members who have not specifically requested to be enrolled as inactive members. Any regularly admitted practicing attorney in the courts of record of another state, having professional business in the courts of record of this state may, on motion, be admitted to practice (for the purpose of said business only), in any of said courts, upon taking the oath as aforesaid and upon it being made to appear to the court by a written showing filed therein that he has associated and appearing with him in the action an attorney who is a resident of Nebraska, duly and regularly admitted to practice in the courts of record of this state upon whom service may be had in all matters connected with said action, with the same effect as if personally made on such foreign attorney in this state; Provided, regularly licensed practicing attorneys of other states, the laws of which states permit the practice in their courts of attorneys from this state, without a local attorney being associated with such attorneys, shall not be required to comply with the provisions of this rule. (See section 7-103, Revised Statutes of Nebraska, 1943.)

3. **Inactive Membership.** Any member who is not engaged actively in the practice of law in this state may, if

he so elects, and files written application with the secretary, be classified as an inactive member. Any inactive member may, on filing application with the secretary, and on payment of the required dues, become an active member. No inactive member shall practice law, vote, or hold office in the State Bar Association.

4. **Non-Resident Affiliates.** A lawyer who has been admitted to practice in the State of Nebraska and is a nonresident of the state, may maintain the status of an inactive member by the payment of the annual dues provided.

ARTICLE IV.

Membership Dues.

1. **Active Members.** The annual dues for active members shall be Five Dollars ($5.00) per year, payable on or before January 1 of each year.

2. **New Members.** Persons admitted to the bar after January 1st of any year shall, within sixty (60) days after such admission, register with the secretary of the State Bar Association to be entitled to practice law, but shall not become liable for dues until January 1, following such admission.

3. **Delinquent Members.** When any member is in arrears more than two (2) months, the secretary shall send written notice by registered mail to such member, addressed to his last recorded business address. Any member who shall fail to pay such arrearages within thirty (30) days after the receipt of such notice shall cease to be a member of this Association, and shall not practice law until the arrearages be fully paid.

4. **Inactive Members.** The annual dues for inactive members shall be One Dollar ($1.00) per year, payable on or before January 1 of each year; and if any inactive member shall fail to pay his dues within thirty (30) days after receiving notice of such arrearage, as above provided, his license to practice shall be suspended, and shall not be reinstated until and unless such arrearages shall have been paid.

ARTICLE V.

Officers.

1. **Officers; Terms.** The officers of this Association shall be a President, three Vice Presidents, all of whom shall be elected at the time and in the manner provided by the by-laws of the Association for a term of one (1) year, and a Secretary-Treasurer.

2. **Executive Council; Number.** In addition thereto there shall be elected nine (9) members of the Executive Council, three (3) of whom shall be known as "Members at Large," and six (6) of whom shall be known as "District Members." The immediate past President of the Association shall be a member of the Council for the year following his term as President.

3. **First Executive Council; Composition; Members at Large.** The first Executive Council of this Association shall be composed of the members of the Executive Council of the Nebraska State Bar Association, a voluntary Association. As the term of office of the Members at Large of such Executive Council shall expire, their successors shall be elected by the Association at the time and in the manner provided by the by-laws of the Association, for a term of three (3) years.

4. **District Members of Council; Qualifications; Term.** The District Members shall be elected as follows: There shall be elected one (1) member for each of the six (6) Supreme Court judicial districts, as said districts are now numbered and constituted, or as they hereafter may be constituted. Said members shall be residents of the district which they represent, and shall be elected by the qualified members of the Association residing within such district. Their term of office shall be three (3) years.

5. **District Members of Council; Nomination; Election.** The District Members shall be elected by a secret mail ballot within the calendar month next succeeding the annual meeting of the Association, in the following manner: The secretary shall receive nominating petitions until the close

of the day next following the conclusion of the annual meeting of the Association. The names of the two members whose petitions contain the largest number of signatures of members qualified to vote shall be placed on a printed ballot, except that every nominee receiving fifteen signatures or more shall be placed upon such ballot, but signatures for more than one candidate shall not be counted. If nominating petitions are not presented to the secretary within the time prescribed, nominating at least two (2) candidates, the Executive Council shall nominate additional members so as to place two (2) candidates on the ballot; but, in such case, there shall be nothing to indicate whether a candidate was nominated by petition or by the Executive Council. The ballot shall contain one blank space for writing in any name the voting member may desire.

6. **District Members of Council; Ballots; Mail Vote.** Ballots shall be mailed to every member of the Association within the proper district not later than the 15th day of the calendar month succeeding such annual meeting. The ballots shall be returned to the office of the secretary not later than the last day of such month, and only the ballots of those members shall be counted who are in good standing, including payment of their dues for the year next preceding such election. The member receiving the highest number of votes at such secret ballot shall be the duly-elected member of the Council for such district, and shall take office immediately upon his election.

7. **Executive Council; Distribution of Ballots; Rules.** The Council shall make necessary rules for the distribution of ballots, for the counting of votes, and for the conduct of elections as shall carry out the true purpose of this section, but such regulations shall not contravene the express provisions hereof.

8. **President; Duties.** The President shall preside at all meetings of the Association and of the Council, and shall perform the duties usually belonging to such office. He shall also deliver an address at the regular meeting of the Association next succeeding his election.

9. **Vice Presidents; Duties.** The Vice Presidents, in the order of their election, shall preside at the meetings of the Association in the absence of the President, and perform such other duties as usually pertain to such office.

10. **Secretary-Treasurer; Duties; Compensation.** The clerk of the Supreme Court shall be the Secretary-Treasurer of the Association. The Secretary-Treasurer shall be the custodian of the records and archives of the Association, and shall preserve and record its transactions. He shall collect all dues and other moneys belonging to the Association, and shall send out notices to delinquent members. He shall be the custodian of the moneys of the Association, which he shall disburse under the authority of the Council. He shall make a monthly report to the President of all expenditures for the preceding month and submit a report of such expenditures for the approval of the Council at each regular or special meeting, and shall make a report as Treasurer at the annual meeting, and shall receive reasonable compensation for his services.

11. **Executive Council; Duties; Vacancies.** The Executive Council shall consist of the President and the ten members above provided for. In addition to the other duties hereinbefore provided, it shall be the executive organ of the Association, shall provide suitable programs and entertainment at the meetings thereof, recommend by-laws from time to time, as they appear to be required, fix the compensation to be allowed any officer, nominate officers, including Members at Large of the Council, to be voted upon by the Association. The Council shall not nominate any one of its members for any office. In case of any vacancy in its membership, the Council shall have the power to fill such vacancy by appointment until the next regular election as herein provided.

12. **Officers; Nomination; Election.** Nominations other than those by the Council may be made by any member, but only in writing, filed with the secretary. In case there are nominees for any office other than those by the Council, election on such office shall be by secret ballot, restricted to members in good standing.

13. **Delegate to American Bar Association; Election; Vacancy.** At the time of election of other officers of this Association in even-numbered years, the Association shall elect its delegate to the House of Delegates of the American Bar Association. Any member of this Association who is also a member of the American Bar Association, shall be eligible to be elected such delegate. Such delegate shall be nominated and elected at the same time and in the same manner as officers of this Association, and shall serve for a term of two years and until his successor shall have been elected and certified. In the event of such delegate being unable to act for any reason, the Executive Council is empowered to fill such vacancy.

ARTICLE VI.

Committees.

1. **Standing Committees; Appointment; Number of Members.** As soon as possible after the regular annual meeting of the Association, the President shall appoint standing committees for the ensuing year, to consist of not fewer than three (3) members each, to wit:

a. A Committee on Legislation.
b. A Committee on Judiciary.
c. A Committee on Legal Education.
d. A Committee on American Citizenship.
e. A Committee on Cooperation with the American Law Institute.
f. A Committee on Unauthorized Practice of Law.
g. A Committee on Finance.

2. **Committee on Legislation; Duties.** It shall be the duty of the Committee on Legislation to consider and recommend to the Association action concerning proposed legislation and constitutional amendments.

3. **Committee on Judiciary; Duties.** It shall be the duty of the Committee on Judiciary to consider and recommend to the Association action concerning the relation between the Bench and the Bar, and the procedure and rules of court.

4. **Committee on Legal Education; Duties.** It shall be the duty of the Committee on Legal Education to consider and recommend to the Association action concerning the legal education in public and private institutions in the State of Nebraska, and qualifications for admission to the bar.

5. **Committee on American Citizenship; Composition; Duties.** The Committee on American Citizenship shall consist of a Chairman to be appointed by the President of the Association; the State member of the General Council of the American Bar Association, as Vice Chairman; the President of the State Bar Association as a Vice Chairman; the Secretary of the State Bar Association, who shall serve as Secretary of the Committee, and in addition thereto one member of this Association from each congressional district in the State to be appointed by the President of the Association. The committee so constituted shall function in an executive capacity for a larger committee, to be selected by the committee of ten above named, and to consist of at least one representative from each Judicial District in this State, exclusive of the members of said Executive Committee. This committee as a whole shall be called together for a joint conference at least once each year. It shall be the duty of such committee to use every lawful means to have the Constitution of the United States and of Nebraska, together with the meaning and ideals of good citizenship taught in all schools, colleges and universities in the State; to further knowledge of the history, institutions, traditions, and form of government of the United States; to cooperate with other civic organizations, including local and national bar associations, and with the press, in the furtherance of a national movement on behalf of a better and more loyal adherence to American institutions and ideals.

6. **Committee on Cooperation with the American Law Institute; Composition; Duties.** The Committee on Cooperation with the American Law Institute shall consist of five (5) members, to be appointed by the President of the Association. One of the members so appointed shall be a

member of the Nebraska District Judges' Association. In addition to members appointed by the President, all members of the American Law Institute from Nebraska shall be members ex officio of this committee. The duties of this committee shall be to cooperate with the American Law Institute in the restatement of the American common law, to give publicity to this work in Nebraska, and to afford the Nebraska Bench and Bar opportunities for information, suggestion and cooperation.

7. **Committee on Unauthorized Practice; Number; Duties.** The Committee on Unauthorized Practice of the Law shall consist of five (5) or more members, and it shall be its duty to consider and report to the Association on professional encroachment and unauthorized practice of the law.

8. **Committee on Finance; Duties.** It shall be the duty of the Committee on Finance to audit the books and records of the Secretary-Treasurer at least once each year.

9. **Other Committees; Appointment.** Such other committees, standing or special, shall be appointed as are authorized by the Association.

10. **Expenses of Committees; Payment; Budget.** The traveling and other expenses incurred by any committee, standing or special, for meetings of each committee or otherwise, during the interval between annual meetings of the Association, shall be paid by the Treasurer out of such appropriation as the Executive Council shall have made on application in each case in advance of its expenditure. Such application shall be made in writing by the Chairman of each committee within sixty (60) days after his appointment and upon a specific budget.

ARTICLE VII.

By-Laws.

Suitable by-laws not inconsistent with these rules may be provided by a majority vote at a regular meeting.

ARTICLE VIII.

Meetings.

1. **Regular Meetings; Publication of Proceedings.** The Association shall have one regular meeting annually at a time and place to be fixed by the Executive Council three (3) months prior to such meeting. Immediately upon designation of the time and place of such meeting by the Executive Council, each member of the Association shall be notified thereof by the Secretary by mail. If the Council so orders, the proceedings of such meetings may be edited and published in a suitable form by the Secretary-Treasurer, and copy thereof furnished to each member free of charge.

2. **Special Meetings.** Special meetings of this Association may be held at such times and places as shall be determined by the Executive Council, and the Secretary-Treasurer shall call a special meeting of the State Bar Association upon petition signed by not fewer than twenty (20) of its active members, and such meetings shall be held within thirty (30) days after said petition is filed.

3. **Notice of Meetings.** A ten-day notice shall be given to all members of a special meeting, and such notice shall include the purposes for such meeting, and no other business than that set forth in such notice may be transacted.

ARTICLE IX.

Amendments.

Recommendation to the Court of amendments to these rules recommended by a three-fifths (3/5) vote of the Council may be adopted by a majority of the Association present at any regular meeting. Recommendation for amendments not so recommended by the Council must be submitted in writing at a regular meeting, and unless approved by a vote of two-thirds (2/3) of the members of the Association present, shall lie over and not be acted upon until the next meeting.

ARTICLE X.

Rules of Professional Conduct.

The ethical standards relating to the practice of law in this state shall be the canons of Professional Ethics of the American Bar Association, including the additions and amendments as of January 1, 1945, thereto, and those which may from time to time be approved by the Supreme Court.

ARTICLE XI.

Investigation and Disposition of Charges.

1. **District Committee on Inquiry; Membership; Term.** The Supreme Court shall appoint a Committee of Inquiry in each district court judicial district, of not fewer than three (3) members, who shall serve for such term as shall be designated.

2. **Advisory Committee; Membership; Term.** The Supreme Court shall appoint a committee to be known as the Advisory Committee, which shall consist of one member from each Supreme Court judicial district and a chairman at large. The members of such committee shall serve for such term as shall be designated.

3. **Initiation of Charges.** All charges of unprofessonal conduct on the part of any member of the Association shall be first made to the Committee of Inquiry in the district where such member resides.

4. **Committee on Inquiry; Disqualification of Members; Powers of Advisory Committee.** In case any member of a Committee of Inquiry is disqualified from acting upon any matter presented to it, the same shall be referred to the Advisory Committee, and such committee shall have the power to (1) direct that the members of said Committee of Inquiry who are not disqualified shall proceed and determine such matter, or (2) direct that the matter shall be referred to some other Committee of Inquiry in which case the Committee of Inquiry to which it is so referred shall

have full power and jurisdiction to the same extent and in like manner as if said matter had arisen in its district and had been orginally lodged with it, or (3) take jurisdiction of and determine said matter to the same extent and with like power as the original Committee of Inquiry might have done if no disqualifications existed as to any of the members thereof.

5. **Committee on Inquiry; Informal Investigation.** It shall be the duty of a Committee of Inquiry, upon having information of or upon receiving charges of unprofessional conduct on the part of a member, to make an informal and private investigation of the matter; and upon being satisfied that any such information is without foundation or that such charges are without merit, the Committee shall take no further action except to dismiss the charges.

6. **Advisory Committee; Informal Investigation.** In case the Committee of Inquiry shall determine that there is no reasonable ground to believe the member charged guilty of an offense which justifies disciplinary action, the person or persons making the initial charges may lodge with the clerk of the Supreme Court an informal charge supported by affidavits or other prima facie evidence. The clerk of the Supreme Court shall thereupon obtain from the Committee of Inquiry the written charges, statements, answer, affidavits or documents filed with it and a report of the said Committee of Inquiry, and shall refer all of such documents to the Advisory Committee for review and recommendations. If the District Committee does not make final disposition of any case within 90 days after charges are filed the District Committee shall, at the expiration of said 90 days' period report in writing to the Advisory Committee stating the reason for such delay, what progress has been made in the hearing and the probable additional time necessary for final disposition, and the Advisory Committee may, if it deems it advisable, take the same action that it is authorized to take in case it finds the District Committee or some member thereof disqualified. But the District Committee having original jurisdiction shall continue to have jurisdic-

tion over said matter until some order in the premises is made by the Advisory Committee.

7. Committee on Inquiry; Formal Charges; Hearing; Powers; Report. If, however, a Committee of Inquiry, after making said informal and private investigation, concludes that there is reasonable ground to believe that the member against whom the charges are made is guilty of an offense which requires and justifies disciplinary action, said committee shall immediately reduce or cause the charges to be reduced to writing, specifying with particularity the facts which constitute the basis thereof, and shall serve a copy of said written charges upon the said member; and the committee shall hold a hearing upon twenty (20) days' notice to the said member and the person making the charges, at which hearing the parties may be heard and may file with the committee any statement, answer, affidavit or document and produce other evidence. Notice of the time and place of hearing shall be given to the parties by registered mail addressed to their last known residence or place of business. The District Committee or the Chairman thereof may continue and adjourn hearing and proceedings from time to time and in cases where such orders of continuance or adjournment are made the committee or Chairman shall give notice thereof to the party making the charges and respondents by registered mail or personal notice unless such parties were present in person or by counsel when such order of continuance or adjournment was announced.

District Committees of Inquiry and the Advisory Committee, within their respective territorial jurisdictions are empowered to issue writs of subpœna, including subpœna duces tecum, in the name of the State of Nebraska, requiring the attendance and testimony of witnesses and parties, and the production of records, books and papers, at hearings before said Committees; to administer oaths to parties and witnesses and to take their sworn testimony or their unsworn statements as the Committee may decide; and to certify to this court, for appropriate action by the

court, any refusal of a party or witness to comply with the requirements of a subpœna or to testify or answer questions at a hearing.

If the committee finds that there is reasonable ground to believe the said member guilty of the misconduct charged, it shall thereupon transmit to the clerk of the Supreme Court the committee's report of investigation, a transcript containing the charges, and any statement, answer, affidavits or documents submitted and filed, and shall accompany the same with a complaint prepared, verified by any member or members of the Committee, and ready for filing in the Supreme Court. The complaint shall be made in the name of the state on the relation of the Nebraska State Bar Association.

8. **Advisory Committee; Review of Record; Report.** The clerk of the Supreme Court shall thereupon refer the entire record including the report of the Committee of Inquiry, the transcript and the complaint, to the Advisory Committee for review. The Advisory Committee shall have authority to hold further hearing at which the person or persons making the initial charges and the member charged shall have a right to be heard; but the Advisory Committee may direct disposition of the charges and complaint without further hearing. If the Advisory Committee determines that no probable cause for disciplinary action exists, it shall so report to the clerk of the Supreme Court and the matter shall stand dismissed unless otherwise directed by the Supreme Court. If the Advisory Committee determines that probable cause for disciplinary action exists, it shall transmit its report, the report of the Committee of Inquiry, the transcript, and the complaint submitted by the Committee of Inquiry, together with such amendments thereto as to it may seem proper, to the clerk of the Supreme Court who shall forthwith enter the same upon the docket of the court as an original action.

9. **Hearings, Records and Proceedings; No Publicity.** Unless requested by the member charged neither the hearings, records or proceedings of the Committee of Inquiry or of the Advisory Committee shall be made public, nor shall any publicity be given thereto prior to the filing of a complaint in the office of the clerk of the Supreme Court.

10. **Supreme Court; Filing of Complaint; Conditions Precedent.** No complaint in any case shall be filed with the Supreme Court until charges shall have first been presented to the Committee of Inquiry and considered by the Advisory Committee as herein provided.

11. **Supreme Court; Prosecution of Proceedings; Additional Charges.** Upon the filing in the Supreme Court of a complaint for disciplinary action as contemplated and provided by this Article against a member of the Association, the Supreme Court in its discretion may either designate the Attorney General or appoint any attorney of the Court to prosecute the action. The Attorney General or attorney so appointed may in his discretion prepare and file an amended or new complaint, and in case he has in his possession evidence which in his opinion warrants disciplinary action on any additional charge or charges, he may incorporate such additional charge or charges in the complaint and prosecute same regardless of the fact that such new charge or charges have not been presented to the Committee of Inquiry or considered by the Advisory Committee.

12. **Expenses of Hearings.** Actual expenses incurred by the District or Advisory Committees in connection with hearings prior to the filing of a complaint in the Supreme Court shall be borne by the Association.

13. **Advisory Committee; Promulgation of Rules of Practice and Procedure.** In addition to the duties heretofore imposed upon the Advisory Committee, the said Committee shall confer and advise with the Committees of Inquiry, and shall promulgate uniform rules of practice and procedure for the hearing and disposition of charges before such Com-

mittees. The Advisory Committee is further empowered in its discretion at the request of any member of the Association, to express its advisory opinion or give its interpretation upon rules of professional conduct where such question has not been previously determined and is not pending in any proceeding for a determination thereof.

14. **Provisions Cumulative.** The provisions of this Article shall be cumulative and not exclusive.

V

JUDICIAL COUNCIL

ARTICLE I.

Creation. For the advancement of the administration of justice according to law, there is hereby created and organized the Judicial Council of the State of Nebraska.

ARTICLE II.

Duties; Report. The Judicial Council shall make a survey of and make recommendations tending to the simplification of the pleadings, practice and procedure of the judicial system of the State of Nebraska, in order to promote the speedy administration of justice; and its report and recommendations shall be filed annually with this court on or before April 1, of each year.

ARTICLE III.

Composition; Qualification of Members. The Judicial Council shall be composed of one Justice of the Supreme Court, two Judges of the District Court, one County Judge, and six qualified practicing attorneys, one from each Supreme Court Judicial District, provided, however, that all members shall be active members in good standing of the Nebraska State Bar Association.

ARTICLE IV.

Selection. The Justice of the Supreme Court to serve on the Judicial Council shall be appointed by the Supreme Court, and except as herein otherwise provided, the other members shall be selected in the following manner: the two Judges of the District Court shall be appointed by the District Judges of the state; the County Judge shall be appointed by the County Judges of the state, and the practicing attorney from each Supreme Court Judicial District shall be nominated and elected by the attorneys of his district.

ARTICLE V.

Term; Vacancies; Nomination and Election. The term of a member of the Judicial Council shall be for four (4) years. The County Judge, District Judges and Judge of the Supreme Court who are members of the Council shall be chosen as provided for in Article IV, during the month of December, 1943, and each four years thereafter. In the odd-numbered Supreme Court Judicial Districts, attorney members shall be nominated at or before the annual meeting of the Nebraska State Bar Association in the year 1940, and each four years thereafter and shall be elected in the manner hereinafter provided. In the even-numbered Supreme Court Judicial Districts, attorney members shall be nominated in the year 1941, and each four years thereafter and shall be elected in the manner hereinafter provided.

When a vacancy occurs by reason of the resignation, death, or inability of an attorney member to continue to perform his duties as such member, such vacancy shall be filled for the unexpired term in the same manner as for the full term.

Nominations of a practicing attorney from a Supreme Court Judicial District may be made either by petition or by the Executive Council of the Nebraska State Bar Association as hereinafter provided. Nominations made by petition shall be in writing, signed by at least fifteen (15) ac-

tive members in good standing of the Nebraska State Bar Association, and living in the Supreme Court Judicial District for which said nomination is made, and said attorney so nominated shall be a resident of and practicing in said Supreme Court Judicial District, and said nominating petition shall be filed with the secretary of the Nebraska State Bar Association before six o'clock p. m. of the first day of the annual meeting of said association next preceding the election of such member, and such nomination shall be publicly announced at the next session of the association. If nominating petitions are not presented to the secretary within the time prescribed, nominating at least two (2) candidates, the Executive Council shall nominate additional members so as to place two (2) candidates on the ballot; but, in such case there shall be nothing to indicate whether a candidate was nominated by petition or by the Executive Council. The ballot shall contain one blank space for writing in any name the voting member may desire.

The secretary of the Nebraska State Bar Association shall, on or before the 15th day of the calendar month succeeding such annual meeting, prepare and mail to the members of the Nebraska State Bar Association who are in good standing, living and practicing in the Supreme Court Judicial District for which said nominations are made, a ballot containing the names of those nominated for said District. The members so receiving said ballots shall return the same to the secretary on or before the last day of each month, and the secretary shall thereupon canvass said ballots, and the attorney receiving the greatest number of votes shall be declared elected, and shall be so notified by the secretary.

ARTICLE VI.

Officers. The Judicial Council shall elect from its membership a chairman and vice chairman, who shall respectively perform the duties usually incident to his office, and

such other duties as this Court or the Council may prescribe. The secretary of the Nebraska State Bar Association shall act as the Secretary of the Council.

ARTICLE VII.

Meetings. The Judicial Council shall convene in regular meetings at such times as the Council may by rule provide. The chairman may, and on application of five (5) members shall, convene a special meeting of the Council.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1944

D. M. MEYER, APPELLANT, V. W. R. LINCH AND CLYDE A. LINCH, PARTNERS DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF LINCH BROS., APPELLEES.

15 N. W. 2d 317

FILED JULY 7, 1944. No. 31807.

1. **Limitation of Actions.** Partial payments made without the authority or consent of a surety or joint obligor do not toll the statute of limitations as to such surety or joint obligor.
2. ———. Any promise to pay a debt or other existing liability in a cause founded on written contract, to prevent the running of the statute of limitations, must be in writing.
3. **Bills and Notes.** Where a promissory note is signed by individuals, without reference to any partnership, the presumption is that it is the individual contract of the makers.
4. **Partnership.** Where a promissory note is signed by individuals, in order to hold them as partners, it is not sufficient to show that a partnership existed between the makers. It must be further shown that the consideration of the note was advanced to the partnership and the note accepted on the credit of the partnership.
5. ———. If the basis for holding the makers of a promissory note to be partners is that they held themselves out as such, then it is incumbent upon the payee of the note to show that he relied upon such holding out in accepting the note.
6. ———. Where two parties, signing as individuals, make and deliver a promissory note in consideration for the assignment of valuable securities by the payee to one of the makers, and the assignee disposes of the securities for money and turns the pro-

ceeds to be expended and used by a partnership composed of the two makers of the note, the note does not *ipso facto* become a partnership obligation.

APPEAL from the district court for Seward county: STANLEY BARTOS, JUDGE. *Affirmed.*

McKillip, Barth & Blevens and *Matzke & Bek*, for appellant.

Chambers, Holland & Locke, Beghtol & Rankin and *H. L. Norval, contra.*

Heard before SIMMONS, C. J., PAINE, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

SIMMONS, C. J.

This is an action to recover judgment on a promissory note. At the close of plaintiff's case in chief, the trial court dismissed the action as to the defendant, Clyde A. Linch. Plaintiff appeals from that decision. The appeal presents the question as to whether or not the trial court erred in sustaining objections of the defendant, Clyde A. Linch, to offers of proof made by the plaintiff. We affirm the judgment of the trial court.

The petition herein was filed June 16, 1942. Plaintiff in the caption of his petition named the defendants as "W. R. Linch and Clyde A. Linch, partners doing business under the firm name and style of Linch Brothers." In the body of the petition, plaintiff alleged that on or about April 2, 1934, "the defendants, W. R. Linch and Clyde A. Linch, partners doing business under the firm name and style of Linch Brothers, for a valuable consideration" made and delivered to plaintiff their promissory note for $4,000, payable September 1, 1934, bearing 6 per cent interest; attached a copy of the note to the petition showing that it was signed "W. R. Linch" and "Clyde A. Linch"; alleged a payment of $12.70 on June 25, 1937; alleged the amount due and prayed for judgment "against the defendants."

The defendant, Clyde A. Linch, answered separately, denied generally and pleaded the bar of the statute of limita-

tions. By reply, plaintiff pleaded that defendants by reason of statements made and promises given were estopped to plead the bar of the statute.

The action went to trial, each defendant being represented by separate counsel. At the close of plaintiff's case in chief, the defendant, Clyde A. Linch, moved that the action be dismissed as to him for insufficiency of the evidence to sustain a judgment against him, and for the further reason that the evidence showed that the statute of limitations had run on the note as against him. The trial court sustained the motion and dismissed the action as to the defendant, Clyde A. Linch. From that order of dismissal, plaintiff appeals.

It appears from the plaintiff's evidence, which was admitted, that on or about April 2, 1934, the defendant, W. R. Linch, tendered to the plaintiff the note here involved, bearing only the signature of W. R. Linch. Plaintiff refused to accept it, and said: "there would have to be another signer." Defendant, W. R. Linch, said: "Alright I can get Clyde, my brother." Some two or three weeks later, the note was tendered to plaintiff with the signature of Clyde A. Linch thereon, and plaintiff accepted it. Thereafter, a short time prior to June 25, 1937, plaintiff bought some lightning rod wire from the defendant, W. R. Linch. Plaintiff returned unused wire on June 25 and inquired about the price of that which he had used. Defendant, W. R. Linch, figured the value of that used at $12.70 and directed that credit be placed on the note for that amount. Plaintiff thereafter on that day endorsed the payment on the note. Plaintiff further testified that at different times W. R. Linch admitted liability on the note, asked that suit be not brought, etc. Plaintiff testified that he did not know the defendant, Clyde A. Linch, and that Clyde A. Linch was not present at any of the conversations had with W. R. Linch.

Plaintiff, in his brief here, states the rule to be that a payment by one of two joint makers will not toll the statute against the other, unless the payment was made with his knowledge, consent and acquiescence; unless the one

making the payment was the agent of the other; or unless they were partners.

On the first proposition, his assignment of error is that the court erred in not receiving evidence that the endorsement was made on the note with the knowledge, consent and approval of Clyde A. Linch, and by him ratified and authorized. The evidence of plaintiff's witness was that when the defendant, W. R. Linch, had told plaintiff to put the amount of the wire "on the back of the note," that plaintiff asked "about the other signature," and W. R. Linch said "it was alright, he would agree to it." This was stricken as hearsay as to defendant, Clyde A. Linch. Clyde A. Linch was not present. Obviously the ruling was correct, and just as obviously the evidence, had it been received, would not have bound the defendant, Clyde A. Linch, either to the effect that the payment was made with his knowledge, or that he ratified and approved it. The rule is: "Partial payments made without the authority or consent of a surety or joint obligor do not toll the statute of limitations as to such surety or joint obligor." *Rawleigh Co. v. Smith*, 142 Neb. 529, 9 N. W. 2d 286.

Plaintiff next argues that where there is a partnership, there is an agency, and hence that his "problem was not to prove agency, but to prove that the defendants were partners. If they were partners, then the payment by one tolls the statute as to the other." To prove partnership, plaintiff made a series of offers of proof, to all of which the trial court sustained objections. Plaintiff's assignments of error go to the rejection of his own evidence upon which he made these separate offers of proof. It is plaintiff's contention that had the evidence been received, it would have shown that the liability of Clyde A. Linch was that of a partner of W. R. Linch and, accordingly, that the payment of W. R. Linch bound the defendant, Clyde A. Linch, and tolled the statute as to him. He further assigns as error the dismissal of the action as to Clyde A. Linch. The answer to the last assignment depends upon whether or not the court erred in excluding the proffered evidence.

The plaintiff in his brief here assumes the sufficiency of the offered evidence to establish the requisite partnership, and argues that the trial court refused the offers on the ground that the action was one against the defendants as individuals and for that he erred.

Defendant in his brief first submits that the trial court ruled properly on the offers on the ground that the preliminary foundation questions as to knowledge of the witness, etc., were not asked, and further contends that had the offered testimony been received, he would still be entitled to have the cause dismissed as to him. To meet the first contention, plaintiff moved here that the record be returned to the trial court and for a diminution of the record to show that preliminary to the trial, a conference was had in the judge's chambers between the court and counsel, wherein the court announced his opinion that evidence of partnership was not admissible under the pleadings. Plaintiff then advised that he would make an offer of proof and that "an arrangement was entered into by counsel whereby the offers of proof should be made in the absence of the jury and that it would not be necessary to place witnesses on the stand in the presence of the jury and ask the preliminary questions;" and that "the arrangement itself related to all the questions which were asked concerning the matter of co-partnership and as to the capacity in which the appellee, Clyde A. Linch, signed the instrument." We do not need to determine here the question of the right of an appellant, at this stage of the proceedings, to have the record amended in the manner indicated. We have examined each of the several offers made, and assuming, but not deciding, that evidence of partnership was admissible under the pleadings, and, disregarding the foundation question, find that the trial court did not err in his rulings thereon.

The offers of proof made were blanket offers, each reciting a series of statements. They will be summarized as made. Plaintiff's first offer of proof was that upon numerous and diverse occasions prior and subsequent to 1937, he discussed this note with defendant, W. R. Linch, when

plaintiff stated that W. R. Linch would either have to make payment or that plaintiff would sue; that W. R. Linch told him not to sue, and said: "I will pay it; I will never raise the statute of limitations against you"; that the plaintiff relied upon the statements and as a result did not file the action earlier, but in the absence of the statements would have done so. It is not claimed that this promise was in writing. The statute is: "In any cause founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise." Comp. St. 1929, sec. 20-216. "Any promise to pay a debt or other existing liability in a cause founded on written contract, to prevent the running of the statute of limitations, must be in writing." *Brainard v. Hall*, 137 Neb. 491, 289 N. W. 845. It is obvious that the court did not err in sustaining an objection made on the above ground.

Plaintiff's second offer was to prove by plaintiff that prior to April 12, 1934, he had purchased from a bank a real estate mortgage on land in Deuel county; that shortly prior to April 2, *1942*, (sic) W. R. Linch, defendant, came to him and stated that he and his brother Clyde desired to acquire the mortgage; that they desired to use the proceeds in their business and that he would give plaintiff a note signed by W. R. Linch and Clyde Linch for $4,000, due September 1st after date; that the note was better security than what he already had; that the land was worth less than the note and mortgage which plaintiff held and, "relying upon that representation," W. R. Linch brought the plaintiff the note in suit, signed by W. R. Linch and Clyde A. Linch; and that upon delivery of the note plaintiff "made an assignment *to W. R. Linch* of his note and mortgage upon the real estate" mentioned. (Emphasis supplied.) To this the defendant, Clyde A. Linch, objected as incompetent, irrelevant and immaterial, and especially so as there was no issue as to

consideration, and hearsay as to him. The court sustained the objection.

Plaintiff then followed this ruling with the statement that the offer was not made for the purpose of explaining the consideration, but for the purpose of "proving that Clyde Linch and W. R. Linch received the consideration for this note and that the same was delivered to them and used by them in their business, for the purpose of supplying the foundation of partnership, whereby the subsequent payment made by Ray Linch upon this note would be applicable to Clyde Linch, and to show the relationship between the parties." This was objected to by Clyde Linch as "incompetent, irrelevant and immaterial; not within the pleadings and hearsay." The offer at most recited (assuming the date of 1942 to be erroneous) the inducements that W. R. Linch offered to secure an assignment to himself. The "purpose," as explained by counsel, was to show that the two defendants "received the consideration for this note." The declared purpose goes to matters not contained in the offer and contrary thereto. The offer itself showed that the assignment was made to W. R. Linch; there was nothing in the offer to show that W. R. Linch and Clyde Linch had a "business," or that the note secured by the mortgage was delivered to and used by them in their business. There was no reference to a partnership in the offer, nor offer to connect with evidence of a partnership. We see no error in the trial court's ruling.

Plaintiff next offered to prove that "contemporaneously, and as a part of this same transaction," there was one "by *W. R. Linch* with one John Sunderman" for a note and mortgage on this same land; and that W. R. Linch told plaintiff he was "making the same arrangement" with Sunderman; that "he was supplying Mr. Sunderman a note signed by himself and his brother, Clyde," and Sunderman was assigning "to him" his note and mortgage, and plaintiff stated that if Sunderman agreed to it, he was willing also. This offer was made for the "purpose of throwing light upon the relationship of the parties to this transaction."

Defendant, Clyde A. Linch, objected to the offer as incompetent, irrelevant and immaterial. The court sustained the objection. The offer merely was to show at most a part of the inducement that W. R. Linch offered to plaintiff, to the effect that in consideration of a note signed by himself and his brother Clyde, Sunderman was assigning a note and mortgage to *W. R. Linch* and plaintiff was "willing" to do the same thing. We see no error in the court's ruling.

Plaintiff then offered to prove that both mortgages were assigned to W. R. Linch, and "thereafter W. R. Linch had his brother Harry B. Linch negotiate" a federal farm mortgage on the real estate, and that the money realized from the new loan "was received by W. R. Linch and Clyde Linch." To this the defendant, Clyde A. Linch, objected "as incompetent, irrelevant and immaterial." It is an offer to prove that a third party negotiated a new loan on the Deuel county land, and that Clyde A. Linch and W. R. Linch received the money realized from the new loan. We see no error in the trial court's ruling.

Plaintiff next offered to prove that the money received from the new loan "which the defendants were able to make" by reason of the fact that "they had received an assignment" of the notes and mortgages of Meyer and Sunderman, was expended and used "in their partnership business, business of a joint nature, to the extent of $4407.20," and that W. R. Linch and Clyde A. Linch each received $409.65 in addition. To this the defendant, Clyde A. Linch, objected on the ground that the offer assumed a partnership relation, of which there was no proof, and that the offer did not in any way tend to establish the conclusions contained in the offer, and the purported facts stated in the offer were incompetent, irrelevant and immaterial. The trial court sustained the objection and we think properly so. The previous offer was that the defendant, W. R. Linch, had a brother Harry negotiate the new loan. No evidence of a "partnership business" involving Clyde A. Linch had been received, and none offered.

Plaintiff then offered to prove that on the date of the

note here in suit, the defendant, W. R. Linch, and Clyde A. Linch were partners engaged in various joint ventures; that the proceeds of the note in suit "by way of the Federal Farm loan" were used in the partnership transactions; that the partnership received the benefit thereof; and that "the relationship is that of partnership, as well as joint makers." To this the defendant, Clyde A. Linch, objected as incompetent, irrelevant and immaterial, calling for a conclusion and speculative. The trial court sustained the objection, and we think properly so. Clearly, the latter part of the offer was a conclusion of law, about which the witness was not competent to testify. The offer as to facts merely went to show that when the note in suit was given, W. R. Linch and Clyde A. Linch were partners in various ventures and that the proceeds of the federal farm loan went to the use and benefit of the partnership. This latter matter will be discussed in connection with the next offer.

Plaintiff next offered to prove that "on the date the note was signed, and on the date when the endorsement was made that W. R. Linch and Clyde Linch were engaged in the business of operating real estate and lands," participating in the profits and losses; and on various occasions had stated openly and publicly that they were partners; "and that they operated lands and other investments together *in the name of W. R. Linch and Clyde Linch, co-partners.* That they received the consideration arising out of this note as such partners." (Emphasis supplied.) The trial court sustained an objection to this offer, and we think properly so. This offer does not go to show that the note here in suit was a partnership obligation. In fact, the only inference possible from plaintiff's own testimony given on direct examination is that defendant, Clyde A. Linch, signed because plaintiff required two signatures. The offer does not purport to show that these two defendants owned the land upon which the federal farm mortgage was given, either individually or as partners. From the briefs we gather that it was owned by Harry B. Linch. The offer does not go to show that the plaintiff accepted the note in suit as a

partnership obligation. His own testimony, given on direct examination, negatives any such conclusion. The offer does not go to show that plaintiff knew of the partnership when he accepted the note, nor that he relied upon it in accepting the note. In fact, his second offer shows a reliance upon an entirely different representation. The offer does not go to show that in accepting the credit and endorsing the payment of $12.70 on the note, he was relying on the representation of partnership. The offer does not go to show, and it is not claimed, that the defendant, Clyde A. Linch, had any connection with the lightning rod transaction. The offer does not go to show that this note was given as any part of the partnership business. It was merely an offer to show that there was a partnership business conducted by these defendants, and that they held themselves out as partners. Neither does the offer go to show that plaintiff knew of the holding out of the defendants as partners. It does not even show that the holding out was made either at or before the time the note in suit was given, or at or before the time the payment was endorsed on the note. It merely states that "on various occasions both W. R. Linch and Clyde Linch stated openly and publicly that they were partners."

The note in suit on its face was the individual obligation of the defendants. The presumption is that it was the individual contract of the defendants. This presumption is strengthened by the fact that plaintiff offered to prove that the defendants were partners operating lands and other investments "in the name of W. R. Linch and Clyde Linch, co-partners." To hold the defendant, Clyde A. Linch, liable as a partner, it is not sufficient to show that a partnership existed between the defendants. It must be further shown that the consideration of the note was advanced to the partnership, and the note accepted on the credit of the partnership. If the basis for holding the defendants liable as partners is that they held themselves out as such, then it was incumbent upon the plaintiff to show that he relied upon such holding out in accepting the note. *Blue Valley*

State Bank v. Milburn, 120 Neb. 421, 232 N. W. 777. Neither the final offer nor the offers as a whole are sufficient to hold the defendant as a partner. The last sentence of the offer is "That they received the consideration arising out of this note as such partners." It is noted that in the second offer of proof, plaintiff offered to show that W. R. Linch told him he and his brother, Clyde Linch, desired to acquire the mortgage and to use the proceeds in their business. That was followed, however, by an offer to prove that the note and mortgage were assigned to W. R. Linch; and, by a subsequent offer, that W. R. Linch had his brother, Harry B. Linch, negotiate the new loan, and that the money from the new loan "was received by W. R. Linch and Clyde Linch"; and, by a subsequent offer, that this money was "expended and used by W. R. and Clyde Linch in their partnership business" to the extent of $4,407.20; and, by a subsequent offer, "that the partnership received the benefit thereof." Conceding that the defendants, W. R. Linch and Clyde A. Linch, desired to secure the note and mortgage for use in their business, the offers of proof were that plaintiff, in consideration for the note in suit signed by the two individuals, assigned his note and mortgage to W. R. Linch, who, in turn, through refinancing by a third party, received money on it, which in turn was received by these two defendants, and they in turn expended and used it in their partnership business. The offer does not go to show that the note and mortgage on the Deuel county land was a partnership asset, nor that the money received from it was a partnership asset, but rather that it was the property of W. R. Linch and was by him turned to himself and brother Clyde and by them later "expended and used" in the partnership business. This evidence would go to show that W. R. Linch was the creditor of the partnership, but from that it does not follow that the note in suit, because of that transaction subsequent to the making and delivery, became a partnership obligation. We think the above is sustained by reason and the authorities. See 47 C. J., sec. 345, p. 872; 40 Am. Jur., sec. 149, p. 236, and cases there cited.

It necessarily follows that the payment by W. R. Linch does not toll the statute as to the defendant, Clyde A. Linch.

Under these circumstances, should the record be amended as asked by plaintiff, it would avail him nothing. The motion accordingly is overruled.

The judgment of the trial court is affirmed.

AFFIRMED.

ROY W. SHEPARD, APPELLANT, V. ANSON L. SHEPARD, APPELLEE.

15 N. W. 2d 195

FILED JULY 7, 1944. No. 31711.

1. **Contracts.** The cardinal rule in the interpretation of a contract is to ascertain the intention of the parties, and to give effect to that intention if it can be done consistently with legal principles.
2. **Attorneys' Fees.** It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by statute, or where the uniform course of procedure has been to allow such recovery.
3. **Trade-Marks and Trade Names.** A trade-mark may be defined as a name, sign, symbol or device which is attached to goods offered for sale in the market, so as to distinguish them from similar goods, and to identify them with a particular trader, or with his successors, as owners of a particular business, as being made, worked on, imported, selected, certified or sold by him or them.
4. ———. The right to the exclusive use of a trade-mark is not unlimited. Its use on one or more commodities does not give the right to use it on all, for the right to the exclusive use of a trade-mark is limited to a use on the particular class on which it has been actually used, and other persons may use even the identical mark or name in connection with a different class of goods.
5. ———. Where the owner of a trade-mark applies for an injunction to restrain the use of the trade-mark or trade name, it must be shown that the two businesses are in actual competition with each other, and, where one is exclusively engaged in the manufacture and sale of insecticides and the other in the exclusive manufacture and sale of leather oil, there is no such com-

petition as will warrant the granting of a permanent injunction, as the businesses are wholly dissimilar. This is especially true where the trade-marks used on the different products are distinctive in character and bear the name of the contents of the package, respecting each separate and dissimilar business.

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

Brown, Crossman, West, Barton & Fitch and *Charles E. Foster,* for appellant.

Rosewater, Mecham, Shackelford & Stoehr and *J. P. Gibbs, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

MESSMORE, J.

This is an action for an accounting, based on a written contract made and entered into January 1, 1938, by Roy W. Shepard, plaintiff, and his brother, Anson L. Shepard, defendant, wherein plaintiff, being the sole owner of the business known as Shepard Laboratories, sold such business to the defendant. The trial court entered a decree in favor of the plaintiff and credited the defendant with certain items as against the net profits due the plaintiff, which were objected to by the plaintiff. Motion for a new trial was overruled, and the plaintiff appeals.

The contract is for the sale of Shepard Laboratories, and the seller retains no title, lien or other security, except a condition wherein certain percentages of the net profits were to be paid as they accrued. First, the case involves an interpretation of the contract. At the outset paragraphs 1 and 2 of the contract, providing for the sale of equipment, office fixtures and merchandise, have been fully complied with. The other provisions of the contract, necessary to a determination of this case, are in substance as follows: The defendant agrees to pay to the plaintiff "for a period of five years on or before December 31st each year, 20% of the profit after deducting the following legitimate neces-

sary business expense itemized as follows for an approximate working basis attached marked No. 3A * * * ." No. 3A is not attached to the contract, nor does it appear as an exhibit. Paragraph 4 of the contract provides that on and after January 1, 1943, the defendant agrees to pay plaintiff "10% of the profit on or before December 31st each year and thereafter for five years after deducting the necessary expenses as outlined in paragraph No. 3 * * * ." Paragraph 5 provides that the parties agree to co-operate with each other in furthering the sales of each other's products, the plaintiff owning a separate company, which will be discussed later in the opinion, with reference to defendant's cross-petition. The other provisions of the contract need not be referred to at this time.

The pleadings joined the issues upon the interpretation of the contract and the accounting, and the evidence details each item constituting the subject matter of the accounting. While some contention is made by defendant in his brief that the action is one at law upon the breach of a contract, the case was tried and considered as in equity.

"Generally speaking, the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles. It has been said that to this paramount rule all others are subordinate. The parties should be bound for what they intended to be bound for, and no more. * * * The law presumes that the parties understood the import of their contract, and that they had the intention which its terms manifest. It is not within the function of the judiciary to look outside of the instrument to get at the intention of the parties, and then carry out that intention regardless of whether the instrument contains language sufficient to express it; but their sole duty is to find out what was meant by the language of the instrument." 6 R. C. L., sec. 225, p. 835, and cases cited.

The plaintiff contends that the court erred in taking into consideration issues not contemplated by the contract, by admitting the evidence regarding family affairs and sup-

port of the parents. We will not detail this evidence except to say that the obligation is personal to the plaintiff. The defendant paid their mother the sum of $300, charged it as a legitimate business expense, and received credit as against the 20 per cent net profits due the plaintiff, the amount charged to plaintiff being $60. The contract does not provide for such item being a legitimate business expense. Paragraph 7 of the contract provides: "There is nothing in this agreement to make either (plaintiff or defendant) * * * financially responsible for each others indebtedness or responsibilities." In allowing this item the court erred.

The court decreed that for the years 1940, 1941 and 1942 certain depreciation of automobiles should be charged against the plaintiff's 20 per cent profits, and fixed the amounts in the sum of $33 and $42, or a total of $75. The evidence discloses that in the defendant's business he used an automobile, and there is evidence of trade-ins and of mileage of cars at different times and value thereof, and it is contended by plaintiff that the defendant used the same for 75 or 80 per cent of the time for family and personal purposes. The defendant's testimony is that he used the car about 10 per cent of the time for such purposes. He arbitrarily fixed an amount of depreciation; the court fixed and determined a reasonable amount in view of all the circumstances, and the amounts so fixed are about as reasonably accurate as can be ascertained from the record. The decree of the trial court in fixing such amounts for depreciation and use, as shown by the decree, is correct.

The trial court decreed that the defendant use as a credit the sum of $200 for attorneys' fees for his defense of this action as a charge against plaintiff's 20 per cent profits. In this allowance the court erred. The contract does not provide that the defendant would, in any event, be entitled to a credit for attorneys' fees for the defense of any action brought against him by plaintiff, and such amount to be charged against plaintiff's per cent of the profits. The contention that attorneys' fees are allowable under the law of

this state is without merit, and the following authorities are applicable.

In *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, 144 N. W. 1037, this court said: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." See, also, *State ex rel. Charvat v. Sagl*, 119 Neb. 374, 229 N. W. 118; *Blacker v. Kitchen Bros. Hotel Co.*, 133 Neb. 66, 273 N. W. 836; *Voss v. Voss*, 144 Neb. 819, 14 N. W. 2d 849.

Plaintiff predicates error in that the defendant arbitrarily set up an amount of $50 a month for expenses for the years 1938, 1939, 1940 and 1941, and, inasmuch as this action was reopened on June 12, 1943, hearing also included an accounting on the net profits for 1942. For the first four years mentioned the amount was shown to be $2,435.20, and, in addition, checks were issued to the defendant totaling $855.11, and other items totaling $566.92, making a total for the years 1938 to 1941, inclusive, of $3,857.23. The trial court granted this allowance. These expenses were for traveling purposes and for contacting and entertaining customers and attending trade meetings, to procure and induce customers to purchase the defendant's products. The record discloses that in February, 1940, the plaintiff accepted the amount of $212, tendered by defendant as plaintiff's share of the profits under the contract for the years 1938 and 1939, based on quarterly reports, and the plaintiff accepted from the defendant a credit memorandum for the amount agreed on; thus consummating a full and complete settlement for those years. In this settlement plaintiff recognized the arbitrary deduction of $50 a month, made by defendant and for the purposes for which he made such deductions. Plaintiff offered no complaint. By the nature of the business the trial court concluded from all of the evidence with reference to the foregoing amount that

the sum constituted a reasonable and fair amount for such purposes and likewise constituted a legitimate business expense.

In the light of plaintiff's knowledge of the deduction made for the years 1938 and 1939, and in light of admissions in the record that certain amounts were necessary for such purposes, we conclude that such amounts were reasonable and fair amounts to be expended for such purposes.

The defendant, by cross-petition, alleges that under the contract of sale, which included equipment, merchandise, formulas, trade-marks and goodwill, the products manufactured and sold by the Shepard Laboratories consisted largely of liquid and dried insecticides for garden and household use, were marked with the trade name of "Sheps," and were identified by labels, in advertising matter, by displaying this name in script, and a figure representing a shepherd, in biblical costume, holding in his hand a shepherd's crook. Defendant further alleges that the plaintiff used and is still using the same trade name and trade-mark in marketing in the trade territory certain harness oil and other products, sold to the same customers and in containers similar in size and appearance; that the plaintiff's quality of merchandise has been inferior and unsatisfactory to the consumer and the plaintiff is unwarranted in using such trade-marks, because it caused confusion and uncertainty in the minds of the buying public. The defendant prays that the action for accounting be denied, and that he be granted a permanent injunction, forbidding the use of the name "Sheps" and the formulas described in labeling his products.

The court decreed that at the time of the sale of the business the trade-marks used in such business, and as described in defendant's cross-petition, were sold to the defendant absolutely, and included the exclusive right to the defendant to use such trade-marks, and that the plaintiff should discontinue using them in connection with any merchandise manufactured and sold by him as soon as the supply of labels he had on hand was exhausted; then decreed that the plaintiff violated the agreement by continuing to

use such trade-marks, causing defendant a great deal of inconvenience and substantial damage, and granted a permanent injunction.

The trade-marks and trade names were not registered as such under the laws of the United States or under the laws of the state of Nebraska, so there is no question involved of prior registration or infringement of a registered trade-mark or trade name.

Defendant relies upon the first part of the contract, viz.: "I, R. W. Shepard, owner of the Shepard Laboratories hereby enter into a contract to sell to Anson Shepard, the Shepard Laboratories consisting of * * * trade marks and good will." The plaintiff agrees that the trade-marks incidental to the Shepard Laboratories were sold to the defendant. However, the trade-marks incidental to his separate business used before and after the sale were not sold or intended to be sold to the defendant. The plaintiff organized a business in 1925 in Council Bluffs, Iowa, under the name of Neatslene Harness Oil Company, later changing the name to Neatslene Leather Oil Company, and in November, 1933, moved the business to Omaha, Nebraska, and continued to operate it. In 1940 the name was changed to Neatslene Company (hereinafter referred to as "Neatslene"). For a number of years the defendant was employed by the plaintiff for Neatslene and Shepard Laboratories. The principal products manufactured and sold by Neatslene in 1925 were "Sheps No. 1 Neatsfoot Oil," "Sheps Prime Neatsfoot Oil" and "Sheps Commercial Neatsfoot Oil." In 1925 the plaintiff secured from the Nourse Oil Company the brands of "Swat-the-Fly Spray," "Kill-Dust Sweeping Compound," and in 1926 additional items of "Sheps Barnyard Spray" and "Sheps Household Spray," using the same insignia upon these sprays as was being used on the Neatslene products.

In 1927 Shepard Laboratories was incorporated, and the corporation was dissolved in 1930, and since such time, and until the contract of sale of Shepard Laboratories was entered into on January 1, 1938, the plaintiff was the sole

owner of both businesses. The word "Sheps" adopted as a trade-mark by Neatslene was used in the fall of 1925 and 1926. In 1927, when Shepard Laboratories was organized, the same name was applied to the insecticides and sprays as above set out. In 1934 a new trade-mark was adopted exclusively by Shepard Laboratories, and has never been used by Neatslene. In 1934 Shepard Laboratories' trade-mark was used in "Sheps" household spray and other sprays of a similar character under the "Shep" name. Neatslene manufactured and sold leather oils at wholesale for ultimate use by farmers and the dairy trade, with the exception of cutting oil and rust preventative. Products of Shepard Laboratories were insecticides, sold at wholesale for ultimate use by farmers and the dairy trade. The products of the two separate companies bear no relation one to the other and are dissimilar in character and kind and not competitive. After the sale of Shepard Laboratories the two brothers continued their respective businesses in the same building, using the same bookkeeper and the same safe, with separate books for each company, which plaintiff had a right to investigate. Under the terms of the agreement, they were to co-operate with each other in the sale of their separate products. This they did by traveling together on several occasions and selling to and having accounts with the same customers. Some criticism attached to the products sold by Neatslene, and complaint was made to Shepard Laboratories, the complainants believing the products were those of the Laboratories. This constituted the confusion claimed by defendant. These incidents were not many and were for the most part corrected. An examination of the trade-marks discloses a dissimilarity, in size and color and in the insignia used, which is discernible as attached to product. The name "Sheps" predominates on the products of each company.

We conclude that the plaintiff did not sell to the defendant exclusive use of the trade-marks so that he would be denied the use of those that identify his products and are incident to his business. The trade-marks are dissimilar,

and the two separate businesses are dissimilar and not competitive.

"A 'trade-mark' may be defined as a name, sign, symbol, or device which is attached to goods offered for sale in the market so as to distinguish them from similar goods, and to identify them with a particular trader, or with his successors, as owners of a particular business, as being made, worked on, imported, selected, certified, or sold by him or them." 63 C. J., sec. 1, p. 308.

"The right to the exclusive use of a trade-mark is not unlimited. Its use on one or more commodities does not give the right to use it on all, for the right to the exclusive use of a trade-mark is limited to a use on the particular class of goods on which it has been actually used, and other persons may use even the identical mark or name in connection with a different class of goods." 63 C. J., sec. 10, p. 317.

In *Basket Stores v. Allen*, 99 Neb. 217, 155 N. W. 893, this court held: "When the owner of a trade-mark applies for an injunction to restrain a competitor from injuring his property by making false representations to the public, it is essential that the complainant and the defendant should both be engaged in the sale of the same kind of goods." And it was held in *Regent Shoe Mfg. Co. v. Haaker*, 75 Neb. 426, 106 N. W. 595: "But, to constitute an infringement on a trade-name, it is necessary that the two places of business be in actual competition with each other; * * * ."

The whole question of injunction relating to trade-marks and trade names in the case at bar resolves itself into: (a) Whether the plaintiff and defendant were competitors; and (b) whether they sold the same kind of goods. The business of plaintiff and defendant was for many years co-operative. The trade-marks used on these different products were distinctive in character and always bore the name of the contents of the package. There is no unfair competition and unfair trade which would warrant an injunctive remedy. The permanent injunction granted defendant on his cross-petition as to trade-marks and trade names should be dissolved.

The trial court decreed that the plaintiff recover from the defendant, on the items taken into consideration in the accounting and the percentage of profits for the years 1938 to and including 1942, the sum of $534.18, including interest. The judgment should be modified by deducting from the credit, allowed the defendant against the 20 per cent net profits due plaintiff, the family expenses considered, amounting to $60, and, in addition, the 20 per cent of the 200-dollar attorneys' fees, credited to the defendant and charged to the plaintiff as against his 20 per cent of the net profits, or an amount of $40; motion to retax costs to be sustained; costs to follow the judgment; the permanent injunction granted to be dissolved, and in all other respects, the decree and judgment are affirmed.

AFFIRMED AS MODIFIED.

ELLA ZARMSTORF FRANKLIN ET AL., APPELLEES, V. MARY ZARMSTORF, APPELLEE: WILLIAM NIEWOHNER ET AL., APPELLANTS.

15 N. W. 2d 190

FILED JULY 7, 1944. No. 31758.

1. Mortgages. Under section 20-202, Comp. St. 1929, a prior mortgage not extended beyond the limitation fixed by the statute in the manner provided therein but attempted to be extended by unrecorded written agreement between the parties was effective as an extension between the parties and continued the priority of such mortgage over a subsequent mortgage where the subsequent mortgagee had notice of the unrecorded extension agreement.
2. ———. By section 20-202, Comp. St. Supp. 1941, which is amendatory of section 20-202, Comp. St. 1929, a prior mortgage not extended beyond the limitation fixed by the statute in the manner provided therein but attempted to be extended by unrecorded written agreement between the parties is effective as an extension as between the parties, but is ineffective as to subsequent purchasers and encumbrancers for value notwithstanding such subsequent purchasers or encumbrancers may have had notice of such agreement.

3. **Specific Performance.** Where the performance of a contract is impossible and a decree for specific performance cannot be enforced, the court will deny the remedy.

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

E. L. Mahlin and *N. H. Mapes*, for appellants.

Sidner, Lee & Gunderson, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

YEAGER, J.

This is an action by Ella Zarmstorf Franklin, Lily Zarmstorf, Elmer Zarmstorf, Edward Zarmstorf and Frederick Zarmstorf, plaintiffs and appellees, against Mary Zarmstorf, defendant, William Niewohner, Nora C. Heyne Foy and Frank A. Foy, defendants, cross-petitioners and appellants, wherein plaintiffs sought foreclosure of certain mortgages upon the north half of the southwest quarter of section 20 and the east half of the southeast quarter of section 19, township 20, range 6, east of the sixth P. M. in Dodge county, Nebraska, given to secure the payment of certain promissory notes claimed to be owing by Mary Zarmstorf to the plaintiffs. In the petition it was declared that the other defendants claimed some interest in the real estate, hence they were made parties to the action. By answer and cross-petition the defendant William Niewohner claimed that he had an interest in 120 acres of the described real estate by virtue of a written contract of sale entered into by and between him and Mary Zarmstorf, which contract he was entitled to have specifically enforced, and that one of the mortgages sought to be foreclosed was unenforceable and conclusively presumed to have been paid and discharged. By answer and cross-petition the defendant Nora C. Heyne Foy claimed that she had an interest in 40 acres of the described real estate created in the same manner as was claimed by Niewohner, and she made the same claim with reference to one of the mortgages. She also asked for spe-

cific performance. Frank A. Foy was the real estate agent in the transaction and he claims there is a commission due him of $572. He prays that if specific performance is decreed that this commission be credited on the purchase price payable by Nora C. Heyne Foy, and in the event that specific performance be not decreed that judgment be entered for that amount against Mary Zarmstorf with 6 per cent interest and that such judgment be a lien against an interest in the land which came to Mary Zarmstorf by reason of the death of a daughter after the execution of the mortgage declared by the defendants Niewohner and Foy to be unenforceable and discharged.

The cause was tried to the court and decree was entered granting foreclosure of the mortgages and denying all relief prayed by the defendants Niewohner and Foy in their answers and cross-petitions.

An appeal was perfected by said defendants Niewohner and Foy. The appeal has been abandoned by the defendant Niewohner, hence it now proceeds as to the defendants Foy alone. They will be referred to herein as appellants.

In the brief are found nine assignments of error. The gist of those which are of first importance is that appellant Nora C. Heyne Foy has a written contract for the purchase of real estate which she is entitled to have specifically enforced, and that the contract creates such an interest in the real estate as to permit her to have a decree declaring the mortgage hereinbefore referred to, and which will be hereinafter specifically identified, unenforceable and discharged.

In order that there may be a proper understanding of the issues it becomes necessary to set forth a history of certain incidents leading up to the commencement of this action.

On or about April 14, 1926, Mary Zarmstorf, defendant, being the owner in fee of the real estate hereinbefore described, and the mother of Ella Zarmstorf, Lily Zarmstorf, Elmer Zarmstorf, Edward Zarmstorf, Frederick Zarmstorf and Blanche Zarmstorf, executed and delivered six promissory notes, each for $2,780.89, payable in five years

with interest at the rate of 5½ per cent until maturity and 10 per cent after the due date. One note was to Ella, one to Lily, and four to William Werblow, as guardian of Blanche, Elmer, Edward and Frederick. These four were, at the time, minors. To secure the payment of the six promissory notes she executed and delivered three mortgages upon the real estate described herein. One was to secure the note to Ella, one to secure the note to Lily, and the third to secure the other four notes. The mortgages, or at least the one securing the four notes, appear to have been duly recorded on September 10, 1926. No principal or interest was ever paid on any of the notes. On April 1, 1937, the defendant Mary Zarmstorf executed and delivered a new note for $2,780.89 to Ella Zarmstorf payable in five years with interest at 5½ per cent per annum. On the same day a note for like amount was executed and delivered to Lily Zarmstorf. These notes were secured by mortgages on the described real estate. These notes and mortgages were in the nature of renewals and were to take the place of the notes and mortgages to the same parties given on April 14, 1926, and recorded September 10, 1926.

The mortgage to Ella contained the following recital: "This mortgage is concurrent with two other mortgages executed by said Mary Zarmstorf, widow, on the same date herewith,—one for $2,780.89 to Lily Zarmstorf and one for $11,123.55 to William Werblow, Guardian." The one to Lily contained the following recital: "This mortgage is concurrent with two other mortgages executed by said Mary Zarmstorf, widow, on the same date herewith, one for $2,780.89 to Ella Zarmstorf and one for $11,123.55 to William Werblow, Guardian." The record does not disclose that on this date or on any other date after April, 1926, a mortgage to William Werblow, guardian, was ever executed or delivered. However the $11,123.55 was the face amount of the four notes given to the guardian in April, 1926, and doubtless the statement represents the unexecuted intention of Mary Zarmstorf to renew and displace those four notes. We can only speculate upon the failure of execution of this

intention. One fact does appear which stood in the way and that is that one of the wards had died in 1935, and probably one or more of those who were minors in 1926 had attained his majority before April, 1937. The following endorsement appears on the back of the notes given to William Werblow as guardian for Elmer, Edward and Frederick: "The debt and interest represented by the within note not having been paid, the time of payment is hereby extended to April 1st, 1942. Mary Zarmstorf." A like endorsement appears on the mortgage given to secure these notes. Blanche is the one who died in 1935 and the fact is, as disclosed by the record, that at the time of her death she had no husband or child, hence under the law Mary Zarmstorf, her mother, succeeded to such interest as she had in the 1926 note and mortgage. The record does not disclose the date when these endorsements were made.

On or about January 24, 1943, defendant Mary Zarmstorf executed a document in which she certified that she had sold the real estate in question to William Niewohner and Nora C. Foy and in which document she agreed to pay Frank A. Foy the standard commission for selling the land. This document was witnessed by Frank A. Foy. Appended to the document are the signatures of Wm. Niewohner and Nora C. Foy. Thereafter on January 25, 1943, a formal written contract was entered into between Mary Zarmstorf, party of the first part, and William Niewohner, party of the second part, whereby the party of the first part agreed to convey to the party of the second part 120 acres of the land described for the consideration of $85 per acre, payable on or before March 1, 1943, or as soon thereafter as the first party could furnish abstract showing merchantable title of record. It was agreed that the second party should go into possession "in about a week" from the date of the contract. A like contract was entered into between Mary Zarmstorf and Nora C. Heyne Foy for the remaining 40 acres. This contract in addition contained the following provision: "As part of the consideration there shall be applied by second party the amount of commission owing by

first party to Frank A. Foy earned in connection with the sale of said land and also the 120 acres this day being sold to William Niewohner, which commission shall be on the basis of 5% on the first $10,000 and 2% on the balance thereof."

No abstract showing merchantable title was ever presented. No part of the consideration was ever paid by either of the parties and no deed was ever tendered.

On March 13, 1943, this action in foreclosure was instituted by the plaintiffs. The foreclosure is not contested by the defendant Mary Zarmstorf.

As has been pointed out abstracts showing merchantable title have never been furnished and from the record it is clear that if all of the mortgages sought to be foreclosed are valid and subsisting liens against the real estate it will not be possible to furnish abstracts showing merchantable title. The indebtedness represented by the mortgages and interest is in excess of the value of the real estate.

The appellants substantially contend that the mortgage given in 1926 is unenforceable and must be conclusively presumed to have been paid; that the contract of Nora C. Heyne Foy with Mary Zarmstorf entered into on January 25, 1943, creates such an interest in said Nora C. Heyne Foy that appellants have the right to assert the unenforceability of the said mortgage of 1926; that a decree declaring said mortgage unenforceable and declaring such an interest in Nora C. Heyne Foy as would permit her to assert the unenforceability of the mortgage would relieve the real estate of sufficient of its burden so that merchantable title would be shown and in consequence specific performance of her contract would be possible and could be decreed.

To sustain their position that the mortgage of 1926 is unenforceable appellants rely on section 20-202, Comp. St. Supp. 1941, which is amendatory of section 20-202, Comp. St. 1929, and the case of *Weekes v. Rumbaugh*, 144 Neb. 103, 12 N. W. 2d 636. The contention is not limited to the statutory proposition that as to "subsequent purchasers and encumbrancers for value" the mortgage is unenforceable

and must be "conclusively presumed" to have been paid, but it embraces the proposition that unless the provisions of the section of the statute relating to extension are complied with the mortgage is unenforceable as between the parties. With this contention we cannot agree and we do not think the case cited sustains the contention. We think that *Steeves v. Nispel,* 132 Neb. 597, 273 N. W. 50, which interprets and applies section 20-202, Comp. St. 1929, which is in most of the important particulars the same as section 20-202, Comp. St. Supp. 1941, announces the applicable rule.

In *Steeves v. Nispel, supra,* it was held that a prior mortgage not extended beyond the limitation fixed by the statute in the manner provided therein but attempted to be extended by unrecorded written agreement between the parties of which mortgage and extension agreement a subsequent mortgagee had notice was effective as an extension and continued the priority of the mortgage over the subsequent mortgage. It follows therefore that the interpretation of the section before amendment should be accepted here unless the amendment requires a different interpretation or unless upon more mature consideration and deliberation the reasons for the decision in that case are found to be unsound and untenable. We recognize no basis for a recession from the holding of this case on the ground of unsoundness of reasoning. Coming then to a comparison of the section as it appeared in the statutes of 1929 and as it appears with its amendments it will be noted that outside of a change in the method of renewing or extending the limitation of mortgages there have been but few important changes in substance.

The following new matter appears in the amended section: "so far as relates only to the rights and interests of subsequent purchasers and encumbrancers for value," "as against subsequent encumbrancers and purchasers for value," and "conclusively."

It is apparent as to the first two quotations that in the particulars to which they refer the legislative intent was to disturb the intent and previously declared meaning of the

statute only in so far as it affected the rights and interests of subsequent purchasers and encumbrancers for value. The statute before amendment provided in part as follows: "At the expiration of ten years from the date the cause of action accrues on any mortgage as is herein provided, such mortgage shall be presumed to have been paid * * * ." In the amendment the word "conclusively" was inserted before the word "presumed."

In *Steeves v. Nispel, supra,* the presumption of payment of the old statute was in nowise indulged between the parties or in favor of the subsequent mortgagee with notice, so that since this case was decided in 1937, the legislature must have considered it and have intended that the "conclusive presumption" named should also be referable only to the rights and interests of subsequent purchasers and encumbrancers for value and that there was no intention to disturb the rights which this court had previously declared to exist as between the parties as regards the extension of mortgages.

Again the decision was rendered in *Steeves v. Nispel, supra,* in the face of the following which appears in the section: "said period of ten years shall not be extended by non-residence, legal disability, partial payment, or acknowledgment of debt." In the amendment the following words were added: "or promise to pay the same." We do not think this amendment calls for any change in application of the statute. The declaration under consideration is one of extension of the mortgage as distinguished from a promise to pay the indebtedness.

To come to any conclusion other than that the amendments in question were meant to apply to the rights and interests of subsequent purchasers and encumbrancers for value would be, as was pointed out in *Steeves v. Nispel, supra,* to ignore and render ineffective as between the parties section 20-216, Comp. St. Supp. 1941, as follows: "In any case founded on contract, when any part of the principal or interest shall have been voluntarily paid, or an acknowledgment of an existing liability, debt, or claim, or

any promise to pay the same shall have been made in writing an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise: * * * ."

We therefore hold that as between the parties the 1926 mortgage was validly extended and that the plaintiffs who, at the time of the execution were minors but at the time of the commencement of the action had attained their majority, had the right to maintain their action in foreclosure.

This holding is not in conflict with *Weekes v. Rumbaugh, supra.* Some of the language might however so indicate. The conclusion ultimately arrived at in that case was the following: "The writer believes that the legislative intent is entirely clear that as against purchasers and lienors for value, nothing should toll the ten-year period unless the mortgage is refiled or a copy thereof filed." And further: "It is unnecessary to consider the effect of the 1941 amendment, since the mortgage in question was fully barred many months before that amendment was adopted." Thus it will be seen that the 1941 amendment was not construed, and further, from the opinion it appears that the only matter of extension considered was that of whether or not partial payment would have the effect of extending the time for foreclosure.

The appellees, substantially assuming but not conceding that the appellant Nora C. Heyne Foy is a purchaser or encumbrancer for value, contend that the provisions of section 20-202, Comp. St. Supp. 1941, with reference to the effect of failure to comply with the provisions thereof relative to extension are not available to appellants for the reason that they had actual knowledge of the 1926 mortgage and the extension thereof. A fair analysis of the original section and the amendments thereto indicates that this contention of the appellees does not reflect the intention of the legislature in the adoption of the amendments. It appears clear that the legislature intended that as to the rights of subsequent purchasers or encumbrancers for value an extension or extension agreement not in compliance with

the statute would be ineffective regardless of whether or not the subsequent purchaser or encumbrancer for value had notice thereof. The placing of the word "conclusively" before the word "presumed" can reasonably have no other meaning. It is clear that the legislature intended that under such circumstances the title examiner should not be required to search beyond the mortgages and extensions appearing of record.

Having arrived at the conclusion that the mortgage and its extension represented a valid obligation between the parties thereto it follows that as between these parties the foreclosure was in all respects proper. It now becomes necessary to ascertain whether or not Nora C. Heyne Foy was a subsequent purchaser or encumbrancer for value, since if she is not there is nothing to which her contract of purchase can attach, it being conclusive that there is not sufficient value in the land to more than liquidate the mortgages with interest. The contract was impossible of performance. In the light of this condition it would be improper to decree specific performance. The general rule is laid down in 58 C. J., sec. 39, p. 882, as follows: "Because equity will not make a nugatory decree, and since specific performance cannot be demanded unless such relief is feasible, it is generally held that, where the performance of the contract is impossible and the decree for specific performance cannot be enforced, the court will deny the remedy. Stated otherwise, where it does not appear that defendant can perform, or where it is out of the power of a party to perform his agreement, specific performance thereof will not be decreed."

The question of whether or not she is such subsequent purchaser or encumbrancer for value on this record is one of fact and not of law. It is unnecessary to discuss the question of whether or not she is purchaser or encumbrancer. If it be assumed that she is a purchaser or encumbrancer, that fact can avail her nothing since the record conclusively shows that at no time did she part with anything of value. Before she may have the benefit of the stat-

ute on which she places reliance for relief it must be found not only that she is either purchaser or encumbrancer, but that she has parted with something of value. See *McBride v. Helmricks,* 140 Neb. 843, 2 N. W. 2d 118; *Savage v. Hazard,* 11 Neb. 323, 9 N. W. 83. This latter has not been shown. The contract is entirely executory and calls for no payment by her unless and until abstract showing merchantable title should be furnished. No part payment was ever made on the contract.

It is suggested that the paragraph of the contract concerning the application of the real estate commission of Frank A. Foy as part payment on the purchase price should have the effect of making her a purchaser or encumbrancer for value but the language of the paragraph is not subject to such an interpretation. By its terms this is one of the unperformed conditions of the contract performance of which is not called for until transfer of title and payment of the purchase price.

As was pointed out earlier herein Frank A. Foy filed a cross-petition wherein he sought a personal judgment against Mary Zarmstorf and to have the same impressed as a lien against the interest in the land coming to her as heir of Blanche Zarmstorf, deceased, in the event that the prayer of Nora C. Heyne Foy for specific performance was denied. Both judgment and lien were denied by the decree. No theory on which such a lien could be impressed has been briefed or argued and we know of none. Judgment was denied on the ground that this cross action was not germane to the proceeding. Whether or not such a judgment could have been properly rendered is a question not necessary to determine here. The decree specifically protects the right of this cross-petitioner to have his claim for commission adjudicated in an action for that purpose.

The conclusion arrived at with regard to the propositions discussed renders unnecessary a discussion of the other assignments of error.

The decree of the district court is in all respects affirmed.

AFFIRMED.

FRANK L. ROBINSON, APPELLEE, V. DAWSON COUNTY IRRIGATION COMPANY, APPELLANT: ELMCREEK DITCH COMPANY, APPELLEE.
15 N. W. 2d 231

FILED JULY 14, 1944. No. 31792.

Waters. The record examined, and it is found to support the judgment rendered by the trial court.

APPEAL from the district court for Buffalo county: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Lyman M. Stuckey, W. A. Stewart, Jr., and *H. L. Blackledge*, for appellant.

Dryden & Jensen, contra.

Heard before SIMMONS, C. J., PAINE, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

PAINE, J.

This is the second appeal in an action filed January 31, 1941, by Frank L. Robinson, plaintiff, against the Dawson County Irrigation Company and the Elmcreek Ditch Company, defendants, to restrain them from appropriating, or converting to their own use, the natural flow of the Platte river, or storage water from the Sutherland dam, and to recover damages to growing crops in the sum of $6,026. Upon the first trial of the case, plaintiff waived his right to an injunction, and the trial proceeded as one for damages. The jury returned a verdict for $3,125, upon which a judgment was entered, and the defendants appealed.

This court entered an opinion, written by Judge Carter, upon such first appeal, which is found in 142 Neb. 811, 8 N. W. 2d 179, and in that opinion will be found a rather complete statement of the pleadings, which will not be repeated here, as the second trial was upon the same pleadings, with certain amendments allowed by the court. There was also in that opinion a summary of the evidence as presented at the first trial.

It was held in that first opinion that "the case is one in

which a court of equity could properly take jurisdiction, and jurisdiction once having been taken, the case will be retained for the adjudication of all issues. No objection was made to the court's calling of a jury. The mere fact that the trial court failed to grant an injunction does not deprive such court from hearing the prayer for damages for the injuries suffered. The verdict of the jury must, therefore, be treated as advisory in character and the presumption follows that any errors in the submission of the case to the jury were considered by the trial court before judgment was entered."

The judgment was reversed in this court upon the ground that the evidence introduced made no distinction between the natural flow and storage waters, "and the cause remanded for a new trial on the question of the wrongful conversion of the storage water in which plaintiff had a beneficial use and the resulting damages, if any, sustained by the plaintiff."

The fourth paragraph of the syllabus in our former opinion reads as follows: "Where evidence of damage to growing crops resulting from the unlawful conversion of storage water is so commingled with evidence of alleged damage resulting from the taking of the natural flow of the stream to which defendant was entitled that the one cannot be separated from the other and the damage caused by each cannot be ascertained, the judgment cannot be said to be supported by the evidence."

A retrial was had in the district court, without a jury, beginning on June 28, 1943. The case was taken under advisement, briefs were submitted, and on January 17, 1944, a judgment was entered against each of the defendants for damages resulting from the wrongful conversion of storage water and the wrongful appropriation of the same between July 24, 1940, and August 9, 1940, in the amount of $2,000, upon which judgment a credit was allowed of $117.70 for costs incurred in the first appeal, which had been reversed by our former opinion.

It will be seen that the cause was remanded because the

evidence at the first trial commingled the natural flow of water in the Platte river and the amount of the flow in that river arising from the storage water released at the North Platte dam of the Platte Valley Public Power and Irrigation District, hereinafter called the Sutherland district.

At the second trial a number of amendments were made to the petition, and a large amount of evidence was taken which was before the court for the first time. The questions now presented on this second appeal must be determined from the evidence in the present bill of exceptions, and not from any previous findings of this court, which of necessity were based only upon the evidence which was then found in that record.

The errors now relied upon for reversal, as set out in the brief of the only appealing defendant, the Dawson County Irrigation Company, hereinafter called the Dawson company, are as follows: That the judgment is not sustained by, and is contrary to, the evidence; that the court erred in allowing the plaintiff to introduce evidence pertaining to natural flow of water, and that the amount of the damages is excessive. In its brief the defendant states: "The case was again tried to the court on the sole issue as to whether or not defendants converted any storage waters belonging to the plaintiff by virtue of his interest in the Kearney Mutual Irrigation Company."

The evidence discloses that the plaintiff is a farmer and stock raiser, who has lived in Buffalo county for 33 years, and owned or operated some 2,000 acres of land, most of it lying about three miles west of Kearney, the map, exhibit No. 20, showing that it was located on both sides of the main line of the Union Pacific railroad; that he had contracted 250 acres of his land for irrigation in 1940 with the Kearney Mutual Irrigation Company, which company had a total of 913 acres under irrigation for that year, the plaintiff's land composing over 25 per cent of its acreage for 1940.

This Kearney company had a contract with the Central

Power Company for the delivery of water to its irrigators. The Central Power Company had a priority on Platte river water as of September 10, 1882, of 22 second feet appropriation for irrigation purposes. Such priority was superior to the rights of either defendant irrigation company.

By virtue of a contract, exhibit No. 4, with the Sutherland district, the Kearney company was entitled to the delivery of a certain amount of storage water from the Sutherland dam. Such water was released just below the city of North Platte into the Platte river.

It appeared that the Dawson company had constructed a dike across the Platte river at its headgates, by which it diverted all the water coming down the Platte river into its headgates, and had then secured from the county judge of Dawson county a restraining order, and later an injunction from the district court for Dawson county, restraining the bureau of irrigation, water power and drainage of the state of Nebraska from closing the headgates of the said Dawson company, and by virtue of such injunction the headgates were kept open, so no storage water could go down the Platte river to the Kearney company, but all such water passed into the canal of the Dawson company.

In a letter, exhibit No. 16, from R. H. Willis, chief of the state bureau of irrigation, water power and drainage, under date of December 13, 1940, to R. F. Stuckey, president of defendant Dawson company, Mr. Willis said that 37,680 acre feet of water passed through the rating flume of the Dawson company between May 1, 1940, and September 30, 1940, of which amount 24,716 acre feet were natural flow and the balance was storage water. Mr. Willis then writes:

"As a routine matter Mr. Hervert, Senior Hydrographer in the employ of the state, has standing instructions to measure all of the river flow in that section, tributary inflows, diversions, etc. Mr. Messmer, Hydrographer in the employ of the Platte Valley Public Power and Irrigation District, coordinated with Mr. Hervert in this work which seemed proper in view of the fact that the Platte Valley Public Power and Irrigation District was disposing of stor-

age water and was keenly interested in knowing about its disposal."

Exhibit No. 2 shows the daily diversion at the Dawson county canal for the month of July, 1940, of both the amount of natural flow and also of storage water, amounting for that month to 2,238 natural flow and 4,252 storage water, and exhibit No. 3 is for the first 20 days in August, 1940, showing there was 3,660 natural flow and 6,536 storage water going into the Dawson canal.

Horace J. Cary, a director of the Sutherland district since 1933, testified that the Kearney company ordered 25 second feet of water on July 19, 1940, from the Sutherland district, and the official answered from North Platte that 200 second feet were at once discharged at the tailrace to supply Kearney with 25 second feet and Elm Creek with 30 second feet of water. This water was to be delivered down the Platte river, but because of the Dawson company dike and its headgates being left open, and the injunction forbidding their being closed, it resulted in all of the storage water sent down from North Platte going into the Dawson company's canal.

R. H. Willis testified: "I doubt that 200 second feet would any more than deliver 25 second feet at the headgate of the Kearney canal by way of the river bed."

Each day's flow, on exhibits Nos. 2 and 3, was inquired about separately of R. H. Willis, and he testified that, with this amount of storage water going into the Dawson canal headgates each day, 25 second feet of that water could have been delivered to the Kearney company daily from July 24 to August 9, inclusive.

Mr. Mesmer testified from the records, as found in exhibits Nos. 2 and 3, that a sufficient amount of storage water was released at the dam, and which went into Dawson canal, to have delivered 25 second feet to Kearney over the period July 24 to August 9, 1940. He also testified that the Kearney canal irrigators could have secured 800 acre feet over the period from July 25 to August 9, 1940, and would have been able to irrigate. He testified that water as it

flows is just water, but by mathematical computation he can arrive at the figure as to how much of it is storage and how much of it is natural flow.

Mr. Balcom, manager of the Kearney canal for over 18 years, who has served in several capacities, testified from the exhibits that from July 25, 1940, up into August all the flow in the Kearney canal was natural water flow, and that no storage water came into the canal.

R. H. Willis, with the exhibits in front of him, testified that the Kearney canal was a wet ditch, which means it can deliver more water for irrigation purposes than if it was dry to start with, and that from the period July 24, 1940, to August 12, 1940, inclusive, if the Kearney canal had received 25 second feet of storage water its irrigators on 961 acres would have been able to irrigate continuously through the season. He testified that 25 second feet of water equals 50 acre feet every 24 hours.

We therefore conclude that the engineers kept accurate records; they show us how much storage water they put in the river at North Platte. The records also take into consideration the natural seepage and other natural water along with the storage water, and show the true facts for each day in their daily bulletin.

These records show us how much water the Dawson canal received, and they used all of this storage and natural water that they could, and dumped what they could not use into Elm Creek, and from July 25 on the Kearney canal got almost nothing,—for unless there was 25 feet of water running in that canal no one could use it, for without a sufficient head one cannot irrigate.

Kearney was to get 25 second feet of water at its intake, and the release of 200 feet of storage water at North Platte would give Kearney that amount, but the defendants took all of this storage water released for Kearney.

It appears from the evidence that, if this water had not been converted by the two defendant irrigation companies, the plaintiff would have received sufficient storage water to have irrigated all his crops, whereas he was unable to irri-

gate at all during the critical period from July 20 to August 9, 1940, and hence suffered the loss to his crops.

This being an equity case, section 20-1925, Comp. St. 1929, requires this court to try the case *de novo* and reach an independent conclusion as to the findings of fact and of the law. See *Peterson v. Winkelmann*, 114 Neb. 714, 209 N. W. 499; *Graham Ice Cream Co. v. Petros*, 127 Neb. 172, 254 N. W. 869; *Batth v. Metropolitan Life Ins. Co.*, 137 Neb. 676, 290 N. W. 902; *Neary v. General American Life Ins. Co.*, 140 Neb. 756, 1 N. W. 2d 908.

"Where all defendants are materially interested, although concert is lacking, and separate and independent acts of negligence combine to produce injury, each defendant so involved is responsible therefor." *Hagadone v. Dawson County Irrigation Co.*, 136 Neb. 258, 285 N. W. 600.

"An act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally." *Schweppe v. Uhl*, 97 Neb. 328, 149 N. W. 789. See, also, *Bosteder v. Duling*, 115 Neb. 557, 213 N. W. 809; *O'Neill v. Rovatsos*, 114 Neb. 142, 206 N. W. 752; *Dickinson v. Lawson*, 125 Neb. 646, 251 N. W. 656; *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N. W. 333.

In the case at bar, the same trial judge tried the case twice, and had the opportunity of observing the many witnesses who testified orally, and is presumed to have rejected and disregarded all incompetent and improper proof, and decided that the evidence clearly supported a judgment of $2,000 for the plaintiff.

We have discussed the only errors argued in the defendant's brief, and have reached the conclusion that there is sufficient competent evidence to support the judgment rendered.

AFFIRMED.

J. LLOYD MCMASTER, APPELLEE, V. REES WILKINSON, APPELLANT.

15 N. W. 2d 348

FILED JULY 14, 1944. No. 31813.

1. **Elections.** An action to contest the purported election of a city councilman of the city of Lincoln was properly brought in the county court, under the state law as provided in section 32-1009, Comp. St. 1929, for this is a matter of state-wide, and not strictly local, concern.
2. **Jury.** The constitutional right to a trial by jury is confined to cases which were so triable under the common law, and an election contest, under the provisions of statute, is not such a suit as is guaranteed the right to trial by jury under section 6, art. I, Bill of Rights, Constitution of Nebraska.
3. **Elections.** An election contest is neither an action at law nor a suit in equity; it is a summary proceeding of a political nature.
4. ———. If the ballots and the boxes which contain them, when produced in court, have been substantially kept as required by law, and the court is satisfied that they have not been tampered with, and are in the same condition as to markings as when cast, then they may be admitted in evidence.
5. ———. If several members of the council are present when the absentee and disabled voters' ballots are canvassed, it is a substantial compliance with the law although only the mayor and two councilmen sign the poll book containing the names of such voters.
6. ———. The right to an office by virtue of an election by the required number of votes cannot ordinarily be defeated by the minor mistakes or careless, but not willful, misconduct of a canvassing board.
7. ———. Mere irregularities of the city clerk in not keeping the poll book of absentee voters in the exact form provided by law will not deprive a *bona fide* elector of his right to have his vote counted, if the elector himself has met all the requirements on his part to be done and performed.
8. ———. Laws regulating the privilege of absentee voting have generally received a strict construction.
9. ———. Absentee voting is a privilege granted an elector, and is not an absolute right.
10. ———. When a notary filled out the venue in one county, and in the jurat stated that he took the acknowledgment of the voter in a city of the county named in the venue, but the notarial seal impressed thereon was for a different county, such affidavit and certificate do not comply with the law, and the ballot contained therein is illegal.

11. ———. When illegal ballots have been cast, the loss due to such ballots should be so apportioned that each candidate shall have deducted a share of them, proportioned according to the whole number of votes received by him.

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

Herman Ginsburg, for appellant.

Baylor, Tou Velle & Healy, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

PAINE, J.

This is an election contest, growing out of the Lincoln city election held on May 4, 1943, and involved only the office of city councilman. J. Lloyd McMaster is the contestant and appellee, and Rees Wilkinson is the contestee and appellant. The judgment in the district court was that contestant was entitled to the office, and ouster was issued against contestee, who appealed to this court.

At the primary election held in the city of Lincoln on April 6, 1943, they were both nominated for the office of city councilman. After the city election held May 4, and the canvass of the votes by the council on May 10, the contestee was declared elected by the city council. The contestant, claiming to be legally entitled to said office, instituted this action in the county court for Lancaster county on May 26, under the state law, without having made any attempt to contest said election under the provisions of the charter of said city.

A judgment was entered in the county court in favor of the contestant, whereupon the contestee appealed to the district court, in which court the case was tried upon the same pleadings as had been filed in the county court, except that the contestee was allowed to amend his answer. The district court found that the contestant received 4,774 16/17 votes and that the contestee had received 4,767 7/17 votes, and the contestant was declared elected city councilman,

and the sheriff was directed to oust from the office the contestee and to put the contestant into possession of said office and all its books and papers.

The original complaint was filed by the contestant against Rees Wilkinson, contestee, Arthur J. Weaver, Jr., and L. H. De Brown, being the three persons declared elected to the office of councilman by the city council, acting as a canvassing board of said city, but in the county court on July 23, 1943, a stipulation was entered into that the cause be dismissed as to Arthur J. Weaver, Jr., and L. H. De Brown, and that the sole and only issues to be determined are between the contestant and the contestee.

In the judgment entered in the county court, after all of the ballots had been recounted, it was found by the court that the contestant received 4,777 votes and the contestee 4,768 votes at the election held May 4 for the office of councilman, and that said contestant should be and is declared duly elected to said office.

Immediately after the election on May 4, it appeared from an unofficial count of the election that the contestant had been defeated by 35 votes, but when the official canvass was made by the city council on May 10 it showed that the contestee had won by four votes. A complaint in action of contest was filed in the county court within the time permitted by law, and the decision in that court was in favor of the contestant.

There are 88 voting precincts in the city of Lincoln, and there were introduced as exhibits in this court 88 boxes containing the official ballots cast at such election, each box containing all of the ballots cast in one of the 88 precincts, the number of such precinct being duly inscribed on the outside. On top of each of the 88 boxes, there is an envelope fastened thereto, in which is the poll book of that particular precinct, bearing the signature of the judges and clerks of election and a list of every person who voted at such election in that precinct. Each box was sealed on July 20, 1943, by seals bearing the date and the signature, "Reid Co. J."

Exhibit No. 102 is a package containing the absent and disabled voters' ballots, marked by the voter, together with the envelopes in which the voters sent them to the city clerk, together with all of the applications for absent voters' ballots, and an "Absent Voter's Identification Envelope" for each ballot, which box with its contents was also sealed in the county court by the county judge.

The action was filed in the county court under the provisions of section 32-1009, Comp. St. 1929. This law has been in force since 1879, and provides that the county court shall hear and determine contests relating to the election of officers of cities within said county.

The first error assigned by the contestee for reversal is that, as election to the city council is a matter of local municipal concern only, neither the county court nor the district court upon appeal had any jurisdiction over an election contest between two city councilmen, but that such a contest must be brought under section 6-122 of the Municipal Code of 1936 of the city of Lincoln, which provides: "That whenever any candidate for any office, or any elector chooses to contest the validity of an election of any officer, he shall, within two days after the closing of the polls give notice in writing to the person whose election he intends to contest of his intention so to do, a copy of which notice shall be filed with the City Clerk before the time fixed for the canvass of the returns as hereinbefore provided for; * * *."

It is argued by the contestee that no such notice of a contest was given by the contestant within two days of the election, as required by this section of the city ordinance.

It is also claimed by the contestee that the general laws of the state yield to the home rule charter provision of the city of Lincoln in all matters of purely local concern, citing *State ex rel. Fischer v. City of Lincoln*, 137 Neb. 97, 288 N. W. 499, which was a mandamus proceeding by a former chief of the fire department, who had been discharged without a hearing, to compel a reinstatement, in which it was held that the city council of Lincoln had the right to discharge one of its firemen without a hearing before the coun-

cil. This court held that this was a question of purely local concern, but such case is not an authority to control our opinion in the case at bar.

In *Eppley Hotels Co. v. City of Lincoln,* 133 Neb. 550, 276 N. W. 196, it is said: "A city may enact and put into its home rule charter any provisions for its government that it deems proper so long as they do not run contrary to the Constitution or to any general statute."

In the case of *Axberg v. City of Lincoln,* 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894, it was held that whether or not an act of the legislature pertained to a matter of state-wide or strictly local concern becomes a question for the court when a conflict of authority arises.

Under the facts appearing in the case at bar, we have reached the conclusion that a contest over the election of a municipal officer is a matter of state-wide concern; that the holding in the case of *Axberg v. City of Lincoln, supra,* is applicable here, and reads as follows: "Where the legislature has enacted a law affecting municipal affairs, but which is of state-wide concern, such law takes precedence over any action by a home rule city under its charter."

The second assignment of error is that the court erred in overruling contestee's demand for a trial by jury. The constitutional right to a trial by jury is confined to cases which were so triable under the common law, and an election contest, under the provisions of statute, is not such a suit as is guaranteed the right to trial by jury under section 6, art. I, Bill of Rights, Constitution of Nebraska. No section of our statute has been cited to us which provides for or authorizes trial by jury in election contests. An election contest is neither an action at law nor a suit in equity; it is a summary proceeding of a political nature. See *Swan v. Bowker,* 135 Neb. 405, 281 N. W. 891; 18 Am. Jur., sec. 314, p. 381; *Ashley v. Wait,* 228 Mass. 63, 116 N. E. 961, 8 A. L. R. 1463.

The third assignment of error might be condensed to the charge that the original ballots, including the 88 boxes, were not preserved in their original condition, free from opportunity to tamper with them.

Four pictures of the clerk's office, the outside windows, and the vault, showing how the boxes of ballots were stored therein, are in evidence. The evidence discloses that this vault door is open all the time that the clerk's office is open; that at least one abstracter goes in and out when he desires; that a former employee of the clerk's office knows the combination of the vault door; and that he has access in the evening to the office.

Such evidence of bare possibility that certain persons may have had access to the vault, in the absence of any suggestion that such persons had any motive for, or did, tamper with the ballots, is not sufficient to reject such ballots when offered in evidence.

If the ballots and the boxes which contain them, when produced in court, have been substantially kept as required by law, and the court is satisfied that they have not been tampered with, and are in the same condition as to markings as when cast, then they may be admitted in evidence. See *Richmond v. Breithaupt*, 110 Neb. 859, 195 N. W. 463; McCrary on Elections (4th ed.), sec. 471.

And, by stipulation of the parties, it was agreed that at the city election held May 4, 1943, the total vote from all the 88 precincts within the city gave the contestant 4,763 votes and the contestee 4,764 votes, exclusive of the absent and disabled voters' ballots.

Assignments of error No. 4 to No. 9 inclusive all relate to various defects alleged in the reception, preservation, counting, and canvass of the absent and disabled voters' ballots. We will now consider those 34 ballots.

The district court found that the absent and disabled voters' ballots were properly preserved in the manner required by law; that the identical ballots were introduced in evidence, and had not been tampered with; that 34 ballots were cast by absent and disabled voters, and that all of said ballots, together with proper envelopes, were delivered to the district court, and that the same agree with the poll book, except as to one ballot received too late to be counted; that of said 34 ballots so cast, 14 votes were cast for con-

testant and 4 for contestee, and if all of said ballots are found valid it would give contestant a total of 4,777 and contestee 4,768 votes.

The first attack is made upon the canvass of these ballots. The home rule charter of the city of Lincoln (art. III, sec. 3) provides that the city council shall canvass the returns. Section 6-114 of the ordinances has the same provision. The evidence shows that the whole city council did not sit as an election board for the purpose of counting the mail votes, but that the matter was referred to a committee.

It appears that a poll book kept by the clerk for the absent and disabled voters' ballots is signed on the sheet at the back, entitled "Official Return," by Arthur J. Weaver, Jr., H. J. Amen and Richard O. Johnson, and the charge is made that the canvassing of these votes was made by a committee of the council only. Richard O. Johnson, who was then mayor, testified that it was his impression that Stanley Maly and "Buster" De Brown were present when the clerk brought these ballots in and began opening them to be canvassed.

Theo H. Berg testified he had been city clerk for 30 years, and being custodian of the records had charge of all the ballots as they were turned over to him. He testified that the official canvass was made by a committee of three members of the city council. But the minutes of the council show that the actual canvass was made by the council, even if they first had a report from a committee.

It is insisted that the case of *Rasp v. McHugh,* 121 Neb. 380, 237 N. W. 394, is authority for rejecting all of the mail votes, as was done in that case. In the *Rasp* case it appears that the box containing the mail votes was turned over to a group of unnamed office employees, who took the box to another room and reported the totals to the canvassing board.

In the case at bar, it appears that, while only three members of the council signed the official return on the mail votes, other members of the council were present during the canvass, and the facts are not the same as in the *Rasp* case at all.

This court holds that there was a substantial compliance with the law in reference to the canvass of these ballots. "The right to an office by virtue of an election by the required number of votes cannot be defeated by the mistake, negligence or misconduct of a canvassing board." 29 C. J. S., sec. 238, p. 347. See *O'Brien ex rel. Miller v. Miller,* 266 Mich. 127, 253 N. W. 241, 106 A. L. R. 387.

The duties of election officers in the matter of canvassing ballots are generally held to be ministerial (*Shaw v. Stewart,* 115 Neb. 315, 212 N. W. 760), or, at most, quasi judicial (*Long v. State,* 17 Neb. 60, 22 N. W. 120). See 18 Am. Jur., sec. 254, p. 346.

It is next charged that the city clerk failed to keep a list of such voters in a poll book in the form required by law. In section 6-101 of the city ordinances, attached as exhibit No. 103, it is provided: "All elections shall be conducted according to the regulations prescribed by the laws of the state governing registration and elections, and the provisions of this chapter."

The general election law of the state, at section 32-804, Comp. St. 1929, relating to absent or disabled voters' ballots, provides: "The clerk shall at once enter said voter's name, postoffice address, residence and voting precinct, * * * in a poll book to be kept by such clerk for such purpose, * * *." While this section was amended by the 1941 legislature (Laws 1941, ch. 57, sec. 4), yet the above provision was unchanged, and is still the law.

An examination of the poll book discloses that the clerk entered only the name of the voter and his election precinct, but he failed to enter in every case the post-office address and residence of each of the disabled or absentee voters who requested ballots.

In our opinion, this failure of the clerk in not keeping this record in the form provided by law should not deprive a *bona fide* elector of his right to have his vote counted, if the elector himself has met all the requirements on his part to be done and performed.

The determination of the questions involved in the case

at bar requires a careful examination of the law relating to absentee voting. Our law allowing voting by mail was first adopted in 1913, beginning with section 2054, Rev. St. 1913. It was generally amended by chapter 94, Laws 1921, and has been more recently amended in 1941 (Laws 1941, ch. 57).

The laws regulating the privilege of absentee voting have generally received a strict construction. See 29 C. J. S., sec. 210, p. 297. The reason is not far to seek, for absentee voting is a privilege granted the elector, and not an absolute right. *State ex rel. Whitley v. Rinehart,* 140 Fla. 645, 192 So. 819; *Matter of Baker,* 126 Misc. 49, 213 N. Y. S. 524; *Sartwelle v. Dunn,* 120 S. W. 2d (Tex. Civ. App.) 130; *Guice v. McGehee,* 155 Miss. 858, 124 So. 643; *Wichelmann v. City of Glencoe,* 200 Minn. 62, 273 N. W. 638; *Bullington v. Grabow,* 88 Colo. 561, 298 Pac. 1059; *Jolly v. Deeds,* 135 Ohio St. 369, 21 N. E. 2d 108; *Torkelson v. Byrne,* 68 N. D. 13, 276 N. W. 134; *Straughan v. Meyers,* 268 Mo. 580, 187 S. W. 1159; *Werber v. Hughes,* 196 Ind. 542, 148 N. E. 149; Annotations, 14 A. L. R. 1256, 35 A. L. R. 819, 121 A. L. R. 939, 132 A. L. R. 374.

It is the policy of the law to prevent as far as possible the disfranchisement of electors who have cast their ballots in good faith, and while the technical requirements set forth in the absentee voting law are mandatory, yet in meeting these requirements laws are construed so that a substantial compliance therewith is all that is required.

We have examined all of the 34 absentee and disabled voters' ballots. Twenty-two of the ballots were apparently handed to Theo H. Berg, city clerk, properly sealed, in envelopes addressed to him. Eight of the ballots were in sealed envelopes, duly registered as provided by law, addressed to Theo. H. Berg, city clerk.

In each of these large envelopes of transmission there was a smaller envelope, being the Absent Voter's Identification Envelope, in which the ballots were sealed. This identification envelope bears the signature of the voter, the signature of the officer administering the oath, and setting

out the name of the voter, the number of the precinct and ward in which he is a qualified voter, his post-office address, giving house number, his age, sex, color, occupation, and his time of residence in the precinct, the county, and the state of Nebraska, and if he is a naturalized citizen the date and place of his naturalization.

Of these identification envelopes, 22 appear to be filled out regularly, properly signed and sworn to before an officer authorized to take the acknowledgment. But three of these identification envelopes bear the venue, "State of Nebraska, County of Adams," and state that they were signed before a notary public at Hastings, Nebraska, on April 29, 1943, but the notary public's seal which is attached is a seal issued for Sarpy county, Nebraska, instead of Adams county, Nebraska. Another identification envelope bears the signature of the same notary public, with the venue "State of Nebraska, Saunders County, ss," and signed and sealed at Wahoo, Nebraska, on May 3, 1943, but the seal of this notary public impressed thereon shows that he is a notary public for Sarpy county, Nebraska.

The trial court properly held that these errors made four ballots void.

In an application for a disabled voter's ballot, a notary public gives the name "May A. Leffler," but she signs the affidavit as "Mary A. Leffler," and on the outside of the disabled voter's identification envelope her name is again written by the notary public as "May A. Leffler," and this time she signs the affidavit as "Mrs. May A. Leffler," so it appears that on the application and the disabled voter's ballot she has signed the original application with the name "Mary," but on the envelope her name is given as "May" and she has signed it "May," and it is entered in the poll books as "May," and it appears to be signed by the same person. The objection to this ballot was properly overruled.

On the back of the original ballots cast by the absent voters, 13 of them are signed in ink "Theo H. Berg, City Clerk," which is proper and meets all the requirements of

the law. The other 21 ballots have had a rubber stamp placed upon the back of them, reading "Theo H. Berg, by ————, Deputy," and on this blank line was written "W. W. Harvey." Objection is made to these 21 ballots on the ground that the law requires that the name of the officer *and his title* appear on the back of the ballots, and the title of the officer does not appear on these 21 ballots.

In the case of *Rasp v. McHugh, supra,* this court held that it was necessary, in complying with section 32-812, Comp. St. 1929, that before issuing the ballot to such applying voter the clerk shall identify the same by endorsing his name *and official title* on the back of the ballot, and in that case the election commissioner had appointed a Mrs. Thomas, who suggested two other women, Mrs. Neilsen and Mrs. Shumaker, and these three women simply signed their last names with "Mrs." in front of them on the back of the ballot, and did not sign the name of the election commissioner or his title. However, in the case of the 21 ballots now before us, Theo H. Berg's name was stamped and a deputy signed his name, and the only thing missing was his title, "City Clerk." While the statute is not strictly complied with, yet substantial compliance has been had, and we are inclined to overrule the objection to these 21 ballots for this reason.

In the envelope enclosing the ballot of Floyd D. Wilson, the notary's signature appears at the proper place, attesting that the voter subscribed the same in his presence and took oath thereto, but the notary entirely failed to fill out the certificate on the lower half of the envelope identifying the voter, and which he should have signed with his official title and impressed his seal thereon. There was no substantial compliance with the law, and the trial court was right in declaring that the ballot contained therein should not be counted.

We have examined all of the many other errors pointed out in these absent and disabled voters' ballots, but in our opinion some of these are but formal mistakes, perhaps a mere clerical and careless error, while the essential facts

required by law can still be ascertained, and we find no prejudicial errors therein. See *Hansen v. Lindley*, 152 Kan. 63, 102 Pac. 2d 1058.

It thus appears that, out of the 34 absentee and disabled voters' ballots, five of them were illegal and should not have been counted. There being 29 legal votes cast, how should the deduction of these five votes be made as between the contestant and contestee?

"In purging the polls of illegal votes, the general rule is that, unless it be shown for which candidate they were cast, they are to be deducted from the whole vote of the election division, and not from the candidate having the largest number. Of course, in the application of this rule such illegal votes would be deducted proportionately from both candidates, according to the entire vote returned for each." McCrary on Elections (4th ed.), sec. 495, p. 364.

"Where there are more ballots found in box than there are names on poll list, and the inspectors fail to draw from the box the excess before canvassing the votes, such extra ballots should, on a trial of the matter, be so apportioned that each candidate shall have deducted a share of them proportioned according to the whole number of votes received by him." *People ex rel. Williams v. Cicott*, 97 Am. Dec. 141 (16 Mich. 283). See, also, *Heyfron v. Mahoney*, 9 Mont. 497, 24 Pac. 93, 18 Am. St. Rep. 757; 10 Am. & Eng. Ency. of Law (2d ed.), 773.

Of the 34 ballots, several only voted on the school board election ballot, and others did not vote for any councilmen, so that out of the 34 ballots the contestant received 14 and the contestee received four votes.

Therefore, the contestant should bear the loss of 14/34 of the five illegal ballots, or 2 1/17 votes, leaving him 11 16/17 votes from these 34 ballots, and the contestee's loss is 4/34 of five votes, or 10/17 vote, leaving him 3 7/17 votes from these 34 ballots. Adding these votes to the votes in the 88 precincts, of 4,763 for the contestant and 4,764 for the contestee, gives the correct final vote of J. Lloyd McMaster, contestant, of 4,774 16/17, and of Rees Wilkinson, contestee, of 4,767 7/17.

It was the judgment of the trial court that the purported election of said Rees Wilkinson, contestee, as councilman of the city of Lincoln, as a result of the election held May 4, 1943, should be, and thereby was, set aside, annulled and held for naught, and that J. Lloyd McMaster, contestant, was duly elected to said position, and is entitled to all the rights and privileges of that office, and entitled to the term thereof for which he was elected on May 4, 1943, and that said Rees Wilkinson, contestee, shall pay the costs of the proceedings, and the sheriff is directed to oust from said office the contestee, and to put the contestant into possession of said office, and to deliver to him all the books and papers belonging to said office, all as provided in section 32-1036, Comp. St. 1929. This judgment of the district court is hereby affirmed.

AFFIRMED.

INEZ V. UPTEGROVE, ADMINISTRATRIX, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK, APPELLANT.

15 N. W. 2d 220

FILED JULY 14, 1944. No. 31669.

1. Insurance. When the certificate delivered to an employee, to certify that he is insured under a group or master policy issued to his employer, is also executed by the same insurance company which issued the group policy, then such policy, the application therefor, the certificate given the employee, and all amendments and riders attached to each, together constitute the entire contract between the employee and the insurance carrier.
2. ———. A beneficiary of an insurance contract is the person who is entitled to the proceeds or benefits which accrue and become payable under the contract.
3. ———. A policy issued to the insured, he being the real party to the contract and the one to whom the benefits under the policy inure, may be sued upon by the representative of the insured's estate where loss occurred before the insured's death.
4. ———. A facility of payment clause is merely an appointment, by agreement between the parties, of persons who may receive

payment of the benefits or proceeds accruing under the contract, give receipt therefor to the insurer, in good faith discharge it from liability, and thereafter hold the amount received for the benefit of the person ultimately entitled thereto.

5. ———. Such a clause is for the benefit of the insurer, to be exercised at its option, to enable it to make prompt payment without the expense of guardianship or administration proceedings, and remove a chance of litigation between claimants and the insurer.

6. ———. A facility of payment clause does not change or modify the original contract with the insured, or make the person therein designated to receive payment for him the beneficiary or owner of the proceeds, or give such person the right to maintain an action to compel the insurer to make payment to him.

7. ———. A claim to the proceeds of an industrial insurance policy is not affected by the facility of payment clause where the insurance company has failed to avail itself of the provision.

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

Beghtol & Rankin and *John C. Mason,* for appellant.

Walter D. James and *Ira D. Beynon, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, CHAPPELL and WENKE, JJ., and NUSS, District Judge.

CHAPPELL, J.

This action was brought by the administratrix of the estate of Armpstead F. Uptegrove, her deceased husband, to recover disability benefits allegedly due and accruing to him during his lifetime, under the provisions of an industrial group insurance contract. The cause was tried to a jury, but at the conclusion of the evidence defendant moved to dismiss and plaintiff moved for judgment, whereupon the trial court discharged the jury and entered a judgment for plaintiff against defendant for the sum of $1,738 and costs, including the sum of $300 as attorney's fees taxed as a part thereof. Defendant appealed to this court, presenting for decision the sole question of whether plaintiff is the real party in interest. We find that plaintiff as administratrix was the real party in interest and the proper person to maintain the action.

By virtue of section 20-301, Comp. St. 1929, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section * * * (20-304)", Comp. St. 1929. In giving effect to this section we have held that the real party in interest is the person entitled to the avails of the suit. *Gregory v. Pribbeno*, 143 Neb. 379, 9 N. W. 2d 485. Sections 20-304 and 30-803, Comp. St. 1929, expressly give an executor or administrator authority to maintain an action for the benefit of the estate of such a person.

An examination of the record discloses that Armpstead F. Uptegrove, who died in the State Hospital on July 24, 1940, was employed by the Franklin Ice Cream Company, and its successor Beatrice Creamery, from 1921 until he was discharged in December, 1931. During most of this period he was a competent employee. However, for some months prior to the termination of his employment he manifested serious mental and physical decline which eventually resulted in his discharge. It appears from the evidence, without contradiction, that while he was insured and before age 60 he was totally and permanently disabled due to, or accompanied by, mental incapacity which prevented him from engaging in any occupation or from performing any work for compensation or profit from a period prior to December, 1931, and until his death.

During his employment he was insured under a group or master policy issued to his employer by defendant company, who also issued to him a certificate of participation, dated April 1, 1925, evidencing his contract which was in full force and effect at the time his disability occurred. After his death the certificate was found in the employee's safety deposit box, to which his wife, the administratrix, did not theretofore have access.

In *Hemmer v. Metropolitan Life Ins. Co.*, 131 Neb. 14, 267 N. W. 153, this court held: "When the certificate delivered to an employee, to certify that he is insured under a group or master policy issued to his employer, is also executed by the same insurance company which issued the

group policy, then such policy, the application therefor, the certificate given the employee, and all amendments and riders attached to each, together constitute the entire contract between the employee and the insurance carrier." This rule is applicable here.

We must bear in mind that the insurance contract of the employee was dual in character, that is, it was insurance upon his life and against his disability. It provided for insurance upon his life in the sum of $1,500, payable after death to his wife, Inez V. Uptegrove, as beneficiary, but it also provided that if he suffered total and permanent disability as the result of injury or disease while insured and before age 60 he was to be paid by defendant during his lifetime certain disability benefits each month for a limited period of time in lieu of payment of the life insurance to his beneficiary after death. This action is to recover such disability benefits and not the life insurance. In this connection, it will be noted that all of the disability payments accrued and were due and payable to the insured employee before his death occurred. None of these payments were ever made by defendant, and the question is whether the administratrix of his estate can now recover them. The defendant contends that under the provisions of the contract the action can only be maintained by Inez V. Uptegrove in her individual capacity as beneficiary.

With reference to disability benefits, the certificate issued to the employee provides that defendant company "will pay *to such employee,* in lieu of the payment of the insurance under said policy at his death, equal monthly instalments, the number and amount of such instalments to depend upon the amount of insurance in force on the life of such employee at such date, as shown in the following table: Amount of Insurance $1,500 Number of Instalments 30 Amount of Each Instalment $51.75". The group or master policy provides, "the Company will, in lieu of the payment at death of the insurance on the life of the said employee, as herein provided, pay equal monthly instalments, as hereinafter described, (as shown above) *to the said Employee,*

or to a person designated by him for the purpose, or, if such disability is due to, or is accompanied by, mental incapacity, to the beneficiary of record of the said Employee." (Italics supplied.) The contentions of defendant are bottomed upon the latter provision. The company insists that it is contractually bound thereby to pay the disability benefits to the "beneficiary of record."

We are unable to give this construction to the contract. A beneficiary of an insurance contract is the person who is entitled to the proceeds or benefits which accrue and become payable under the contract. 29 Am. Jur., sec. 1271, p. 948; 2 Couch, Cyclopedia of Insurance Law, sec. 305, p. 809. Therefore, it may be rightly said that Inez V. Uptegrove, wife of the insured employee, was the beneficiary of the life benefits after his death, but the employee was himself the beneficiary of the disability benefits which accrued and became payable to him during his lifetime. *Shea v. Aetna Life Ins. Co.*, 292 Mass. 575, 198 N. E. 909; *Foster v. North Carolina Mutual Life Ins. Co.*, 150 S. C. 482, 148 S. E. 656.

The promise of defendant to pay disability benefits was made to the employee. He is the person thus insured under the contract and his substantive rights to payment of all the installments became fixed when he suffered the permanent, total disability during the life of the certificate and survived the 30-months' period of their duration. Not having been paid by the company to him or the person designated by him for that purpose, then upon his death these rights passed to his administratrix. Because of mental incapacity of the employee all of the conditions precedent to recovery of disability benefits were not complied with during his lifetime, but this was impossible under the circumstances and does not preclude recovery by the administratrix who seasonably after his death, and after obtaining knowledge of her legal rights, made necessary proof and claim upon defendant for payment. *Trucken v. Metropolitan Life Ins. Co.*, 303 Mass. 501, 22 N. E. 2d 120; *Shea v. Aetna Life Ins. Co., supra.* It is generally held that a pol-

icy issued to the insured, he being the real party to the contract and the one to whom the benefits under the policy inure, may be sued upon by the representative of the insured's estate where loss occurred before the insured's death. 8 Couch, Cyclopedia of Insurance Law, sec. 2063, p. 6738; *Langevin v. Prudential Ins. Co.*, 132 Me. 392, 171 Atl. 392.

We find no conflict between the certificate and the group or master policy. The provision relied upon by defendant, which appears only in the master policy, is simply a facility of payment clause in which the option of payment is by agreement confined to a person to be designated or to one already designated by the insured to receive payment for him. The words "beneficiary of record" appearing therein have no significance except as an agency or a person designated to whom payment might be made for the insured. *Carruth v. Aetna Life Ins. Co.*, 157 Ga. 608, 122 S. E. 226. The defendant company could have paid the disability benefits to the "beneficiary of record" in good faith and acquitted itself of liability to the employee or his guardian during his lifetime or his representative after his death, but it neglected to do so.

While the phraseology of facility of payment clauses which appear generally in industrial insurance policies is not always identical, their definition, purpose, and legal effect are ordinarily the same. Courts have looked upon them with favor and they should be liberally construed. A facility of payment clause is merely an appointment, by agreement between the parties, of persons who may receive payment of the benefits or proceeds accruing under the contract, give receipt therefor to the insurer, in good faith discharge it from liability, and thereafter hold the amount received for the benefit of the person ultimately entitled thereto. It affords a ready method of raising money for the support, maintenance, and medical care of the disabled insured employee, but it has been generally held that such a clause is for the benefit of the insurer, to be exercised at its option, to enable it to make prompt payment without the expense of guardianship or administration proceedings,

and to remove a chance of litigation between claimants and the insurer. A facility of payment clause does not change or modify the original contract with the insured, or make the person therein designated to receive payment for him the beneficiary or owner of the proceeds, or give such person the right to maintain an action to compel the insurer to make payment to him. Therefore, the rule is that a claim to the proceeds of an industrial insurance policy is not affected by the facility of payment clause where the insurance company has failed to avail itself of the provision. Under such circumstances it cannot be used by the company to avoid liability and defeat the purposes of the policy. In the case at bar the rights of the company to pay the "beneficiary of record" for the insured and thus in good faith discharge itself of liability existed only up to the time suit was filed by the administratrix, and this cause must now be disposed of as if there were no facility of payment clause. These conclusions are supported by many authorities, including our own. See 29 Am. Jur., sec. 1278, p. 953, secs. 1279, 1280, p. 955; 31 C. J. 969-972; 2 Couch, Cyclopedia of Insurance Law, sec. 311a, p. 836; Annotation, 75 A. L. R. 1435; *Caveny v. Healey*, 94 N. J. Law 28, 109 Atl. 204; *Ogletree v. Hutchinson*, 126 Ga. 454, 55 S. E. 179; *Weddle v. Prudential Ins. Co.*, 130 Neb. 744, 266 N. W. 624; *Brown v. Ehlers*, 130 Neb. 918, 267 N. W. 156.

Without doubt, the provision relied upon by defendant means that if the employee is totally and permanently disabled, but mentally competent, the company will make the scheduled payments to him. In such case, only the employee, if living, or his representative after his death, could maintain an action to recover them. Defendant concedes as much. However, if he were so disabled, and mentally competent, but had designated a person to whom such payments might be made for him, the company could in good faith make the payments to such designated person and be relieved of liability, but if it refused to do so, then only the employee, if living, or his representative after his death, could maintain an action to recover them. If, as in the

case at bar, he is so disabled, but mentally incompetent, he thereafter could not legally designate any other person to receive the payments for him, in which event the company could in good faith under the contract have made the payments to the "beneficiary of record," the person theretofore designated by him for that purpose while he was competent, and be relieved of liability; but if it refused to do so, then only his guardian, if the employee were living, or his representative after his death, could maintain the action.

It follows that the judgment of trial court was right, and it is affirmed.

AFFIRMED.

SIMMONS, C. J., dissenting.

We are in accord here upon the proposition that, by statute, "Every action must be prosecuted in the name of the real party in interest, * * * ." Comp. St. 1929, sec. 20-301; and that, by decision, "The real party in interest * * * is the person entitled to the avails of the suit." *Kinsella v. Sharp,* 47 Neb. 664, 66 N. W. 634.

We are in accord on the proposition that "When the certificate delivered to an employee, to certify that he is insured under a group or master policy issued to his employer, is also executed by the same insurance company which issued the group policy, then such policy, the application therefor, the certificate given the employee, and all amendments and riders attached to each, together constitute the entire contract between the employee and the insurance carrier." *Hemmer v. Metropolitan Life Ins. Co.,* 131 Neb. 14, 267 N. W. 153. We are not in accord upon the construction to be given, under the above rule, to the group policy and the certificate involved in this action, and hence are not in accord upon the proposition that Mrs. Uptegrove, as administratrix, is entitled to maintain this action and receive the "avails of the suit."

This court has said: "The proceeds of a life insurance policy in which a third person is named beneficiary belong exclusively to such beneficiary as an individual; they are

not the property of the heirs of insured, are not subject to administration, and cannot properly be claimed or received by the administrator or other legal representative of insured as assets of his estate." *In re Estate of Reynolds*, 131 Neb. 557, 268 N. W. 480. It is my view that Mrs. Uptegrove, as an individual and not as administratrix, is the real party in interest.

There is no material dispute in the evidence. The defendant, hereinafter called the insurer, in 1925 issued a group insurance policy, containing total and permanent disability provisions, on the lives of the employees of the Franklin Ice Cream Company. At the same time, there was issued to plaintiff's intestate, as such an employee, a certificate that he was insured under the group policy. He will hereafter be referred to as the insured.

The insurance was in force in December, 1931, when the insured was discharged from his employment. Thereafter, he did not secure any permanent employment, and died on July 24, 1940.

The group policy contained a provision that "The Company will issue to the Employer, for delivery to each Employee * * * an individual Certificate setting forth a statement as to the insurance protection to which such Employee is entitled, the beneficiary to whom payable, * * * " and other matters.

The policy further contained a provision that "Upon receipt, * * * of due proof that any Employee, * * * has become totally and permanently disabled, as the result of bodily injury or disease, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, the Company will, * * * pay equal monthly instalments, as hereinafter described, to the said Employee, or to a person designated by him for the purpose, or, *if such disability is due to, or is accompanied by, mental incapacity, to the beneficiary of record of the said Employee.*" (Emphasis supplied.)

The certificate which was issued to the insured provided that "*under and subject to the terms and conditions of*" the

group policy, he was insured for $1,500. (Emphasis supplied.) It named "Inez V. A. Uptegrove Beneficiary." It contained a provision as to a change of beneficiary and the continuance of the insurance after a change of employment. These provisions are on the first page of the certificate and above the facsimile signature of the president of the insurer. On the reverse side of the above is a page headed "Plan of Insurance"; and other headlines such as "New Employees Eligible"; "Cost"; "Beneficiaries"; and "Total and Permanent Disability Benefits". Under this heading is the following: "Under the terms of the Group policy mentioned on page one of this Certificate, any employee shall be considered totally and permanently disabled who furnishes due proof to the Company that, while insured thereunder and prior to his sixtieth birthday, he has become so disabled, as a result of bodily injury or disease, as to be prevented permanently from engaging in any occupation or from performing any work for compensation or profit." This is followed by: "Upon receipt of such proof, the * * * (company) will pay to such employee, * * * equal monthly instalments, * * * as shown in the following table: * * *." The policy and certificate both contained provisions as to the payment of benefits in the event of the death of the employee during the period of total and permanent disability. These will be referred to later herein. There are no signatures appearing on this second page. The third page is a printed letter from the employer to the employee. This letter contains the following statement: "In addition to the Life Insurance protection offered through this plan, you are entitled to the valuable benefits enumerated on the second page of this Certificate." This letter was obviously a part of the certificate as prepared by the insurer. The fourth page (which is the reverse side of the letter page) is the cover page and contains blank space for notation of change of beneficiary.

Following the insured's death, Mrs. Uptegrove found the certificate in a bank box, to which she had not had access during his lifetime. Inquiry first was made in her name.

Liability was denied on the ground that the policy had lapsed. Later, as administratrix, she claimed the benefits of the policy as payable to the estate, on the ground of her husband's total and permanent disability.

Plaintiff filed her petition herein alleging, among other things, that the insured's employment ceased in December, 1931, or January, 1932; that at that time he "was mentally incompetent and insane and remained so during the remainder of his lifetime" and "at the time of the termination of his employment the said Armpstead F. Uptegrove was totally and permanently, both physically and mentally, disabled."

The insurer by its answer specifically denied that allegation. The insurer further pleaded that "the benefits from said policy of insurance, if any are due, are payable to Inez V. A. Uptegrove and not the plaintiff herein."

At the trial plaintiff established, as found by the general finding of the trial court, that Mr. Uptegrove was totally and permanently disabled, both physically and mentally, as of December, 1931.

The insurer contends that the controlling policy language applicable to the facts here is that part quoted herein, which provides that the total and permanent disability benefits shall be payable "to the beneficiary of record" if "such disability is due to, or is accompanied by, mental incapacity," and it being established that the insured was both mentally and physically totally disabled from December, 1931, these payments were under the policy terms payable to Mrs. Uptegrove individually, she being the "beneficiary of record."

Plaintiff relies upon the language of the certificate and argues that under the certificate these monthly payments in any event are payable to the insured; that, being payable to the insured in his lifetime and not having been so paid, they are payable to his estate; and that, therefore, the administratrix is a proper party plaintiff.

We are not here concerned with the life insurance provisions of this policy, but with the disability provisions, and

then only with the question of who is entitled to receive those benefits.

The majority set out certificate and policy provisions. They say that a beneficiary is the person entitled to the proceeds "which accrue and become payable under the contract." Agreed. But who is the beneficiary "under the contract?" They answer that not by resort to, or analysis of, the contract, but by resort to the decisions of the courts in two cases, and hold that Mrs. Uptegrove was beneficiary of the life benefits *after his death,* but the insured was himself the beneficiary of the benefits which accrued and *became payable to him* during his lifetime. The case of *Shea v. Aetna Life Ins. Co.*, 292 Mass. 575, 198 N. E. 909, cited by the majority, obviously is not in point here. There the application, which was held to be a part of the insurance contract, named the wife as "death beneficiary." Here, there is no such limitation. There, the court said: *"No person* is specifically named in the insurance contract as the beneficiary of disability benefits payable thereunder. Neither the employer nor the plaintiff's wife is so named. * * * And the plaintiff's wife, though named as 'death beneficiary' under the insurance contract, is *not for that reason* also the beneficiary of disability benefits. * * * The clear implication from the contract of the company with the plaintiff for insurance against his own disability, *which names no beneficiary for disability benefits,* is that the plaintiff is such beneficiary." (Emphasis supplied.) But here, as I will presently point out, a person is named as beneficiary *under the contract* for disability benefits, under the conditions proved by plaintiff, and plaintiff, as administratrix, is not that beneficiary. *Foster v. North Carolina Mutual Life Ins. Co.*, 150 S. C. 482, 148 S. E. 656, is likewise cited by the majority. This was a suit to recover sick benefits. The policy named the plaintiff as beneficiary of *death* benefits. It provided that sick benefits should be paid to the *insured.* The court held that the plaintiff, not being the named beneficiary of sick benefits, could not recover. I find nothing in the opinion to support the majority. It is against them in

this: It holds that a court will not permit recovery of benefits by a party who is not the beneficiary named in the policy.

Now let us do what the majority in their opinion do not do, and examine the contract entered into by the insured and the insurer to determine what obligations the insurer assumed, and to whom it contracted to pay benefits. It is that contract that is binding upon the insurer, and it is that contract that courts are bound to follow. To whom are the benefits "payable under the contract"?

There are three conditions set out in the policy under which the insurer contracts to make disability payments. Beneficiaries are named in each case.

The first set of facts is that where the insured "has become totally and permanently disabled, as the result of bodily injury or disease," the insurer will pay to the insured or to a person designated by him certain monthly payments. The insured made no designation of a person to receive the payments.

The second set of facts is that where the total and permanent "disability is due to, or is accompanied by, mental incapacity," then the payments are to be made "to the *beneficiary of record of the said Employee.*" (Emphasis supplied.) This set of facts includes the first plus "mental incapacity." The "beneficiary" named in the certificate is "Inez V. A. Uptegrove."

The third provision (to be set out hereafter) is that if the insured dies during the period of permanent and total disability, any installments remaining unpaid at the date of death shall be commuted and paid "in one sum *to the beneficiary.*"

Plaintiff proved the factual condition of the second provision, i. e., she alleged and proved permanent and total disability plus "mental incapacity," but she did not bring the action in her own behalf as "beneficiary of record," for the obvious reason that as to her individual suit, the statute of limitations would be a defense. The majority combine the second factual situation, which they find to be true,

with the beneficiary of the first and thereby permit a recovery.

It is not necessary to go to the books to find out who is meant by "beneficiary" or "beneficiary of record." The insured named Mrs. Uptegrove as beneficiary and the insurer agreed to it. If Mrs. Uptegrove is the "beneficiary" named in the certificate, and the beneficiary under the life provisions, as the majority hold, and under the third disability provision, is she not also the beneficiary under the second provision? Does the word "beneficiary" in several instances mean Mrs. Uptegrove, and in one other mean the insured? The contract does not say so, and it controls. Had the parties so intended, they could have easily provided that in the case of mental incapacity, the guardian of the insured or some designated person, such as the wife, was to receive the payments for the insured. They did not so provide. The contracting parties did not overlook the possibility of a condition arising where the interest of a beneficiary should become the interest of the insured. They provided that "In case of the death of any individual named as beneficiary, the interest of such beneficiary shall vest in the Employee by whom he was designated." A similar provision is in the certificate. They did not provide that the interest of the beneficiary, in the event the insured became disabled as the result of mental disability, should vest in and be for the benefit of the insured.

The policy clearly says that these payments are to be made *to the insured* if he becomes totally and permanently disabled without "mental incapacity"; *to the beneficiary* (Mrs. Uptegrove) if the disability is due to or accompanied by "mental incapacity"; *to the beneficiary* if the insured dies before all payments are made; *to the beneficiary* if death benefits accrue. Why should not the contract be enforced as made?

The majority, on the authority of the two cases above reviewed, determine early in their opinion that the "employee was himself the beneficiary of the disability benefits which accrued and became payable to him during his lifetime"

and later that "these rights passed to his administratrix." I shall discuss later herein the right of the administratrix to recover *under the terms of the policy* in that event. But the majority having reached the conclusion above stated, it would seem to determine the case so far as the question here presented is concerned. But the majority do not stop there.

They proceed further and say: "The promise of defendant to pay disability benefits was made to the employee." Agreed. "He is the person thus insured under the contract and his substantive rights to payment of all the installments became fixed when he suffered the permanent, total disability during the life of the certificate and survived the 30-months' period of their duration." This begs the question we have to determine. The fact that he is the "insured" does not *ipso facto* make him the "beneficiary" contrary to the terms of the insurance contract. This statement ignores the "due to, or is accompanied by, mental incapacity" provision of the policy, upon which the insured relies and the clause which we have to construe. The issue here is so made that the clause cannot be deleted and properly decide the case. The majority further say: "Not having been paid by the company to him or the person designated by him for that purpose, then upon his death these rights pass to his administratrix." This, of course, is on the basis that he is the beneficiary, as well as the insured—but who was "the person designated by him for that purpose." Outside of the policy, he designated no one to receive payments for him. Within the policy he designated no one to receive the payments for him. The policy does not say that, if he is mentally incapacitated, the payments shall be made to "the beneficiary of record for the benefit of and for the insured." The majority read into the policy language that is not there, and make the "beneficiary" in this one instance an agent or trustee of the insured. Had the parties so desired, they could have so provided. They did not, and it is not contended from anything in evidence or in the policy that they so intended.

The majority then go on to say that the action was timely brought. It is not now claimed that the statute ran against the insured, he having been found to be under the disability of "mental incapacity." The majority next hold that "a policy issued to the insured, he being the real party to the contract *and the one to whom the benefits under the policy inure,* may be sued upon by the representative of the insured's estate where loss occurred before the insured's death." The language quoted is taken almost verbatim, as the majority show, from 8 Couch, Cyclopedia of Insurance Law, sec. 2063, p. 6738. The majority should have read further. The first sentence of the second paragraph of the same section is: "Although an administrator *cannot* sue on a policy on the life of his intestate *where a beneficiary is named,* as a general rule the contrary is true where the policy is payable to the insured, his executors, administrators, etc." (Emphasis supplied.) See, also, *In re Estate of Reynolds, supra.* The language above quoted from the majority opinion may be a general rule, when it is first determined that the insured is the beneficiary and in the absence of a provision as to payment in the event of death, and there is such a provision here, as I shall later point out.

The majority then state: "We find no conflict between the certificate and the group or master policy." If there is no such conflict, then it is because the language in the certificate to the effect that in the event the insured becomes totally and permanently disabled, the insurer will pay "to such employee" the disability benefits, is not in conflict with the provision that in the event of mental incapacity, the payments are to be made to the beneficiary of record, and the latter provision becomes one modifying the first. Under the rule stated in *Hemmer v. Metropolitan Life Ins. Co., supra,* that construction seems proper.

The majority then state that the provision relied on by the insurer "is simply a facility of payment clause in which the option of payment is by agreement confined to a person to be designated or to one already designated by the insured to receive payment for him." As already pointed out,

extraneous of the policy, the insured designated no one to receive payment for him. The majority then say the words "beneficiary of record" appearing in the policy "have no significance except as an agency or a person designated to whom payment might be made for the insured." The majority cite, as their sole authority here, *Carruth v. Aetna Life Ins. Co.*, 157 Ga. 608, 122 S. E. 226. The case, if I read it correctly, is against their contention here. There was no facility of payment clause involved in that case. There, the defendant insurance company issued a group policy in which the *employer* was named as beneficiary. Certificates were issued to the employees providing that the amount of insurance on each employee would be paid to certain designated relatives and "If neither survive you, to your estate." There being no living relatives within the named classes, the administratrix *in equity* sued both the insurer and the employer. The question was raised as to whether or not the plaintiff could maintain the action. The court held that the policy and the contract must be construed together (as we agree should be done here); that the employer was the beneficiary in the policy and the employee the beneficiary in the certificate; that the employee had a beneficial interest in the contract between the insurer and the employer; that the employer had a mere right to the possession of the fund and a duty to pay it to the employee; that the insurer used the employer as an agency to pay the money to the employee; and that the plaintiff was the real party in interest and could maintain the action. The majority use a part of the language from one sentence in the body of the opinion. They stop too quickly. The court there said: "The use of the two following words 'as beneficiary' (in the policy following the name of the employer) has no significance beyond a narrow technical meaning, *when considered in connection with the certificate;* for the certificate *confines* the *possession* of the fund to the mere duty of paying the money over to the holder of the certificate * * * ." (Emphasis supplied.) In the instant case the use of the words "beneficiary of record," *"when considered in connection with the*

certificate" can mean only one thing, and that is Mrs. Uptegrove, individually, for the certificate so states in unmistakable language that she is the "beneficiary," and neither the certificate nor the policy confine "the possession of the fund to the mere duty of paying the money over" to the insured or for his benefit. It is clear in the *Carruth* case that had there been a husband or child, or father or mother of the insured, they and not the administratrix would have been the real parties in interest to bring the suit, for, as pointed out, the estate was a beneficiary contingent upon the circumstance that none of the named relatives "survive" the insured. The estate there took, not on the ground that the benefits were payable to the insured and, not having been paid, were due to the estate. The estate took there as a named beneficiary under the terms of the certificate. And here, under the terms of the certificate, Mrs. Uptegrove, and not the estate, is the beneficiary. The *Carruth* case points inescapably to the conclusion that Mrs. Uptegrove, individually, is the real party in interest, she being the "beneficiary," "when (the policy is) considered in connection with the certificate." The *Carruth* case is cited in 8 Couch, Cyclopedia of Insurance Law, sec. 2094, p. 6793, as holding that the employer " * * * is merely a trustee of the employees, or an agent for distribution, and the beneficiary or his personal represenative is the real party in interest, and may sue on the contract, * * * ." If the majority now propose to turn this decision upon the *Carruth case,* then it is upon the proposition that Mrs. Uptegrove as "beneficiary of record" was in fact a trustee or agent for the insured, and that he was the beneficiary of the trust. I, accordingly, suggest that the majority should then determine whether or not there is a defect of parties here, and whether or not the remedy of the administratrix, if she has one, is not in equity. Mrs. Uptegrove as "beneficiary of record" is not a party to this action. I shall not undertake to determine that question, except to point out that the Code provision, Comp. St. 1929, sec. 20-304, cited by the majority at the beginning of their opinion, authorizes the "trustee of an ex-

press trust" or a person "in whose name a contract is made for the benefit of another" to bring an action without joining the beneficiary. It does not say that a beneficiary can bring an action without joining the trustee or the person in whose name the contract is made. It is said that "Even in a court of equity, * * * the trustee is generally an indispensable party, * * * ." 65 C. J., sec. 758, p. 868. I point out that in the *Carruth* case, solely relied on for this proposition, the plaintiff proceeded in equity against both the insurer and the agent, or, as Couch says, the trustee. See 2 Restatement, Trusts, 862.

The majority, without analyzing the clause and without more, discuss the terms and effects and benefits of a facility of payment clause. I shall not enter into that. The majority do not show upon what basis this language becomes a facility of payment clause. And that is the question that is to be determined before the effect of such a clause need be considered. A facility of payment clause is one which, within limits, " * * * confers on the company an option as to whom it will make payment." 31 C. J., sec. 7, p. 969. Generally, they are of two classes: Either the insurer has an option to pay to one whom it considers equitably entitled thereto, or is confined to certain designated classes. 29 Am. Jur., sec. 1278, p. 954; 135 A. L. R. 956. Such a clause permits the insurer to make payment to any one of two or more beneficiaries, under any one condition or set of facts. 31 C. J., sec. 7, p. 969; 29 Am. Jur., sec. 1278, p. 953. The fact that a policy provides for the payment of benefits to *different* beneficiaries under *different* sets of facts does not make a facility of payment clause out of the provisions, and does not authorize either the insurer or a court to pick out a named beneficiary under one set of facts, and make that beneficiary the beneficiary also under another set of facts, and that contrary to the language of the policy. This court in *Weddle v. Prudential Ins. Co.*, 130 Neb. 744, 266 N. W. 624, said: "The 'facility of payment' clause provides that the company may or may not elect to pay to another equitably entitled to the benefit, rather than the

beneficiary named in the policy." There is no such provision in this policy. The election is to be made by the insurer, not the insured. The only election provided for in this policy is a right given to the *insured* to designate a person to receive payment for him in the event he is permanently and totally disabled not due to or accompanied by mental incapacity, *and that right of election was not exercised.* Where in this policy is there any right of election on the part of the insurer? The majority point out none. Even if the majority construe the policy as meaning that the payments to the "beneficiary of record" are for the use and benefit of the insured, the fact would still remain that there is no election given to the insurer to whom to pay. It had no choice but to pay to Mrs. Uptegrove as "beneficiary of record." The policy does not say that the insurer can pay to the "beneficiary of record" or to his guardian or to any one else. I find no mention of a "guardian" in the policy, and the majority say that the purpose of a facility of payment clause is to enable payment to be made "without the expense of a guardianship."

The majority then dispose of the facility of payment clause discussion with the statement: " * * * this cause must now be disposed of as if there were no facility of payment clause." Just how much of the clause they thus read out of the policy and refuse to apply is not clear. The minimum language so deleted would be: "Or, if such disability is due to, or is accompanied by, mental incapacity, to the beneficiary of record of the said employee," leaving the clause so as to provide that the monthly payments shall be made to the insured or to a person designated by him (and no person has been designated). With that language removed (and I do not agree it should be), the payments not having been made, and the insured dead, to whom does the policy say the payments shall be made? As pointed out, the majority, without reference to the policy, have assumed that they then become payable to the administratrix. However, the policy provides: "The first monthly instalment will be paid upon receipt of due proof of total and permanent dis-

ability, in which event the insurance herein provided under this Policy, on the life of the said Employee, shall cease to be in force and no further premiums will be payable on account thereof. During the period of total and permanent disability the said Employee shall not have the right to receive in one lump sum, the commuted value of any unpaid monthly instalments, but, if the said Employee dies during such period, any instalments provided herein, remaining unpaid at the date of death, shall be commuted at the rate of three and one-half per centum per annum, compound interest, and paid in one sum to the *beneficiary.*" This applies, of course, to payments that were payable to the insured during his lifetime, but which were not paid to him because of his death. The payments were to be made beginning not with permanent and total disability, but upon receipt by the company of due proof of that disability. That due proof was not made during his lifetime, so that the company was not obligated to begin to pay until after his death. They did not contract to pay to the insured in any event. The insurer contracted to pay to the insured, if entitled thereto, during this period of permanent and total disability for not to exceed 30 months, but if he died during the period of total and permanent disability, then the payments "remaining unpaid" were to be commuted and paid "to the beneficiary," and the beneficiary is Mrs. Uptegrove, individually. So we come out on that basis at exactly the same conclusion, and that is: These payments, not paid during the insured's lifetime, do not go to his estate, but to his beneficiary, and this plaintiff, as administratrix, is not that beneficiary. I suggest that if it is proper for the parties to contract that payments which would otherwise go to the insured may be cut off in the event of his death and then accrue not to his estate but to his beneficiary, it is also proper for the parties to contract that those payments may likewise be cut off and accrue to his beneficiary in the event the insured becomes mentally incapacitated, and that is what this policy does as I read it.

One thing further requires notice. The majority say that

the insurer "could have paid the disability benefits to the 'beneficiary of record' in good faith and acquitted itself of liability to the employee or his guardian during his lifetime or his representative after his death, but it *neglected* to do so" and (later in the opinion) that the right "existed only up to the time suit was filed by the administratrix." I take it that this means that the insurer, not having paid to Mrs. Uptegrove as "beneficiary of record" before she sued as administratrix is now estopped to assert that the payments are due to the beneficiary under the contract. The facts here in evidence are that the insurer did not know of any claim of liability during the lifetime of the insured. The plaintiff testified that she did not know of this insurance during the insured's lifetime. Accordingly, no claim was made during "his lifetime." The majority find that the necessary proof and claim were a "condition precedent * * * not complied with" during the insured's lifetime. There is, accordingly, no basis for holding that the insurer "neglected" to pay during "his lifetime." The correspondence between the plaintiff's attorney and the insurer is in evidence. After the insured's death and after the certificate was discovered, the insurer was notified and inquiry made as to "benefits" to which Mrs. Uptegrove personally was entitled. The company advised her that there was "no death benefit" payable, the certificate having been canceled on February 28, 1933. Some weeks thereafter claim was made by plaintiff, as administratrix, in which it was "presumed" that the insured had not made a claim because of his mental condition. Thereafter the insurer sought information as to the insured's mental condition, its extent, when it arose, etc. I find in the correspondence no assertion on the part of the plaintiff that the insured was from December, 1931, permanently and totally disabled from mental disability. On the contrary, I find that insurer repeatedly asked for a statement as to when the mental incompetency began and received answers that it was "impossible to say;" that the disease was progressive; and that "At the time he lost his employment he appeared to have mental lapses" and

"became totally disabled about the time that he quit his employment." The plaintiff did not fix the beginning of the period of mental incompetency as at the time of insured's discharge from his employment, until she filed her petition in this action. The defendant had no opportunity to assert its defense until after suit was brought. The above allegation in the petition was denied, and it was not until the trial of this case that plaintiff by her own testimony, and by the testimony of an expert based largely upon plaintiff's recital of facts, established that fact to the satisfaction of the trial court. Under these circumstances, the insurer should not be held to have "neglected" to pay during insured's lifetime and prior to the beginning of this litigation, nor should it be held estopped to present its defense.

I have no doubt but that insurer could have paid the benefits to the "beneficiary of record" and acquitted itself of liability, and that had it done so, this litigation would not have followed. But the insurer recognized that the law gave it a defense, in the statute of limitations, to the claim of the "beneficiary of record." It did not waive that defense. The courts have no right or power to compel it to do so. Neither do the courts have the right or the power to compel the insurer to pay the insured's estate money which, save for the statute of limitations, it was clearly obligated to pay to the beneficiary of record, Mrs. Uptegrove. Courts have no right or power to compel one party to pay money to another party, except by the processes and for the reasons authorized by law. In my judgment, the decision of the majority is wrong.

NUSS, District Judge, concurs in this dissent.

IZZIE GARSICK, APPELLEE, v. HATTIE V. DEHNER, APPELLANT.
15 N. W. 2d 235

FILED JULY 14, 1944. No. 31740.

1. **Contracts.** Mutuality of contract consists in the obligation on each party to do, or to permit something to be done, in consideration of the act or promise of the other.

2. **Specific Performance.** Inadequacy of consideration alone is no defense to an action for specific performance of a contract unless so great as of itself to furnish an irresistible inference of fraud.
3. **Contracts.** Ordinarily a unilateral mistake affords no ground for avoiding a contract although it may do so where it results in a complete difference in the subject matter so as to preclude existence of consideration or where it is caused by, or known to, the other party.
4. ———. Courts will not permit a party to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form.
5. **Specific Performance.** Specific performance should, in general, be granted, as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, where the ends of justice will be subserved thereby.

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

Votava & McGroarty, for appellant.

Carnazzo & Kaslow, contra.

Heard before SIMMONS, C. J., PAINE, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CHAPPELL, J.

This is an appeal from a judgment of the district court for Douglas county decreeing specific performance of a written real estate purchase contract. Appellant, hereinafter called defendant, contends that the judgment of the trial court is contrary to the law and the evidence; that the contract lacks mutuality; that plaintiff's conduct in its inducement precludes the aid of equity; and that a mistake in the matter of consideration to be paid avoids specific performance of the contract. We find that these contentions are without merit.

An examination of the record discloses that defendant is a woman of experience in business and property matters,

being the owner of three apartments and other real property in Omaha, Nebraska. She conducted a business of her own in Omaha for many years. One of the properties owned by her is the Mayart Apartment, the legal description of which is lot 19, block 9, J. I. Redick's Subdivision, an addition to the city of Omaha, as surveyed, platted and recorded. It is the property involved in this appeal.

The Byron Reed Company, realtors, had the exclusive rental management of the property, but it is admitted that the property was, and for many years had been, for sale upon open listing and not exclusively. At the time of the transaction involved the property was mortgaged for a balance of $11,226.81. It was purchased by defendant and her husband for $24,000 in 1930. In the intervening years it was reconditioned, and a new boiler, gas stoves, and electric refrigerators had been installed. The property was of brick-veneer construction. It was erected some 22 to 24 years ago. It had been for sale upon open listing many years at $27,500 without any offers at that price or approaching that price. Both by letter and in her testimony at the trial defendant indicated that she was willing to sell the property for $25,000, subject to the mortgage. The income from the property was comparatively low. Without any consideration being given to principal and interest payments, its annual earnings for the last six-year period ranged from $2,148.03 to as low as $491.19. The mortgage was reduced only $2,500 over a period of seven years. At the trial competent real estate men placed a value of from $20,000 to $24,500 upon the property.

With reference to the transaction at hand the City Loan Realty Company, realtors, submitted for plaintiff to defendant, through the Byron Reed Company, an offer of purchase for a consideration of $20,000, subject to the mortgage, which the offerer was to assume and agree to pay. The balance above the mortgage was to be cash. It was understood at all times that the Byron Reed Company was to share in the commission.

This offer was submitted by the Byron Reed Company to

defendant but it was rejected by her. Thereupon the Byron Reed Company orally suggested that the offer of plaintiff be raised $1,000. Thereafter it wrote the City Loan Realty Company a letter enclosing a form of purchase agreement to follow in making the new offer. The latter by use of this proposal drew the contract involved on January 31, 1943. It was prepared upon a "Uniform Purchase Contract" form used generally by real estate men in Omaha for many years. The form is printed with appropriate blank spaces for varying descriptions, consideration, and terms of purchase. The upper portion is the agreement to purchase which contains its terms and conditions. At the bottom is a space for signature of the purchaser, followed by form of receipt for earnest money and form of acceptance and agreement to perform the contract with space for signature of the seller. It differs from the Byron Reed Company's proposal in only minor particulars which are not of importance to this decision. As printed and typed the agreement to purchase, in so far as it is important here, reads: "I agree to pay for same Twenty One Thousand and no/100 ($21,000.00) Dollars, on the following terms, to wit: $100.00, deposited herewith as evidenced by your receipt attached below, and the balance cash, above the mortgage of about $11,226.81, on date of closing with interest at 5% per annum which purchaser assumes and agrees to pay." There were also provisions for prorating the taxes and insurance, adjustment of rents, and possession. In this form plaintiff signed the agreement to purchase and paid the $100 earnest money, subject to written approval and acceptance by defendant on or before February 10, 1943. The contract signed by both plaintiff and defendant is in evidence.

Defendant was out of the city at the time that plaintiff executed the agreement and an agent of City Loan Realty Company, in the presence of plaintiff and another, called defendant by telephone at St. Joseph, Missouri, on February 1, 1943. The evidence is that the agent told her in this conversation about the offer by plaintiff of $21,000, subject to the mortgage which the purchaser would assume and

agree to pay, leaving $9,000 or $10,000 cash net to her. Defendant denies that such matters were thus explained to her over the telephone, but she agreed to and did come to the offices of City Loan Realty Company on Thursday, February 4, 1943. There, defendant was handed the contract. She looked it over while she talked with an agent of the company. She testifies that she glanced over the contract but would not say whether she read it carefully all the way through. There is convincing evidence, however, that she was told at that time the amount remaining due upon the mortgage which the purchaser would assume and agree to pay, and the amount of cash she would receive above the mortgage. There is evidence also that she read the contract and said that it was a good deal. She admits that during the conversation she consented to an adjustment of $100 to plaintiff because of the shortage of one gas stove and one electric refrigerator; that she and the agent talked over the prorating of taxes and insurance and the adjustment of rents as of February 15, 1943; and that she authorized the company to get the abstract from the mortgagee for examination and to perfect its extension at her expense. She admits that she then signed the contract and delivered it to the agent. After defendant signed the contract a copy of it was delivered to the Byron Reed Company. It is stressed by defendant that plaintiff was guilty of offensive conduct in calling her over the telephone and otherwise dealing in part directly with her instead of exclusively with the Byron Reed Company, but under the circumstances presented here we find that the point is without merit.

When it came time to close the transaction plaintiff tendered complete performance, which was renewed at the trial, but defendant refused to perform, her chief contention being that there was a mistake on her part, by reason of the conduct of plaintiff, concerning the price and terms. That is, she insists that she understood and was told by plaintiff's agent that the price was to be $21,000 cash above the amount of the mortgage which plaintiff was to assume and agree to pay. However, we find, as did the trial court,

that the evidence and circumstances appearing in the record do not support this contention.

If there was any mistake or misunderstanding in the inception and execution of the contract it was only on the part of defendant. It was not a mutual mistake in any sense of the term. In this connection, the general rule is that, "Ordinarily, a unilateral mistake affords no ground for avoiding a contract, although it may do so where it results in a complete difference in subject matter so as to preclude existence of consideration, or where it is caused by, or known to, the other party," 17 C. J. S., sec. 143, p. 495.

There is no evidence which could support a finding that there was a complete difference in the subject matter so as to preclude existence of consideration. Upon the question of consideration the evidence is convincing that the price offered and received was adequate for the property. If it were not, there is an applicable rule controlling in this case to the effect that inadequacy of consideration alone is no defense to an action for specific performance of a contract unless so great as of itself to furnish an irresistible inference of fraud. *Moore v. McKillip,* 110 Neb. 575, 194 N. W. 465; *Price v. Fraser,* 119 Neb. 806, 231 N. W. 18.

We are convinced, as the trial court who heard and observed the witnesses must have been, that if there was any mistake it was not caused by plaintiff or known to him until claim of mistake was made by defendant just prior to or at the time of plaintiff's demand for performance. In this connection, it is generally held that courts will not permit a party to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form. *Von Knuth v. Ryan,* 107 Neb. 351, 186 N. W. 81; *Lincoln Joint Stock Land Bank v. Bexten,* 129 Neb. 422, 261 N. W. 845; 17 C. J. S., sec. 41f, p. 376, sec. 137, p. 487; 13 C. J., sec. 75, p. 277. As a matter of fact, the record herein is convincing that defendant knew full well all the terms and conditions of the contract from its inception.

Speaking generally, mutuality of obligation is an essential element of every enforceable agreement. However, "Mutuality of contract consists in the obligation on each party to do, or to permit something to be done, in consideration of the act or promise of the other. * * * Mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only." 13 C. J., sec. 179, p. 331. See, also, 17 C. J. S., sec. 100, p. 443.

It will be observed that the contract at bar is by its terms an unconditional offer made by plaintiff, in writing, to purchase the property for a stipulated price, upon plain and simple terms and conditions, which offer was unconditionally accepted, in writing, by the defendant who thereby agreed to sell upon those terms and conditions. Plaintiff had paid the earnest money and thereafter tendered complete performance. Both parties are bound by the contract and there is no want of mutuality. *Iske v. Iske*, 95 Neb. 603, 146 N. W. 918; *Abel v. Gill*, 95 Neb. 279, 145 N. W. 637; *Beard v. Morgan*, 143 Neb. 503, 10 N. W. 2d 253.

As was said by this court in *Bauer v. Bauer*, 136 Neb. 329, 285 N. W. 565: "The right to specific performance is ordinarily termed a matter of judicial discretion. *Clarke v. Koenig*, 36 Neb. 572, 54 N. W. 842; 25 R. C. L. 214, sec. 16. It is not discretionary in the sense, however, that it may be granted or denied at the will or pleasure of the judge. Pomeroy, Specific Performance of Contracts (3d ed.) sec. 35. It is governed by the elements, conditions and incidents that control the administration of all equitable remedies. Pomeroy, Equity Jurisprudence (2d ed.) sec. 2184. While no rule of absolute obligation and authority in all cases can be laid down (2 Story, Equity Jurisprudence (14th ed.) sec. 1026), it should, in general, be granted as a matter of course, of a written contract, cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, where the ends of justice will be subserved thereby. *Bennett v. Moon*, 110 Neb. 692,

194 N. W. 802; * * * . If the party seeking the relief has been guilty of any conduct offensive to the conscience, the remedy may, of course, be denied, under the familiar maxims of equity." See, also, *Beard v. Morgan, supra.*

We have searched the record and, in conformity with rules of law heretofore stated, find that plaintiff and his agents were not guilty of any conduct offensive to the conscience of an equity court, that the contract was not lacking in mutuality, and that there was no mistake affording ground for avoidance of an enforcement thereof. It follows that the judgment of the trial court was amply supported by both the law and the evidence, and it is hereby affirmed.

AFFIRMED.

CLARENCE F. FISHER, EXECUTOR, APPELLEE, V. STANDARD INVESTMENT COMPANY, APPELLEE: MARTIN FISHER ET AL., APPELLANTS, HOWARD FISHER ET AL., INTERVENERS, APPELLEES.

15 N. W. 2d 355

FILED JULY 21, 1944. No. 31734.

1. **Appeal and Error.** While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.
2. **Acknowledgment.** The certificate of an officer having authority to take acknowledgments cannot be impeached by showing merely that such officer's duty was irregularly performed.
3. ———. When the party executing a deed or mortgage knows that he is before an officer having authority to take acknowledgments, and intends to do whatever is necessary to make the instrument effective, the acknowledging officer's official certificate will be, in the absence of fraud, conclusive in favor of those who in good faith rely on it.

4. **Reformation of Instruments.** The rule that a conveyance, without a grantee capable of receiving the grant, is void does not apply to equitable rights growing out of such a conveyance.
5. **Executors and Administrators:** REFORMATION OF INSTRUMENTS. Where the grantee in a deed is named as the "Estate" of a person known to be deceased, and where it was the intent of the grantors and the grantee that the conveyance was to be to the executor of the estate, the equitable title passes to the executor thereby. Such a deed may be reformed in equity by inserting the executor as grantee, and when that is done, the legal title vests in the executor.

APPEAL from the district court for Buffalo county: ELDRIDGE G. REED, JUDGE. *Affirmed.*

O. A. Drake, for appellants.

Dryden & Jensen and *C. J. Mingus, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, YEAGER, CHAPPELL and WENKE, JJ.

SIMMONS, C. J.

In this action the grantee in a deed was named as the "Estate" of a person known to be deceased. The executor brings this action to reform the deed and to quiet title in him as executor. The trial court so decreed. We affirm the judgment of the trial court.

For some time prior to 1928, Martin Fisher was the owner and in possession of a quarter section of land in Buffalo county. It was the homestead of himself and his wife, Jessie. On February 28, 1928, he and his wife executed three promissory notes for $3,000 each, with interest coupons attached, payable to James H. Fisher. To secure the payment of the same, they executed and delivered a real estate mortgage on the land; James H. Fisher died, and the notes and mortgage came into the possession of this plaintiff as executor.

On January 27, 1936, no part of the principal debt had been paid, although long past due, and there was unpaid and delinquent interest due in the sum of approximately $2,500. On that date Martin and Jessie Fisher, as husband

and wife, executed and delivered a warranty deed to the executor, whereby, for the recited consideration of $10,750, they conveyed the land to "Estate of James H. Fisher" and the covenants also ran to "Estate of James H. Fisher." The conveyance showed the customary notarial acknowledgment. It was recorded April 6, 1936. The executor thereupon surrendered to Martin Fisher the notes, marked "paid by execution of deed SE¼-7-11-13," and the mortgage endorsed "paid by execution of deed to said premises this Jan 27, 1936 Clarence F. Fisher Executor Estate of James H. Fisher." Martin Fisher retained possession of the notes and mortgage, so endorsed, until the trial of this case when he tendered them to the plaintiff. Bearing the same date, there was a receipt issued bearing the signatures of the defendants Fisher, acknowledging receipt of the notes and mortgage from "Clarence F. Fisher, Executor of the Estate of James H. Fisher," in which they expressed an intention by the deed to convey "absolutely" and reciting that it was given for the protection and benefit of "Clarence F. Fisher" executor, etc.

At the same time, January 27, 1936, there was executed a contract between the "Estate of James H. Fisher" by the executor, as party of the first part, and Martin Fisher, as party of the second part, whereby it was agreed that if Martin Fisher paid the sum of $10,750 to the "party of the first part" on or before February 1, 1938, the land would be reconveyed to him.

At the same time, January 27, 1936, "The Estate of James H. Fisher," by written instrument, leased the premises to Martin Fisher from the date of the lease until March 1, 1938, for a crop and cash rent. Thereafter, a subsequent lease was entered into for the period March 1, 1938, to February 28, 1939. Thereafter, another lease was entered into for the period March 1, 1939, to March 1, 1940.

Martin Fisher undertook later to raise the necessary money to repurchase the land but was unable to do so, tendered a lesser sum to plaintiff, and it was refused.

Martin Fisher paid rent in cash and in crops to the plain-

tiff. It further appears that in October, 1940, the Fishers were ousted from possession by court order, although the nature of the proceedings and the order do not appear in the record.

The defendant, Standard Investment Company, was a judgment creditor of Martin Fisher. It caused execution to be issued and levied upon the premises and sale was advertised when plaintiff brought this action.

Plaintiff brought this action alleging a mutual mistake in the naming of the grantee in the deed, seeking a reformation of the deed to show "Clarence F. Fisher, Executor of the Estate of James H. Fisher, Deceased" to be grantee therein, and to restrain the defendants from asserting any right or title in the premises and to quiet title in him as such executor, and for equitable relief. A temporary injunction was issued against the Standard Investment Company and the sheriff.

Defendants Fisher answered, asserting ownership of the premises and that it was their homestead. They alleged that plaintiff required Jessie Fisher to sign the deed, or otherwise they would be "put off" the farm by March 1, 1936, and were promised "free use" of the premises for two years if Mrs. Fisher would sign; that she signed only in the presence of the husband and did not acknowledge the signing before the notary as her voluntary act and deed; and that she knew of no other negotiations. Martin Fisher alleged inducements to sign the deed, which he asserted had not been performed, and denied acknowledgment of the deed before the notary. He alleged that the deed was a nullity because of the grantee designation; that he paid money to plaintiff under threats of eviction and had never voluntarily vacated the premises. He offered to return the notes and mortgage, and prayed that title be quieted in him.

Heirs and legatees under the will intervened and prayed that the deed be reformed, as plaintiff prayed, and that title be quieted in them, subject to the rights of plaintiff as executor. To these pleadings answers and replies were filed.

The matter was tried. The trial court found generally

for the plaintiff and against the defendants, and against the interveners in so far as their prayer was at variance with the prayer of plaintiff's petition. The court decreed a reformation of the deed as prayed and quieted title in the plaintiff as against the defendants and interveners.

The defendants Fisher gave notice of intention to appeal and are the appellants here. The defendant Standard Investment Company, sheriff and interveners have made no appearance here. The plaintiff is appellee. The issues here are those presented between plaintiff and defendants Fisher.

Defendants make nine assignments of error. The first two may be considered together. They are that the trial court erred by failing to adjudge the deed to be void when defendants proved that they did not acknowledge it to be their voluntary act and deed before a notary. The testimony of the defendants was that they signed the deed in the presence of Clarence Fisher only; that the notary was not present; that they did not acknowledge the deed before him; and that it was not their voluntary act. Plaintiff's testimony was that the deed was signed by both grantors in the presence of the notary and Clarence Fisher; that the notary asked if it was their voluntary act and deed; that Martin Fisher replied in the affirmative; that Mrs. Fisher asked if she had to say that; that the notary explained to Jessie Fisher that this was a homestead and that necessarily she must say that it was her voluntary act and deed; that the notary told Jessie Fisher not to sign unless it was her voluntary act and deed; that the notary said he would sign if it was; that her reply was not remembered, but she said something indicating an affirmance, and the notary raised his hand and she raised her hand; and that the notary then attached his signature and seal in the presence of both grantors. A direct conflict in the testimony is presented. The trial court decided it in favor of the plaintiff. With the exception of the notary, the evidence is from interested witnesses. Under such circumstances, the rule long followed is: "While the law requires this court, in determining an appeal in an equity action involving questions of

fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Johnson v. Erickson,* 110 Neb. 511, 194 N. W. 670. See *Dvorak v. Kucera,* 130 Neb. 341, 264 N. W. 737; *Fisher v. Keeler,* 142 Neb. 728, 7 N. W. 2d 659. We agree with the trial court in its findings of fact.

It is the rule that: "The certificate of an officer having authority to take acknowledgments can not be impeached by showing merely that such officer's duty was irregularly performed. * * * When the party executing a deed or mortgage knows that he is before an officer having authority to take acknowledgments, and intends to do whatever is necessary to make the instrument effective, the acknowledging officer's official certificate will be, in the absence of fraud, conclusive in favor of those who in good faith rely on it." *Council Bluffs Savings Bank v. Smith,* 59 Neb. 90, 80 N. W. 270.

In *Bode v. Jussen,* 93 Neb. 482, 140 N. W. 768, this court said: "To hold that mortgagors can deny the acknowledgment of a mortgage and thereby defeat it, upon their naked assertion that a formal question was not asked, would open the door to fraud and perjury and make recorded acknowledgments a snare and a delusion. No one could safely deal with land on the faith and truth of public records if such a rule were to obtain." The same rule would obviously apply to acknowledgments to deeds. We see no error in the assailed findings of the trial court.

The third assignment is that the trial court erred in failing to adjudge the deed void because it was executed under duress and coercion. This refers to the testimony of the defendants Fisher that the plaintiff told them that if they did not sign the deed, he would put them off the place "in the spring," as testified to by Martin Fisher, or by "March 1st," as testified to by Jessie Fisher, and for that reason they signed the deed. The plaintiff's testimony, supported

by the defendants, was that this mortgage had been a repeated subject of conversation between them. Plaintiff testified that he asked for the deed; that because of the delinquencies he told the defendants that the heirs were demanding a foreclosure; that he was going to foreclose if the deed was not given; and that the defendants said they would give him the deed rather than to be foreclosed. The factual dispute here, tested by the above rules, is resolved, as did the trial court, in plaintiff's favor. When so determined, there is obviously neither duress nor coercion shown to avoid the deed.

The fourth and fifth assignments are that the trial court erred in failing to hold the deed void because executed by Martin Fisher as a result of false representations, and because of a failure of consideration as to Martin Fisher. The evidence does not support either of the assignments.

Defendants' sixth and seventh assignments are that the trial court erred in reforming a deed made to a "nullity" and naming as grantee therein an executor, who does not have capacity to "own" land, and by reforming a deed to correct a mistake without any evidence that the agreement expressed in the reformed instrument was concurrently in the minds of the parties at the time of its execution. The conclusion is inescapable that the parties to this deed intended that the plaintiff, as executor, was the grantee. Their testimony all points in that direction. What they did at the time shows it. Their conduct thereafter shows that they so construed the deed, until about the time this litigation began. The plaintiff, as executor, was in possession of the notes and mortgage and charged with their collection. The negotiations leading up to the deed were with him as executor. The notes and mortgage were surrendered to defendants by him. The three leases of the land were negotiated with him and rent was paid to him as executor. The contract of resale was one which the executor was expected to perform, and one which the defendants undertook to have performed by him on the basis of a compromise of the agreed consideration. The receipt was giv-

en for his "protection and benefit." Mrs. Fisher denied signing the receipt. Mr. Fisher testified that he signed her name to it about a week later. The entire evidence negatives this testimony. There is nothing in the evidence indicating an intent on the part of any of the parties that the conveyance was to the estate, as distinguished from the executor.

The argument of the defendants is that the estate, as such, is not a person in being who could take title, and that the deed is a nullity, citing 8 R. C. L., sec. 27, p. 953; 84 Am. St. Rep. 239. Assuming, but not deciding, that to be true, it does not necessarily follow that the beneficial title did not pass to the plaintiff as executor, nor that the deed cannot be reformed so as to express the true intent of the parties. The rule that a conveyance, without a grantee capable of receiving the grant, is void does not apply to equitable rights growing out of such a conveyance. 18 C. J., sec. 36, p. 159; 26 C. J. S., sec. 13, p. 185; *Black v. Beagle*, 59 Wyo. 268, 286, 139 Pac. 2d 439, 140 Pac. 2d 594, 148 A. L. R. 243, and note page 257. See *City Bank of Portage v. Plank*, 141 Wis. 653, 124 N. W. 1000, and *McCollum v. Loveless*, 185 Ga. 748, 196 S. E. 430, 187 Ga. 262, 200 S. E. 115, where equitable relief was granted under somewhat similar circumstances. In the *City Bank of Portage* case, *supra*, the Wisconsin court referred to cases where deeds ran to a partnership. This court was confronted with such a situation in *Schlake v. Healey*, 108 Neb. 35, 187 N. W. 427. During the course of the opinion, this court said: "It is quite generally held by the authorities that, where the partnership name is a fictitious one, and does not contain either the full name or the surname of any of the partners, an equitable estate only passes to the firm, the legal title remaining in the grantor. Such a deed may be reformed in equity by inserting the names of the individual partners as grantees, and this, when done, vests the legal title in the partners."

Applying the reasoning of these cases and the rules to the instant case, we conclude that the deed in question,

when executed and delivered by the defendants, passed the full equitable title to the plaintiff as executor; that the court properly reformed the deed to show the intent of the parties; and that when so done, the legal title also vested in the plaintiff as such executor. The land then became an asset of the estate in his hands to be distributed and dealt with as estate property. 24 C. J., sec. 708, p. 201; 33 C. J. S., sec. 268, p. 1284; *Battey v. Battey*, 94 Neb. 729, 144 N. W. 786.

It necessarily follows that the trial court did not err in quieting the title in the plaintiff as executor and did not err in denying the defendants a writ of assistance for possession of the land; and that defendants' eighth and ninth assignments asserting error in that regard are without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

DALE L. CRAMER, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.
15 N. W. 2d 323

FILED JULY 21, 1944. No. 31805.

1. **Criminal Law.** A plea in abatement which raises an issue of fact must be tried by a jury. If it raises only a question of law, the court may properly determine the issue.
2. ———. A defendant cannot properly dispute the record made by an examining magistrate in a preliminary hearing by a plea in abatement in the district court. If the findings and judgment of the examining magistrate do not correctly reflect the record, proper steps should be taken to correct it in the court where it was entered.
3. ———. A plea in abatement is a dilatory plea, not favored by the courts, which must be pleaded with strict exactness. Any material variance between the pleading and proof is fatal to the plea.
4. **Homicide.** An information charging murder in the first degree by the administration of poison, drawn in the form prescribed

by the court in *Davis v. State*, 116 Neb. 90, 215 N. W. 785, is sufficient to charge such offense.

5. **Criminal Law.** In a criminal case the trial court is invested with a broad judicial discretion in allowing or denying an application to require the state to produce written confessions, statements and other documentary evidence for the inspection of defendant's counsel before the trial. Error may be predicated only for an abuse of such discretion.
6. **Witnesses.** Communications not necessary and proper to the discharge of a physician's professional duties or services are not privileged within the meaning of the statute forbidding the disclosure of confidential communications between physician and patient.
7. **Criminal Law.** Whether a confession is admissible in evidence is in the first instance for the court, and, if the court determines as a matter of law that it was not voluntary, the confession should be rejected. Where the confession is received in evidence, its voluntary character is still a fact question to be determined by the jury.
8. ———. A confession otherwise voluntary is not affected by the fact that improper inducements had been previously made where it appears that such improper influences were not operating when the confession was made.
9. ———. An argument by a prosecuting attorney, which is based on the evidence and inferences drawn therefrom, does not ordinarily constitute misconduct.
10. **Homicide.** Evidence examined and *held* sufficient to sustain a conviction for murder in the first degree by the administration of poison.

ERROR to the district court for Harlan county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Anderson, Storms & Anderson and *Perry, Van Pelt & Marti*, for plaintiff in error.

Walter R. Johnson, Attorney General, H. Emerson Kokjer, Rush C. Clarke and *D. A. Russell, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CARTER, J.

Plaintiff in error, who will be hereafter referred to as the defendant, was convicted of first degree murder and

sentenced to serve the balance of his life in the state penitentiary. Defendant brings the case to this court for review.

The record shows that defendant was married to Ilene Malone on May 2, 1942, and that they thereafter moved onto and farmed the land upon which they were living at the time the defendant was charged with the crime of which he now stands convicted. On May 9, 1943, a daughter, Janice Mae Cramer, was born. In the early morning hours of June 11, 1943, Janice Mae Cramer died of strychnine poisoning. The body of the child was taken to Dr. K. C. McGrew of Orleans, who directed that the baby's stomach be removed and caused its contents to be examined. The analysis of the contents of the stomach revealed the presence of strychnine in a quantity sufficient to cause death.

The county attorney undertook an investigation of the case in the course of which he took statements from various members of the Cramer family. At this time defendant accounted for the presence of strychnine in the baby's stomach by stating that he and his father had previously purchased some strychnine to kill prairie dogs, that they had mixed about half the strychnine with oats and left the remainder in a bottle in the tool shed. It also appears that a quantity of the oats to which strychnine had been applied had been left in a sack in the tool shed, that they had become spilled and defendant had replaced them with his hands as he was on the way to do the evening milking, that he had wiped his hands on his trousers and proceeded to milk the cow which provided milk for the baby. Defendant's story was that in this manner the strychnine found its way into the baby's food and subsequently into its stomach.

Defendant was subsequently taken into custody and after considerable questioning he admitted that he put a pinch of strychnine in one of the baby's feedings. The confession was thereupon reduced to writing by an official court reporter and signed by the defendant after certain changes were made and authorized by him. A complaint charging

first degree murder was then filed in the county court, to which defendant in open court entered a plea of guilty. The evidence further shows that defendant's father talked with defendant in the county jail in the presence of witnesses, at which time defendant admitted the commission of the crime in substantially the same language as was contained in the written confession.

The record further shows that in September or October, 1942, defendant learned that his wife was pregnant. He admits that he persuaded his wife to submit to an abortion and that they approached two physicians for the purpose of having such an operation performed. Both physicians advised against any such operation and refused to have anything to do with it. It also appears that defendant was farming an 811-acre farm, which he had recently contracted to purchase from his father, that he was unable to hire sufficient help and that his wife, immediately prior and after the birth of the child, had been able to help him much less with the chores and farm work. He complained about the child keeping him awake nights and evinced other evidences of irritation because of the baby.

It is shown by the evidence that the child was being fed a combination of prepared baby food and cow's milk. It was the custom of the mother each evening to prepare a number of feedings at one time, placing each feeding in a separate bottle. The baby was fed at ten p. m. on the evening previous to its death without showing any ill effects therefrom. It was fed again at two a. m. the next morning and it became ill very shortly thereafter. There is evidence in the record that the child had spasms or convulsions between the time it was fed and prior to its death 30 or 40 minutes later. This, however, was denied in the oral testimony produced at the trial.

There are many discrepancies and changes in the various statements made by the defendant which will not be related here, except as they may become pertinent to matters under discussion. The foregoing is a general statement of the evidence upon which a verdict of guilty was found by the jury.

The defendant alleges that the trial court committed reversible error in refusing a jury trial on the issues raised by the plea in abatement filed by him. The plea in abatement requested the court to quash the information for the reason that no preliminary hearing was had and that no waiver thereof had been made.

The record shows that on August 6, 1943, defendant was taken before the county judge of Harlan county, where a complaint charging first degree murder was read to him and he was asked whether he was guilty or not guilty. The judgment of the county court binding the defendant over to the district court for trial recites the following: " * * * The complaint was read to said defendant and he was then fully informed of the nature of this hearing and of his constitutional rights and that he had the right to employ and be represented by an attorney and that he would be given a continuance of this hearing for a reasonable time to prepare for hearing, to all of which the defendant stated that he was ready for hearing at once, that he fully understood the nature of the offense charged in said complaint, and thereupon voluntarily entered his plea of 'GUILTY' thereto. Upon consideration of said plea and the files and the evidence and the whole of said preliminary examination the Court finds that said crime has been committed and that there is probable cause to believe the defendant guilty thereof. * * * ."

The defendant testified that he was taken before the county judge, the complaint read to him, but that he did not answer either "guilty" or "not guilty" thereto. Many witnesses were called who testified that defendant answered "guilty" to the complaint in the manner recited in the judgment entered by the county judge. The defendant contends, however, that the evidence raises a question of fact which only a jury can properly determine.

A plea of abatement is a dilatory plea, not favored by the courts, which must be pleaded with strict exactness. The instant plea purports to dispute the findings and judgment of the county court. It is clearly the law of this state

that if a plea in abatement raises an issue of fact it must be determined by a jury. If it raises only a question of law, the court may properly determine it. In cases of prosecution by information, when it is claimed there was no preliminary examination of the accused, the question may be determined by a plea in abatement. *Cowan v. State,* 22 Neb. 519, 35 N. W. 405. But the record shows in the present case that defendant was taken before the county judge of Harlan county, the complaint read to him and inquiry made as to his guilt. The finding and judgment of the county court were that defendant entered a plea of guilty and thereby made the taking of further evidence unnecessary. The defendant cannot properly dispute this record by a plea in abatement in the district court. If the findings and judgment of the county court do not correctly reflect the record, proper steps should be taken to correct it in the county court. An issue of fact cannot be made thereon in the district court. Consequently, we are required to say that the record shows as a matter of law that defendant was accorded a preliminary hearing and that no error was committed in refusing a jury trial as claimed by the defendant.

In *Turk v. State,* 7 Ohio *240, pt. 2, the court aptly said: "There is, however, another and still more fatal objection to these pleas. They contradict the record; and it is a principle of law, familiar with all, that a record is proved by itself, and is of such validity that it cannot be proved per notiora, and no fact can be averred against it."

In *State ex rel. Attorney-General v. Savage,* 89 Ala. 1, 7 So. 7, the court in a case similar in principle said: "In *Sparrenberger v. State, supra,* (53 Ala. 481) it was held, that inasmuch as such objections do not go in abatement, but to the legal existence of the indictment, the motion to quash and strike from the files must be addressed to the court, upon whose records, or into whose files, the paper has been introduced without warrant of law, before pleading to the indictment. Such motion is an invocation of the inherent power of the court over its own records, to make

them speak the truth. That court is clothed with exclusive jurisdiction and power to expunge it from the records. When the proceeding is not void, no other court has authority to declare that the record speaks a falsehood. Its verity can not be collaterally assailed. This court is without authority to quash an indictment, or strike a paper from the files of the Circuit Court, however illegally introduced, unless in the exercise of its appellate or supervisory jurisdiction. So long as it remains a part of the record, we must, except on appeal or writ of error, receive and regard it as absolutely true." See, also, *Maher v. State,* 144 Neb. 463, 13 N. W. 2d 641.

As a matter of law, the plea in abatement should have been overruled and, consequently, no error prejudicial to the rights of the defendant was committed when a jury trial of the issues raised by the plea was denied him.

Defendant contends that the information is insufficient to charge murder in the first degree. The material part of the information is as follows: " * * * In Harlan County, Nebraska, on June 11, 1943, Dale L. Cramer, defendant, with intent to take the life of and kill Janice Mae Cramer, did feloniously and purposely cause to be administered to her strychnine poison, and as a result thereof she died on June 11, 1943. Defendant thus committed murder in the first degree * * * ." This information is in the exact form prescribed by this court in *Davis v. State,* 116 Neb. 90, 215 N. W. 785. No other authority need be cited to establish the sufficiency of the information. See *Nichols v. State,* 109 Neb. 335, 191 N. W. 333; *Cowan v. State,* 140 Neb. 837, 2 N. W. 2d 111.

The defendant contends that the trial court erred in denying his application to inspect and make copies of the purported confession and other statements and documents in the possession of the state. We do not appear to have passed directly upon the respective rights of the parties in a matter of this kind. We think that when a prosecution is based upon a written instrument, as in a forgery case, the defendant is entitled to inspect and make copies of such

instrument under such conditions as the trial court may prescribe. If a prosecution is based upon the correctness or incorrectness of certain records, such as is ofttimes the case in a prosecution for embezzlement, the examination of such records by the defendant should be granted. But as to all statements and documents not admissible in evidence in chief, and obtained for impeachment or other purposes not going to the merits, the defendant has no basis for demanding an inspection of them. As to the right of a defendant to demand an inspection or a copy of a written confession made by him, the authorities do not seem to be in accord. The rule generally is that a confession need not be so produced. However, we think the trial court should order a written confession produced where the interests of justice require. If there be a question whether the signature thereto is forged, or if the written confession is necessary to a proper determination of the mental condition of the defendant at the time the confession was made, or for other reasons which tend toward establishing the merits of the litigation, we are of the opinion that such an application should be allowed. Where the only reason for the production of a written confession for the inspection of a defendant is that it would aid generally in preparing the defense, no basis exists for requiring the state to produce it. The defense counsel in a criminal prosecution have no right to inspect or compel the production of evidence in the possession of the state unless a valid reason exists for so doing. The defendant has no inherent right to invoke this means of examining the state's evidence merely in the hope that something may be uncovered which would aid his defense. In the administration of these rules the trial court has a broad judicial discretion and it is only when such discretion is abused that error can be based thereon.

In the present case, medical experts were permitted to read defendant's confession prior to the trial as a part of the evidence to be considered in determining the mental condition of the defendant at the time the confession was made. Defendant's counsel were given a copy of the con-

fession four days before it was offered in evidence by the state. Under this state of the record the trial court properly safeguarded the rights of the defendant with reference to defendant's application to inspect the confession and other statements and documents in the possession of the state.

Defendant urges that the trial court erred in permitting Dr. McGrew to testify that defendant requested him to perform an abortion on his wife, for the reason that such communication was privileged. Defendant's contention is without merit. This court has held many times that communications not necessary and proper to the discharge of the physician's professional duties or services are not privileged within the meaning of the statute forbidding the disclosure of confidential communications between physician and patient. *Nichols v. State, supra; Koskovich v. Rodestock*, 107 Neb. 116, 185 N. W. 343; Underhill, Criminal Evidence (3d ed.) sec. 297.

Defendant contends that the court erred in receiving the confession in evidence for the reason that the evidence shows that it was not voluntary. The record shows that the defendant was taken into custody on August 6, 1943, and that he was interrogated during the forenoon of that day. During this inquiry a deputy state sheriff made the following statements: "Tell the truth and we recommend leniency; but if you are bull-headed and won't admit the truth, we take it into court" and "You have your chance either to admit it now and we recommend leniency to the judge, or hold you to the fall term of court and jury trial." We quite agree with defense counsel that if the foregoing statements induced the confession it could not be properly admitted in evidence. The state recognized this in the presentation of its opening statement to the jury wherein the county attorney said: "and, by the way, there were some statements made by Mr. Clark, the deputy State sheriff, which were improper, and which the State does not authorize. However, gentlemen, I can say that, fortunately, the statements had no effect whatever upon this defendant."

The record shows that defendant was not influenced by the deputy state sheriff. He did not confess or even weaken his story during the forenoon during which the statements were made. The confession was obtained in the afternoon at which time no inducements of any kind were made. It is evident from the record that the reason for making the confession at the time it was made was to prevent the officers from going out and questioning his wife about the matter. In the written confession subsequently taken by the county attorney with the assistance of an official court reporter, the defendant was asked: "There have been no promises of rewards of any kind for your making this statement?" and he answered "No."

The record shows that oral confessions made by the defendant were received in evidence without objection on the part of the defendant. In the early afternoon he told the state sheriff and his deputy that he had taken a pinch of strychnine from the bottle in the tool shed, carried it into the house, and put it in one of the baby's milk bottles. This was not objected to. Another confession was made in the county court and no objection was made to this evidence on the ground that the confession was not a voluntary one. Another oral confession was offered in evidence without objection on the occasion of the defendant's father visiting him in the jail immediately following the preliminary hearing, at which time the defendant repeated substantially the same story as was contained in the written confession received in evidence. This evidence tends to support the state's claim that the evidence sustains the voluntary character of the confession. Clearly, the most that can be said concerning the question whether the confession was voluntary is that it was a question of fact for the jury to determine. The jury determined the question adversely to the claims of the defendant upon evidence which amply sustains their finding that the confession was voluntarily made.

Whether a confession is admissible in evidence is in the first instance for the court, and, if the court determines that it was not voluntarily given, the confession should be

rejected. Where the confession is received in evidence, the question whether it was voluntarily made is still a question to be decided by the jury.

It is urged, however, that the promise of leniency extended in the forenoon, though it failed to induce a confession, continued sufficiently coercive at the time the confession was made in the afternoon so as to require its rejection as having been involuntarily made. We do not agree with this conclusion. There is ample evidence in the record that the promises of leniency extended in the forenoon had no effect whatever on the defendant. A confession otherwise voluntary is not affected by the fact that improper inducements had been previously made where it appears that such improper influences were not operating when the confession was made. Under such circumstances the question is one for the jury, and where, as here, the jury have determined the question upon conflicting evidence, their finding will not ordinarily be disturbed on appeal. *Shepherd v. State,* 31 Neb. 389, 47 N. W. 1118; *King v. State,* 108 Neb. 428, 187 N. W. 934; *Lewis v. United States,* 74 Fed. 2d 173; *Lyons v. State,* (Okla. Cr.) 138 Pac. 2d 142; *Lyons v. State of Oklahoma,* 322 U. S. 596, 64 S. Ct. 1208.

We have examined the instructions and find that the court fairly and impartially submitted the question of the voluntary character of the confession to the jury. It appears that the rules prescribed by this court in *Schlegel v. State,* 143 Neb. 497, 10 N. W. 2d 264, were meticulously followed by the trial court. No error is found in the admission of the confession in evidence or in the manner of its submission to the jury by the trial court.

Defendant complains of the misconduct of the county attorney in his argument to the jury. During the course of the argument the county attorney stated that there were only two people who could possibly be involved in the crime, the defendant and his wife, and when Dale Cramer comes into court and pleads not guilty he thereby, by inference, accuses his wife of first degree murder. The county attorney also argued that if defendant goes out of this court a

free man, then Ilene Cramer, by inference, will be branded as the murderess of this child. We do not think this line of argument constitutes error. The statements were deductions that could properly be made from the evidence. Each statement complained of contained within it language showing that it was a mere inference to be drawn from the evidence. It is not probable that a jury sworn to try the case on the evidence and the law applicable thereto would mistake the argument of counsel as evidence, or be misled thereby to defendant's prejudice. At any rate, upon objection being made to this line of argument, the trial court admonished the jury that the attorneys had the right to discuss the facts and inferences therefrom and that it was for the jury to say whether those facts were proved and whether the inferences were correct. Under the circumstances shown, the trial court amply protected the rights of the defendant with reference to the alleged misconduct of the county attorney in his argument to the jury.

Finally, the defendant contends that the evidence is insufficient to show beyond a reasonable doubt that a crime was committed and that defendant was the perpetrator. We think the record establishes beyond a reasonable doubt, as the jury found, that defendant put strychnine in the baby's food and thereby caused its death. That defendant did not want the baby and attempted to prevent its arrival by having an abortion performed upon his wife is shown by the record. The opportunity to commit the crime was present and all the circumstances integrate themselves into confessions made by the defendant. The story told by the defendant endeavoring to account for the presence of strychnine in the baby's stomach contains many unexplained contradictions. Assuming that it was possible to transmit into the pail of milk, in the manner described by the defendant, the quantity of strychnine which the contents of the baby's stomach indicated was contained therein, no satisfactory explanation appears why the baby was not taken ill after its ten o'clock feeding. Certainly, if the pail of milk from which the baby's milk was taken was poisoned

with strychnine in the manner described by the defendant, the baby would have shown signs of illness after the ten p. m. feeding. The only logical conclusion is that defendant placed a pinch of strychnine in one of the baby's bottles, just as he said he did in his confession, and when the mother of the child unsuspectingly fed that bottle of food to the baby at the two a. m. feeding, the death of the child followed within 30 or 40 minutes thereafter. The jury evidently believed this version after seeing and hearing the witnesses and examining all the evidence, and we think they were amply justified by the evidence in doing so.

We have examined all other assignments of error and find that they are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF CLEM HERGOTT DOING BUSINESS AS NEBRASKA TRANSPORT SERVICE.

CLEM HERGOTT, DOING BUSINESS AS NEBRASKA TRANSPORT SERVICE, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE: LEROY ANDERSON ET AL., INTERVENERS, APPELLEES.

15 N. W. 2d 418

FILED JULY 21, 1944. No. 31782.

1. **Public Service Commissions.** Nebraska state railway commission is a constitutionally created body, and, under section 20, art. IV of the Constitution, it is endowed with powers and duties which include "the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."
2. **Carriers.** In conformity with the constitutional provision, the legislature has the right to prescribe how the Nebraska state railway commission may proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate.
3. ———. The show-cause order in the instant case is sufficiently comprehensive to acquaint the carrier with the nature of the

proceedings. It is not the name given to the pleading but whether the person charged was apprised of the charge against him.

4. Statutes. All statutes relating to the same subject are considered parts of an homogeneous system; so, too, all statutes *in pari materia* must be taken together and construed as if they were one law and effect be given to every provision.

5. Carriers. The Nebraska state motor carrier act (Comp. St. Supp. 1941, sec. 75-222 to and including sec. 75-238) places on the Nebraska state railway commission the duty to regulate common carriers by motor vehicles, and to that end the commission may establish reasonable requirements with respect to continuous and adequate service. Comp. St. Supp. 1941, sec. 75-222.

6. ———. Section 75-228(d), Comp. St. Supp. 1941, provides that any certificate of public convenience and necessity, issued under such section shall specify the service to be rendered, the routes over which, and the territory within which, the carrier is authorized to operate; and "there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require * * * ." Such section does not confer upon the commission continuing jurisdiction to change, suspend, or revoke, in whole or in part, a certificate of public convenience and necessity.

7. ———. The power to attach terms, conditions and limitations granted by section 75-228(d), Comp. St. Supp. 1941, is inadequate to permit what, in effect, is a modification of the separate provision of the act, section 75-231, Comp. St. Supp. 1941.

8. Statutes. Section 75-231, Comp. St. Supp. 1941, is a special statutory provision with regard to a particular subject and, as such, controls the general provisions with regard to such subject.

9. Carriers. The language appearing in section 75-231, Comp. St. Supp. 1941, "after notice and hearing, be suspended, changed or revoked in whole or in part for wilful failure to comply with any provisions of this Act or with any lawful order, rule or regulation of this Commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate" makes the requirement that the suspension, change or modification of the certificate, in whole or in part, must be for willful failure to comply with any provisions of this act, or with any lawful order, rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate, and an order of the commission which does not include such a finding of willful violation is irregular and will be set aside on appeal.

APPEAL from the Nebraska State Railway Commission: *Reversed.*

Baldwin & Pike and *R. E. Powell,* for appellant.

Walter R. Johnson, Attorney General, Edwin Vail and *W. F. Manasil, contra.*

Heard before SIMMONS, C. J., PAINE, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

MESSMORE, J.

This is an appeal from an order of the Nebraska state railway commission, changing and revoking, in part, the certificate of public convenience and necessity, issued to Clem Hergott, doing business as Nebraska Transport Service, Hubbell, Nebraska. For convenience, the Nebraska state railway commission will be hereinafter referred to as the commission; Clem Hergott, doing business as Nebraska Transport Service, as appellant; and Ray Peake, doing business as Peake Oil Company of Hubbell, Nebraska, will be referred to as Peake.

Prior to the enactment of chapter 142, Laws 1937, the Nebraska motor carrier act, Peake, as a carrier, transported petroleum products. On November 30, 1937, the commission issued to Peake a certificate of public convenience and necessity under application No. M-2332. Section 75-228(d), Comp. St. Supp. 1937, provided that under such circumstances Peake would be required only to show the operations previously performed by him on April 1, 1936, in keeping with the "grandfather" clause contained in section 75-228(d), *supra,* and the certificate of public convenience and necessity was issued under the application, No. M-2332. The authorized operation granted Peake as a common carrier for hire in intrastate commerce was the transportation of petroleum products exclusively and specifically. The route or territory authorized was: "Irregular routes from Hubbell and Superior, to and from Orleans and Chester, and occasionally to and from Oshkosh and Lamar and Omaha, and various points in the State at large."

Appellant filed application No. M-6368 with the commission June 25, 1940, requesting that the certificate of public convenience and necessity, previously issued to Peake, be transferred to him. On July 23, 1940, the commission issued a certificate of public convenience and necessity to appellant, authorizing operation as a common carrier by motor vehicle for hire in intrastate commerce. This certificate granted the appellant the exact and identical authority previously granted to Peake.

On June 12, 1942, an order to show cause was entered against the appellant, to appear June 30, 1942, and show cause, if any there be, why his certificate should not be suspended, revoked or altered for abandonment of service and cessation of operations over all, or a part of, the territory, and for failure to comply with the lawful rules and regulations of the commission, and for willful failure to comply with the provisions of the Nebraska motor carrier act and with the lawful orders and regulations promulgated thereunder. Hearing was had on July 15, 1942. On September 11, 1942, an examiner's report was filed, recommending that the order entered on June 12, 1942, be vacated in part and sustained in part, and the certificate issued to appellant to be altered to read: "Service Authorized: Petroleum products in bulk. Route or Territory authorized: Irregular routes from Superior as a point of origin, to Fairbury, Reynolds, Benedict and Bradshaw as points of destination." Exceptions to the order were filed, argument had thereon November 4, 1942, before the commission en banc; exceptions were overruled on December 15, 1942. The commission approved the order, and further ordered appellant to forthwith cease and desist all operations as a common carrier of petroleum products in Nebraska intrastate commerce except in conformity with the certificate as modified. July 15, 1943, motion for rehearing was filed, argued before the commission en banc September 29, 1943, and overruled October 7, 1943; hence this appeal.

In the 1937 session of the legislature an act was passed, commonly referred to as the Nebraska motor carrier act.

Comp. St. Supp. 1937, secs. 75-222 to 75-238, inclusive. Amendments of a minor nature have been made to the act as originally passed, but it is now substantially the same in form. Comp. St. Supp. 1941.

The commission is a constitutionally created body. Section 20, art. IV of the Constitution, provides in part: "The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

In conformity with such constitutional provision, the legislature has the right to prescribe how the commission shall proceed and what authority it may exercise in granting certificates of public convenience and necessity for operation of motor vehicles for hire intrastate.

As said in *Enyeart v. City of Lincoln,* 136 Neb. 146, 285 N. W. 314, "All statutes relating to the same subject are considered as parts of homogeneous system * * * ." And in *Steeves v. Nispel,* 132 Neb. 597, 273 N. W. 50, this court said: "So too, all statutes *in pari materia* must be taken together and construed as if they were one law, and, if possible, effect be given to every provision." Citing *Hendrix v. Rieman,* 6 Neb. 516, and other cases. See, also, *O. G. Pierce Co. v. Century Indemnity Co.,* 136 Neb. 78, 285 N. W. 91; *Lennox v. Housing Authority of City of Omaha,* 137 Neb. 582, 290 N. W. 451. In conformity with the foregoing authorities, we consider the Nebraska motor carrier act.

The act recites a policy to "regulate transportation by motor carriers * * * in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical and efficient service * * * develop and preserve a highway transportation system, properly adapted to the needs of the commerce of Nebraska; * * * ." Comp. St. Supp.

1941, sec. 75-222. It places upon the commission the duty to regulate common carriers by motor vehicle, and to that end the commission may establish reasonable requirements with respect to continuous and adequate service. Comp. St. Supp. 1941, sec. 75-222.

The appellant predicates error in that the commission acted contrary to law by changing and revoking, in part, the certificate of public convenience and necessity held by him, and in failing to conform to the provisions of section 75-231, Comp. St. Supp. 1941. The commission contends that the certificate of public convenience and necessity, once issued, is not final, but rather that the commission has continuing jurisdiction over any certificate of public convenience and necessity which it may issue by the express terms of section 75-228(d), Comp. St. Supp. 1941, the applicable portion of which reads: "Any certificate issued under this Section shall specify the service to be rendered and the routes over which the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which such carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, * * * ."

Section 75-228(d) is similar in language to, and appears to have been copied in part from, the federal motor carrier act of 1935, 49 U. S. St. at Large, part I, ch. 498, sec. 208 (a), 49 U. S. C. A. sec. 308(a), and is the same for all practical purposes.

Section 75-231, Comp. St. Supp. 1941, cited by the appellant as constituting the power of the commission to change, revoke or suspend a certificate of public convenience and necessity, upon which appellant relies, reads as follows: "Permits and certificates shall be effective from the dates specified therein and shall remain in effect until terminat-

ed as herein provided. Any such permit or certificate may, upon application of the holder thereof, in the discretion of the Commission be revoked or may, upon complaint or on the Commission's own initiative, after notice and hearing, be suspended, changed or revoked in whole or in part for wilful failure to comply with any provisions of this Act or with any lawful order, rule or regulation of this Commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate." The foregoing section is similar in language and appears to have been copied in part from the federal motor carrier act of 1935, 49 U. S. St. at Large, part I, ch. 498, sec. 212(a).

The commission calls attention to *Effenberger v. Marconnit*, 135 Neb. 558, 283 N. W. 223. At page 563 this court said:

"We necessarily conclude that a certificate of convenience and necessity is in the nature of a permit or license and that it is not property in any legal or constitutional sense. It is a mere license that can be amended or revoked by the power authorized to issue it. Such being the case, it is personal in its character, is not transferable, and does not pass by succession. It is purely a regulatory measure that can vest no property right in the holder. This being true, the railway commission has the sole power to grant, amend, deny, revoke or transfer a certificate of (public) convenience and necessity."

Appellant cites No. MC-16670, *Smith Bros. Revocation of Certificate*, 33 M. C. C. 465. The Interstate Commerce Commission had before it the consideration of the revocation of a certificate. Certain complainants contended that respondents had abandoned certain of their operations, and that, due to a provision in the certificate which required that the carrier should continue to perform service in conformity with such certificate, the rights of Smith Brothers were automatically forfeited when they ceased to perform such services. In this connection section 208(a), 49 U. S. St. at Large, part I, ch. 498, 49 U. S. C. A. sec. 308(a), was cited. This section of the statute for all practical purposes

is analogous to section 75-228(d), Comp. St. Supp. 1941. On page 471 of the *Smith Bros.* case the commission said:

"The power to attach terms, conditions, and limitations granted by the above section (section 208(a), *supra,*) is a broad one, but it is questionable whether it was intended that we should regulate service through 'terms, conditions, and limitations,' in view of the fact that in section 204(a)(1) (49 U. S. St. at Large, part I, ch. 498, setting forth the duty of the commission to regulate common carriers, which, for all practical purposes, is analogous to section 75-225, Comp. St. Supp. 1941), we are given the power to 'establish reasonable requirements with respect to continuous and adequate service.' Assuming but not determining that we can regulate service through 'terms, conditions, and limitations,' even such a broad power is inadequate to permit what in effect is a modification of a separate provision of the act. (See 49 U. S. St. at Large, part I, ch. 498, sec. 212(a), which language is identical with section 75-231, Comp. St. Supp. 1941, as heretofore quoted.) The United States Supreme Court has frequently held that the Commission is an agency of limited powers and authority; that, while Congress may delegate to the Commission certain of its own powers and authority, the exercise of such delegation does not extend beyond expressed enactment or its fairly implied inferences; and that important powers should not be read into the act by implication but should be conferred in clear and unmistakable terms." Citing cases. The commission further said: "We have also found that, in the absence of specific language, only the most unmistakable evidence of the intention to confer upon us (the commission) the power to act under given circumstances would warrant the assumption of such power through our own construction of the act. *Wisconsin R. Comm. v. Chicago & N. W. Ry. Co.*, 87 I. C. C. 195.

"It therefore is first necessary to ascertain whether Congress intended by the words 'terms, conditions, or limitations,' to empower us (the commission) to include self-executing forfeiture provisions in certificates in view of the provisions contained in section 212(a)."

One of the questions before the commission in the foregoing case was whether, assuming that the commission would find that respondents ceased all operations, such cessation automatically, and without further proceedings on the commission's part, constitutes a forfeiture and termination of the certificate. In connection with this question section 208(a), *supra,* was considered as the authority to terminate the certificate. Likewise, in the instant case, the commission relies on section 75-228(d), Comp. St. Supp. 1941, and contends that under such provision the appellant's certificate may be changed and that the jurisdiction is continuing; so practically the same question was involved in the *Smith Bros.* case, and especially in view of the consideration of section 204(a) (1), *supra,* analogous to section 75-225, Comp. St. Supp. 1941.

There is no contention made by appellant that the commission is not privileged to suspend, change or revoke, in whole or in part, a certificate of public convenience and necessity. The contention is that, in order to do so, the commission must proceed under section 75-231, Comp. St. Supp. 1941. Referring again to the *Smith Bros.* case, the commission said that the word "terminate", appearing in section 212(a), *supra,* (and such word appears also in section 75-231, *supra,*) "is a technical word to describe the end or termination of a period." Therefore, section 212(a), *supra,* (and it may properly be said section 75-231, *supra,*) provides one method for terminating a certificate and that is by revoking it. In giving the interpretation to section 212(a), *supra,* the commission in the *Smith Bros.* case, said:

"In our opinion, the language (of the section) * * * is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us (the commission) only on the conditions, and according to the procedure, therein specifically provided. * * * but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. * * * To hold that under section 208(a) we have the power to include in certificates self-executing for-

feiture terms, conditions, or limitations would make section 212(a) merely surplusage and would wipe out the stability and certainty with respect to operating rights of common carriers by motor vehicle required in the public interest and contemplated by the act."

Section 75-228(d), Comp. St. Supp. 1941, does not make reference to the provisions of certificates themselves. It states that the commission has the power to attach to the exercise of the privileges granted by the certificates such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require. Certain general orders have been issued by the commission in keeping with such reasonable terms, conditions or limitations of such privileges as the public convenience and necessity may from time to time require. Such are reflected by General Order 81, in accordance with section 75-232, Comp. St. Supp. 1941, governing the filing and approval of policies of insurance, qualifications of carriers, self-insurers, filing of other securities or agreements, conditioned to pay all judgments recovered against all motor carriers for bodily injuries to, or the death of, any person, resulting from the maintenance or negligent operation of motor vehicles under certificates or permits, and for the loss or damage to property of others; regulations requiring common carriers to compensate shippers for damage in transit. Motor tariffs and supplements thereto have been adopted and published; providing a method for computing distances to and from all points and places; forms of freight bills have been standardized, and other matters.

It will be further noted that section 75-228(d), Comp. St. Supp. 1941, does not contain the words "terminate," "revoke," "change," or "suspend," a certificate of public convenience, in whole or in part. Section 75-231, *supra*, provides (1) that a certificate may be revoked in the discretion of the commission upon application of the holder; (2) the commission may in its discretion upon complaint, or upon its own initiative, suspend, change or revoke the certificate, in whole or in part, "for wilful failure to comply with

any provisions of this Act or with any lawful order, rule or regulation of this Commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate." It will be noted that the language, "any term, condition or limitation of such permit" obviously refers to section 75-228(d), Comp. St. Supp. 1941. The commission has specified terms, conditions or limitations with reference to certificates, which are incorporated in the rules and regulations adopted by the commission as provided for in section 75-225, Comp. St. Supp. 1941.

The question next arises as to whether or not the order to show cause in the present case is sufficient and complete.

The fundamental point is not the name given to the pleading, but whether appellant was apprised of the charge against him. The show-cause order was sufficiently comprehensive to acquaint appellant with the nature of the proceedings. However, in compliance with section 75-231, Comp. St. Supp. 1941, there must be a willful failure on the part of the carrier to comply with the provisions of this act, or with any lawful order, rule or regulation of this commission, promulgated thereunder, or with any term, condition or limitation of such certificate. The commission's order, revoking in part the certificate of public convenience and necessity of the appellant, and changing the certificate, did not contain a finding of willful failure to comply with any provisions of the act, etc. By statute, willfulness is one of the essential facts to be determined by the commission before it possesses the power to revoke, in whole or in part, a certificate of public convenience and necessity. Because a violation was found in the commission's findings, it does not follow that it included a willful violation.

In the case of *State ex rel. Northeast Transportation Co. v. Abel*, 10 Wash. (2d ser.) 349, 116 Pac. 2d 522, while the statutes involved are not the same, but similar in import, the assignment of error is whether or not the order to show cause conferred jurisdiction on the department to revoke the certificate of public convenience and necessity, and it

was held that an order to show cause was a sufficient pleading and notice thereon and the hearing sufficient. But, upon the proposition that under the statute there must have been a willful violation of a departmental order, and the findings of the department must clearly indicate such willful violation, the order did not contain the last two elements mentioned, and upon failure of the department to make a finding as to whether its order was willfully violated it was held to be fatal as to its validity.

Under the Nebraska statute, willfulness is one of the essential facts to be determined by the railway commission before it can properly revoke a certificate of public convenience and necessity. The fact that a violation was found to exist does not meet the requirements of the statute. When a finding of willfulness is not made, the order of revocation is irregular and will, on appeal, be vacated and set aside.

It will be noted that section 75-231, Comp. St. Supp. 1941, deals specifically with suspension, change or revocation, in whole or in part, of a certificate of public convenience and necessity "for wilful failure to comply with any provisions of this Act," and no other provision of the Nebraska motor carrier act covers the same subject matter except by inference or indirectly. Therefore, section 75-231 must be considered a special statutory provision with regard to a particular subject and, as such, controls the general provisions with regard to such subject. *City of Grand Island v. Willis*, 142 Neb. 686, 7 N. W. 2d 457; *Dawson County v. Whaley*, 134 Neb. 509, 279 N. W. 164.

We hold that the commission, in order to revoke, change or suspend a certificate of public convenience and necessity, must proceed in accordance with the provisions of section 75-231, Comp. St. Supp. 1941, and, should the commission, after hearing, revoke, change or suspend the certificate, it must do so for willful failure to comply with the provisions of the act or with any lawful rule or regulation of the commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate. This hold-

ing is not in conflict with *Effenberger v. Marconnit, supra,* because this provision of the statute in no sense considers a certificate of public convenience and necessity a property right, but recognizes that it may be changed, suspended or revoked, in whole or in part, by its creator, the commission. The section simply designates the proper procedure to be followed, should the question of revocation, in whole or in part, or a change or suspension of a certificate of public convenience and necessity, arise.

"On appeal to the supreme court from an order of the Nebraska state railway commission, while acting within its jurisdiction, the question for determination is the sufficiency of the evidence to prove that the order is not unreasonable or arbitrary." *In re Application of Chicago, B. & Q. R. Co.*, 138 Neb. 767, 295 N. W. 389.

The statute (Comp. St. Supp. 1941, sec. 75-231) requires "wilful failure to comply with any provisions of this Act or with any lawful order, rule or regulation of this Commission promulgated thereunder, or with any term, condition or limitation of such permit or certificate." The order of the commission in the instant case failing to include such finding of willful violation is irregular and will be set aside on appeal. Therefore, we will not review the evidence to ascertain whether or not the violation, if any, of the certificate of public convenience and necessity was willful.

REVERSED.

ROBINSON OUTDOOR ADVERTISING COMPANY, APPELLANT, V. WENDELIN BAKING COMPANY, APPELLEE.
15 N. W. 2d 388

FILED JULY 21, 1944. No. 31719.

1. **Pleading.** Under the Code of Civil Procedure amendment to pleadings is permissible either before or after judgment, in furtherance of justice by asserting allegations material to the case or where the amendment does not change substantially the claim or defense by conforming the pleading or proceedings to the facts proved.

2. ———. An amendment to a pleading may be made, which does not change the issues, nor affect the quantum of proof as to a material fact, at any stage of the proceeding.
3. **Appeal and Error.** Prejudice to a party as a result of an amendment to pleadings must appear from the record to constitute reversible error.
4. **Pleading.** It is within the discretion of the court to permit a party, during the course of the trial, to amend his pleading so as to present a new cause of action or defense.
5. **Evidence.** In an action to recover on a contract the general rule is that the burden rests on plaintiff to show fulfillment of a condition precedent to his right of recovery.
6. **Contracts.** By the terms of section 20-836, Comp. St. 1929, where the pleading of performance of a condition precedent in a contract is controverted the party pleading the performance of such condition precedent is required to establish the facts showing such performance.
7. ———. *Held*, under the facts and circumstances disclosed by the record that the requirement for periodic painting of the sign is a condition precedent to the right to exact payments after failure of the condition.

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

Lloyd Dort and *Coburn Campbell*, for appellant.

Harry R. Ankeny, contra.

Heard before SIMMONS, C. J., PAINE, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

YEAGER, J.

This is an action by Robinson Outdoor Advertising Company of Nebraska, a corporation, plaintiff and appellant, against Wendelin Baking Company, a corporation, defendant and appellee, for the balance claimed to be due under a written contract. Trial was had to a jury. A verdict was rendered in favor of defendant. Judgment was entered on the verdict. Following the rendition of judgment motion for new trial and motion for judgment notwithstanding the verdict were filed and by the court overruled. From this judgment and the ruling on these motions the plaintiff has appealed.

The contract which is the basis of this action was entered into August 27, 1936, between Waller Sign Company and the defendant. By the terms of the contract the Waller Sign Company agreed to furnish an electric neon display sign on which should be displayed an advertisement of bread for the defendant. The specifications for the sign and the care and maintenance to be given it for the term were set forth in the contract. The term of the contract was five years. For the use of the sign, and its maintenance by Waller Sign Company, the defendant agreed to pay on the basis of $125 a month for the term of the contract, however, at the rate of $90 a month for 36 months and $177.50 for the remaining 24 months. The following which furnishes the basis for the defense to this action is one of the provisions of the contract: "Sign is to be repainted completely, every six months." During the month of September, 1937, plaintiff purchased the business of the Waller Sign Company including the interest of Waller Sign Company in and to this contract and assumed the obligations thereof.

After the expiration of the term of the contract plaintiff instituted this action alleging that it had furnished and defendant had accepted the service contracted to be performed under the contract but that defendant had failed to pay in accordance with its terms; that there was a balance due and unpaid in the amount of $1,597.50, together with $86.94 interest, making a total of $1,684.44. For this amount plaintiff prayed judgment.

For answer to the petition the defendant denied that plaintiff performed the conditions of the contract, and specifically denied that the sign had been painted every six months; that instead it had been painted but twice during the term of the contract, such times being in October, 1938, and September, 1939. Defendant alleged that this failure to paint resulted in the reduction of the advertising value of the sign to the extent of $1,000 in which amount defendant was damaged. In the prayer defendant confessed judgment for $597.50, that being the difference between the

amount admitted to be due under the terms of the contract and the amount it claimed to have been damaged.

Thereafter with leave of court the defendant filed an amended answer and cross-petition. In this amended answer and cross-petition defendant alleged that its damage caused by failure to paint every six months was $2,250; that the balance due plaintiff under the terms of the contract was $1,597.50; that the difference was $652.50. It prayed judgment in its favor for $652.50.

During the course of the trial and after the introduction of plaintiff's evidence in chief and a substantial portion of the evidence for the defense the defendant was, over objection of plaintiff, allowed to withdraw its amended answer and cross-petition and to substitute an amended answer. The request for amendment and substitution was based and allowed on the ground that the amended answer conformed to the proof. No request was made by plaintiff for continuance on the ground of surprise. In fact plaintiff expressly waived a continuance. The theory of the amended answer limited the defense to the proposition that the failure to paint every six months constituted a substantial breach damaging to the defendant the effect of which was to defeat the right of plaintiff to recover the balance due under the terms of the contract.

In appellant's brief are numerous assignments of error. The first is that the court erred in permitting defendant to withdraw its amended answer and cross-petition and to file an amended answer. Specifically appellant urges that the amendment changed the issues and affected the quantum of proof and was therefore improper and erroneous.

Section 20-852, Comp. St. 1929, relating to the power of the courts to allow amendments to pleadings is as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect or by inserting other allegations material to the case,

or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendent."

In *Miller Rubber Products Co. v. Anderson,* 123 Neb. 247, 242 N. W. 449, this section is interpreted and the decisions of this court bearing on the power of the court to permit amendment of pleadings are reviewed. The case, in point of procedure, is somewhat similar to the one here. As stated in the opinion: "Defendant was allowed to amend its allegation of fraud in its answer, after nearly all the evidence had been adduced at the trial." In approving the allowance of the amendment it was said: "The Code of Civil Procedure, section 20-852, Comp. St. 1929, permits, either before or after judgment, in furtherance of justice, an amendment to any pleading, by asserting allegations material to the case or where the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved. The court has interpreted this statute in *Deck v. Smith,* 12 Neb. 205, *Cate v. Hutchinson,* 58 Neb. 232, *Bliss v. Beck,* 80 Neb. 290, and *Folken v. Union P. R. Co.,* 122 Neb. 193. The rule deduced from these cases and supported by many other cases is that an amendment to a pleading may be made, which does not change the issues, nor affect the quantum of proof as to a material fact, at any stage of the proceeding. Prejudice to a party, as a result of an amendment to pleadings, must appear from the record to constitute reversible error. * * * The amendment to the pleading in this case did not change the cause of action or the quantum of proof. It is argued that for the first time in the proceeding it pleaded a sufficient legal affirmative defense and therefore changed the quantum of proof. Even if we concede this, which we do not, there was no prejudice to plaintiff, as the necessary and the only witnesses were present and testified."

In this opinion appears the following by quotation from

Dunn v. Bozarth, 59 Neb. 244, 80 N. W. 811: "It is within the discretion of the court to permit a defendant, during the course of the trial, to amend his answer so as to present a new defense. In such case, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause, upon such terms as the court may deem just." See, also, *Thomas v. Haspel,* 126 Neb. 255, 253 N. W. 73.

In the case at bar we find nothing to justify a holding that the amended answer had the effect of changing the issues or of affecting the quantum of proof except that the issue of damage in favor of defendant was withdrawn. Of this plaintiff may not be heard to complain. In the original answer and in the amended answer and cross-petition the defendant stated facts constituting a breach on the part of plaintiff although it did not so denominate them. In the amended answer of which complaint is made the defendant stated the same facts and denominated them a breach of contract. The only substantial change in the last answer from the earlier pleadings was in the remedy prayed for. This assignment is without merit.

Plaintiff next contends that it was error for the court to refuse to direct a verdict in its favor at the close of the evidence. The effect of the assignment is to say that the amended answer and the evidence in support thereof did not amount to a defense to plaintiff's cause of action in the light of the admitted fact that defendant had failed and refused to pay the balance of $1,597.50 required by the terms of the contract.

On the other hand the defendant contends that the failure of plaintiff to perform the condition of the contract requiring it to paint the sign every six months was a breach of the contract by plaintiff and was such a breach as would preclude a recovery of this balance. It contends that the suit of plaintiff was based on a conditional promise to pay, and therefore the burden was on plaintiff to show that every condition precedent had been complied with before a recovery could be had, which burden plaintiff failed to sustain.

In *Bingaman v. Securities Investment Corporation*, 129 Neb. 788, 262 N. W. 859, this court adopted the following general rule: "The general rule is that the burden rests on the plaintiff to show the fulfilment of a condition precedent to his right of recovery." Also by statute (Comp. St. 1929, sec. 20-836) where the pleading of performance of a condition precedent in a contract is controverted the party pleading the performance of such condition precedent is required to establish on the trial the facts showing such performance. See *Davidson v. First American Ins. Co.*, 129 Neb. 184, 261 N. W. 144.

We are required under this assignment to determine whether or not painting each six months was a condition precedent to the right to recover payments thereafter coming due under the terms of the contract.

From the character of the contract and the use to which the sign was to be put it is obvious that the parties contemplated that the purpose was to advertise and to increase the sale of bread to be manufactured by the defendant. It is further obvious that for the sign to accomplish its full design and purpose painting every six months was necessary. It is also obvious that no standard or measure could be found whereby damage could be ascertained or determined for failure of plaintiff to comply with this condition of the contract. It follows from these obvious facts that unless defendant is permitted to treat the requirement that the sign should be painted each six months as a condition precedent, or perhaps more accurately as recurring conditions precedent, which would permit the withholding of payment for failure of performance it would be denied a remedy in the premises.

It is the holding of the court that the requirement of the contract that the sign be painted each six months was a condition precedent; that the amended answer pleaded a defense to plaintiff's cause of action; and that the burden was upon plaintiff to prove performance thereof before it would be entitled to a recovery on its cause of action.

The issue of performance was submitted to the jury un-

der proper instructions and the evidence was sufficient in this regard to sustain the verdict. The motion of plaintiff for a directed verdict in its favor at the close of the evidence was properly overruled.

Plaintiff contends that defendant by part payment and acceptance of benefits waived this condition of the contract. Numerous cases are cited in support of this proposition and while no fault is found with them as statements of legal principle yet they are not in point when applied to facts such as are disclosed by this record. In the cases cited the waiver depends upon a variety of conditions such as: Acceptance without protest or objection (*Havens v. Grand Island Light & Fuel Co.*, 41 Neb. 153, 59 N. W. 681); counterclaim for damages (*Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325); entering into supplemental contracts (*Carter v. Root*, 84 Neb. 723, 121 N. W. 952); failure to act, in such manner as to induce a belief that there is an intention to waive (*Advance-Rumely Thresher Co. v. Bartzat*, 114 Neb. 35, 206 N. W. 7); and continuance of acceptance of orders through a sales agent after continual breach (*Elson & Co. v. Beselin & Son*, 116 Neb. 729, 218 N. W. 753), but the case here falls within none of these categories.

The evidence here discloses without substantial dispute that the sign was the property of plaintiff with defendant as lessee only. Defendant had no control whatever over it. From the beginning and throughout the entire term of the contract the defendant through M. Wendelin protested the failure to paint the sign. The defendant had no alternative under the facts but to accept that which was done.

If the evidence was sufficient to convince a jury, and we do not hesitate to say that it was, that there was failure of performance as alleged in the amended answer it may not reasonably be said that defendant should be required to pay that which it withheld in part which of right and legally it could have withheld in whole. It cannot be said on the record here that the defendant waived the right to assert the defense set up in its amended answer.

This determination upon the first two assignments of er-

ror disposes of the other assignments or renders a determination thereof unnecesary. The jury were properly instructed and the verdict is sustained by the evidence.

The judgment of the district court is affirmed.

AFFIRMED.

ADA A. YOCUM ET AL., APPELLEES, V. JAMES LABERTEW, APPELLANT.

15 N. W. 2d 384

FILED JULY 21, 1944. No. 31753.

1. **Waters.** Where water is impounded upon land by natural conditions whereby a lake is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage.
2. ———. For such an injury injunction is the proper remedy, and equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.

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

Raymond & Sheldon, for appellant.

Neighbors & Danielson, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CHAPPELL, J.

This is an equity action filed by plaintiffs, appellees, in the district court for Scotts Bluff county, to secure an injunction and prevent defendant, appellant, from draining a lake upon his land by means of a channel dug through a natural retaining embankment causing waters to be wrongfully discharged upon and flow across plaintiffs' lands, and to recover damages for the destruction of growing crops. To plaintiffs' petition defendant filed an answer and cross-

petition praying for a denial of relief to plaintiffs, and affirmance by the court of defendant's right to thus accelerate the flow and discharge the water from his premises. After perfection of the issues by plaintiffs' reply to defendant's answer and answer to defendant's cross-petition, trial was had. At its conclusion the trial court entered a decree granting plaintiffs a perpetual injunction both prohibitory and mandatory as prayed by them but denying any recovery for damages to growing crops because the evidence adduced for that purpose was uncertain and insufficient to support a judgment. The decree also denied defendant the relief prayed in his cross-petition, and taxed the costs to him.

Defendant appeals, contending that the decree is contrary to the law and the evidence, and that the trial court erred in refusing to receive certain evidence offered by him. The plaintiffs did not cross-appeal and the question of their right to recover a judgment for damages is not involved in this appeal. An examination of the evidence and applicable law discloses that defendant's contentions cannot be sustained.

The record discloses that plaintiffs are the owners of the southwest quarter of section 11 and defendant is the owner of the southeast quarter of section 10, both in township 22, north, range 56, west of the 6th P. M. in Scotts Bluff county, Nebraska. The plaintiffs' land is on the east side and defendant's land on the west side of a county highway which extends north and south between them.

Upon the west side of defendant's land is a large lake which has accumulated through the years by seepage, percolation, precipitation, irrigation, and furrowed drainage from the lands of others to the northwest. Until 1938 the water in this lake was retained upon the western portion of defendant's land by a natural embankment extending generally north and south across his land. To the east of this embankment defendant's land slopes down toward the east where a natural lower land basin is formed, partly on defendant's land and partly on that of plaintiffs. The smaller

and higher portion of this basin, approximately five acres, is located on defendant's land, but the larger and lower portion thereof, approximately 25 acres, is located upon plaintiffs' land. There is no natural or artificial course of drainage through which water accumulating in the basin may be conducted therefrom to any natural stream or watercourse.

During 1938 defendant, without plaintiffs' consent or agreement, dug a channel through the natural embankment by which water was drained from defendant's lake to the lower basin on the east. In 1939 this channel was deepened by defendant until it was 4.3 to 4.7 feet deep. As a result substantial quantities of water flow at different times each year through the channel in an easterly direction into that part of the basin located on defendant's land causing it to fill up with water and flow or flood over and across the highway and into that part of the basin upon plaintiffs' land thereby flooding several acres, where the water continues to stand rendering plaintiffs' land unfit for cultivation and damaging their crops.

When defendant cut the channel across the natural embankment and caused the water to flow into the basin he did not drain the water into any natural watercourse or into a natural depression or draw whereby it could be carried into a natural watercourse as provided by sections 31-301 and 31-302, Comp. St. 1929. The evidence is that the water upon reaching plaintiffs' land is impounded in a natural basin from which the only means of escape is through evaporation or deep percolation, and there is no doubt that digging the channel has been the cause of injury and damage to plaintiffs.

The defendant's own testimony is that he dug the channel in 1938 and enlarged it in 1939 because he thought as long as the east part of his land was wet and alkali he could drain the lake into it and reclaim some of his land on the west. He testifies that he thought he had as good a right to run water down there as others did to run it upon him; that by digging the channel he reclaimed nine or ten acres of his land to the west of the embankment with only the

loss of an acre or an acre and a half in his part of the basin to the east. He admits that after the channel was dug more of plaintiffs' land was flooded than would have been flooded if the channel had not been dug by him. He admits also that when the water reaches the plaintiffs' land it just stands there until it seeps away or evaporates, since there is no other natural or artificial way for it to escape or get out of the basin.

Under these circumstances, defendant cannot prevail. Well-reasoned opinions from this jurisdiction in similar cases are directly in point and controlling. In *Graham v. Pantel Realty Co.*, 114 Neb. 397, 207 N. W. 680, it was held: "Where water is impounded upon land by natural conditions whereby a lake is formed, the owner of such land has no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage. For such injury injunction is a proper remedy and an injured party may recover such damages in the same action as he may have sustained by such wrongful act." Also, in *Warner v. Berggren,* 122 Neb. 86, 239 N. W. 473: "Owner of land on which water is impounded by natural drainage forming a lake has no right to drain the water by artificial means upon the land of another to his damage, except as provided by statute. * * * Evidence in this case does not bring it within the provisions of sections 31-301 and 31-302, Comp. St. 1929, for the water collecting in the basin was not drained into any natural watercourse or into any natural depression or draw draining into a natural watercourse."

Further, as early as *Davis v. Londgreen,* 8 Neb. 43, a case similar to the one at bar, this court held that, "In such cases equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief."

Finally, the defendant offered evidence of certain proceedings of the county commissioners of Scotts Bluff county, together with the tax records showing that the assessed

valuation of plaintiffs' property involved had been reduced because of seepage thereon prior to the time the channel was dug by defendant, to which the trial court sustained objections of counsel for plaintiffs. Thereafter defendant made appropriate offers of proof to which objections were sustained. In this connection, we call attention to the fact that plaintiffs have not sought in this action to recover damages to the land involved, and the question of the amount of damages suffered to crops has been eliminated from this appeal. The sole question presented here is whether defendant had a right to drain and discharge the water upon plaintiffs' land in the manner claimed by plaintiffs and admitted by defendant. Under such circumstances the value of the land would be immaterial. We fail to see where such evidence even though admitted or considered by this court upon trial *de novo* as in equity could in any manner affect or control decision of the issues actually presented to us. Therefore, its exclusion could not be prejudicial error. Accordingly, the judgment of the trial court was correct and it is hereby affirmed.

AFFIRMED.

MARIE LEE, APPELLANT, V. LINCOLN CLEANING & DYE WORKS ET AL., APPELLEES.
15 N. W. 2d 330

FILED JULY 28, 1944. No. 31755.

1. **Workmen's Compensation.** Malingering, as applied to compensation cases, may be defined as a deception, practiced by a dishonest employee, by feigning, inducing, or prolonging either sickness or injury, for the purpose of securing illegal or fraudulent payments therefor under the workmen's compensation law.
2. ———. Plaintiff may be allowed compensation for neurosis if it is a proximate result of her injury and results in disability.
3. ———. While plaintiff is unable to perform any substantial amount of labor, either in her particular line of work or in any other for which she is fitted except for the injury following an accident, she is totally disabled within the meaning of the compensation law.

4. ———. When an employee appeals to the supreme court from a judgment denying an award in the district court, such employee is not entitled to an allowance of attorney's fees in the supreme court, under section 48-125, Comp. St. Supp. 1941, even if the judgment of the district court is set aside and an award granted employee.

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

Frederick J. Patz, for appellant.

Baylor, TouVelle & Healey, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

PAINE, J.

This is a workmen's compensation case, in which plaintiff seeks an award for disability arising out of an accidental injury sustained by her in the course of her employment with the defendant company on August 11, 1942. A judge of the compensation court awarded her $14.67 a week for not to exceed 300 weeks, with medical expenses. Defendants appealed to the district court, and the award was set aside. Plaintiff appeals to this court.

The defendants in their petition on appeal in the district court deny that plaintiff had any accident or injury which was compensable within the meaning of the Nebraska workmen's compensation act, and charge that the award entered in the compensation court by a judge thereof is not supported by the evidence, is contrary to law, and should be set aside and vacated; that the judge erred in finding that the plaintiff suffered any permanent disability, and in finding that the disability suffered was in excess of a period of two weeks; that if plaintiff suffers from any disability of any character, which is not admitted but is expressly denied, the same is the result of sickness and infection, or an inherent condition within the plaintiff, or other natural causes, and is in no way related to or connected with the alleged accident.

The plaintiff filed answer to the defendant's petition on appeal, alleging that she sustained an accidental injury in the course of her employment while ironing a garment, and received a severe and painful electric shock from an electric iron, transmitted from the iron to the fingers of her right hand and her right arm, shoulder and body; that as a result of said electric shock the plaintiff's fingers of her right hand and her right hand, arm, right shoulder and right side were and have been permanently totally disabled, and there exists therein weakness and pain to such an extent that she is unable to carry on any of the duties for which she was employed at the time of the accident, or to do any kind of work for remuneration or gain, and that plaintiff has lost the permanent total use of the fingers of her right hand and of her right hand, arm and right side of her shoulder, and that since August 21, 1942, she has been under the constant care of her physician.

Plaintiff further alleges that she has no special training or education whereby she can earn a living without the use of the fingers of her right hand, right hand, arm, and right side of her shoulder; that she is by education and training a silk finisher, and is entitled to full compensation benefits as provided by law; that she has incurred doctor bills in the sum of $433, and bills for medicine in the sum of $5.40, and that she will incur further doctor and medical bills in the future by reason of said accident, injury and disability resulting therefrom; that at the trial before Honorable Charles E. Jackman the plaintiff was awarded $14.67 each week from and after August 21, 1942, for temporary total disability for a period not to exceed 300 weeks, and plaintiff alleges that she should have been awarded 50 per cent penalty for waiting time and a reasonable attorney's fee.

Plaintiff further alleges that she has not performed any work for pay or gain since August 21, 1942, and is unable to perform any work for pay or gain because of the injuries as set out; denies that said disability arose from a condition inherent within the plaintiff, and alleges that her physical condition has become progressively worse since the

time of the accident, and that the award of the compensation court is supported by the evidence and by the law.

After trial in the district court *de novo*, a judgment was entered by the district judge, finding that the plaintiff suffered only trivial injury because of the accident of August 11, 1942, which did not result in any disability beyond a period of seven days after the date of the accident, and that plaintiff has not since the time of the accident suffered any compensable disability, and that if she suffered any disability the same arose from a condition inherent in herself which is not connected with the alleged accident of August 11, 1942; that the award of a judge of the compensation court should be reversed, vacated and set aside and held for naught, from which judgment the plaintiff filed a motion for a new trial.

Ten errors are relied upon for reversal by the plaintiff, which may be summarized as follows:

That the trial court erred in finding that plaintiff did not sustain an injury from the accident she suffered, and in setting aside the award entered in the compensation court in favor of the plaintiff, and in dismissing the action;

That the district court erred in refusing and failing to find that the plaintiff had proved by evidence leading either to the direct conclusion or to a legitimate inference that the plaintiff was entitled to be paid for all medical expense, including doctor bills;

That the district court erred in finding that the disability of the plaintiff "arose from a condition inherent in herself which condition was not and is not connected with the alleged accident;"

That the district court erred in failing and refusing to find that the injury suffered and sustained by the plaintiff aggravated a pre-existing diseased condition of the plaintiff, causing hysteria, neurosis, and disability;

That the district court erred in failing and refusing to follow the long-established rule of our supreme court and the statutes of the state of Nebraska which provide for a liberal interpretation of the evidence in compensation cases;

That the district court erred in failing and refusing to permit the plaintiff to amend her answer to defendants' petition on appeal after judgment had been entered and before the motion for new trial had been ruled upon, and such failure and refusal on the part of the district court was an abuse of discretion;

That the judgment of the district court is not sustained or supported by the evidence.

The plaintiff, Mrs. Marie Lee, testified that she was 41 years old in July, 1942, and had been married about 23 years, and has one son 20 years of age. Her husband is a common laborer, employed at the Stuart building, and they had lived in Lincoln about two years before the time of the accident, moving here from Fremont. She worked at the Paramount Laundry & Cleaners for about a year, and then at Butler's Cleaners before she began working for defendant.

She had an operation for appendicitis when she was 19 years of age, and about four years before the accident Dr. Condon of Omaha operated for a tumor and removed her uterus and ovaries, and within four months of that operation she went to work in a cleaning plant in Fremont as a silk finisher and presser; after garments were cleaned she would measure them so that they would be the proper size when finished.

She testified that at the time of the accident she was working with an electric steam iron which has holes at the bottom of it to let the steam out when you put your foot on the pedal, and has a cord which plugs in for electricity, and you stand on a rubber mat and work at the wooden ironing board; there is a wooden handle in the center, with a metal piece which comes up on both sides to hold the wooden handle on, and on this iron you were required to touch the metal.

On August 11, 1942, after a half-hour lunch period she returned to work, and was to teach a girl how to finish silk, and she started in by measuring the garment, and showed her how to take hold of the iron, and this girl had wet feet

and got a shock, and she told the girl that she could not iron if she had wet feet, and plaintiff started in and just as she put her foot on the pedal, and had her iron in her hand, she received a shock, which went in her right hand, arm and shoulder and through her back. She made some kind of an outcry, and got to a couch nearby in the washroom. She laid down, as everything was getting black. She thinks she became unconscious, and the others helped her, rubbed her arm, and put cold water on her face, and the next time she looked at her watch, which they had taken off to rub her arm, it was around 2 o'clock.

Mabel Mercier was a fellow employee who helped her, and also another girl, Louise, the seamstress. The office manager was Freda Hansen, who acted as boss when Mr. Truman was not there, and gave instructions to the girls. At the time of this accident Mr. Truman was not at the plant. Miss Hansen asked if she was all right, and she said her arm was numb, and Miss Hansen told her to come out in front and get some air, and so she sat out on the sidewalk about half an hour, and then she tried to work again, and used a tape measure to get the width and length of garments, but it was painful for her. When Mr. Truman came back she told him exactly what had happened, and about the shock she had received, and he said, "Well, we will see how it is tomorrow and then we will make arrangements that you go to the doctor." She said they had already taken that iron away.

She came back to work the next day, but did not try to do any ironing, but measured the garments and complained to Mr. Truman about the pain from the accident, and he told her to go and see a doctor, and gave her the address. The doctor looked at her hand and arm and shoulder and said he thought she would be all right, and said to just keep on working and using her hand and arm. There was some discoloration at that time in the palm of her hand, and ten days after the accident the same doctor came to the cleaning works to see her, and she complained of the pain and he told her, "What I can do is to give you some dope or cut

your arm off." This statement of the doctor frightened her terribly. She immediately left the office and went out in the plant and made an appointment to see her own doctor, and went to his office about 3 o'clock that same afternoon; he gave her a thorough examination for about two hours, and told her she should rest the arm, hand and shoulder and go back and tell her employer that she was unable to work for a while.

She asked her doctor whether she had to have her arm taken off. He replied, "Why, no, * * * what makes you think that?" She said the company doctor told her she had to have her arm taken off and that she believed him. She went back and told Mr. Truman, the owner and manager, that her doctor told her she would have to rest her arm for a while, so he could get somebody else to take her place. Mr. Truman said "he didn't like that because he needed me awful bad and Saturday was a busy day," and she told him that it was no fault of hers, it was the doctor's orders, and furthermore that she was not getting any better, and said she had told him during the ten days she worked that her condition was not improving.

She quit work on August 21, 1942, and has never been back a day since, and has never worked anywhere else since then, and is only able to do a very little of her housework. She testified that for months she went to see her doctor at his office every day except Sunday, and has constantly been under his care, and her arm and hand have been getting worse right along; that she has terrible pains when she tries to hold or lift anything, and that severe pains go across her neck and side and back to her shoulder, the pain starting in the middle of her right hand; that she has severe headaches, and some nights is unable to sleep, whereas before the accident she had perfect health.

She testified that she has been working in cleaning establishments for 12 years; that that is the only kind of work that she is fitted for, having only an eighth grade education, and is unable to do stenographic work or office work; that she has little or no appetite, is very nervous, fussy and irri-

table, cannot stand the radio, which she enjoyed before the accident and listened to programs every evening; that her hand hurts her, she has to give it support and hold it up with her other hand; that she was right-handed; that when she walks it jars her hand, and if she hangs it down it hurts her and she has to hold it up; that she can do some of the cooking at home with her left hand, that she can wash the dishes but cannot wipe them; that she is unable to get any kind of employment by reason of the accident, and has lost the use of her right arm; that she has incurred doctor bills, and the defendant company has not paid her a cent of compensation, or doctor bills, or medicine bills.

Mabel Mercier testified that she lives at 1500 Vine street, and was working at the ironing board right in front of Mrs. Lee at the time Mrs. Lee had her accident; that she was also a silk finisher, the same as Mrs. Lee; that she "heard her holler 'Oh'" and turned around; that Mrs. Lee had jumped back toward the sweater board and tried to place her iron, and witness tried to catch her, and asked her what was the matter, and she said she got a shock and everything went black; that she went to the rest room "kind of wobbly," and she helped her lift her feet up on the couch, took off her wrist watch and started rubbing her hand; that she received this shock about 25 minutes to 1 o'clock; that the witness and another girl, named Louise Ellithorpe, worked with her about 30 minutes, and Mrs. Lee stayed there some time after that and finally went to the front door and one of the boys put a chair for her to sit on where she could get fresh air; that one of the boys disconnected the electric iron that Mrs. Lee was using, to take it to an electric shop; that she worked there some time afterwards, and that they did not put that same iron back in use during the time she was there, that they had another iron.

The witness testified that Mrs. Lee worked there a few days afterwards, complained of her hand being stiff, that she could not use it to measure or to lift the iron; that she tried to use the iron, but her fingers were stiff and she could not use the iron at all after the accident. The wit-

ness said that she doubted if Mrs. Lee would ever be able to use an iron the way it had to be handled to do the work.

On cross-examination she said that Mrs. Lee got to the rest room ahead of her, and was sitting there with her hand over her eyes. "I asked, 'What's the matter' and she said she got a shock, * * * she was kind of hazy and we laid her down and I took her wrist watch off and got one of the girls to come in with a rag to wipe her face and keep damp cloths on her face." She seemed conscious but rested there for about an hour and then went out and sat in a chair. During the ten days that Mrs. Lee worked there after the accident, she said that she did not do the same work, but she measured garments, and tried to write measurements, but said it hurt her when she moved her fingers. She worked at the body machine, where skirts are ironed, and used her left hand mostly, and when she took hold with her right hand it pained her quite a bit.

Mrs. Jacobs, a neighbor whom plaintiff knew very well, testified that her hand and arm were all right before the accident, and that she would not be able to get any employment in her present condition.

Plaintiff's husband testified that he worked nights as janitor for the Stuart Investment Company; that before this accident plaintiff was pretty healthy, always happy and singing, but that now she is nervous, complains, and is "pretty crabby" and hard to get along with.

We now come to the testimony of the plaintiff's physician. It is given in the greatest detail, and covers nearly 50 pages of the bill of exceptions.

He set out the history of the case as she gave it to him when he first took over the treatment. He gave her a careful examination, and found her eyes, teeth, breast, heart, lungs, and blood normal in every respect. The Wassermann test was negative. X-rays showed no breaks or dislocation of the bony tissue, and his diagnosis is a traumatic neuritis of the nerves of the right lower arm and hand.

Exhibit No. 1, consisting of four pages, is an itemized statement of the kind of treatments given her when she

called at his office daily except Sundays, beginning August 21, 1942, and continuing up to the time of trial in the district court.

These treatments have prevented the atrophy of the muscles, and usually there were 30 minutes' exposure to infrared, the next 30 minutes long wave diathermy, other times short wave, in which the hand is placed in a salt solution and the current goes in one direction and then the other. Following the last 30 minutes there will be a massage to all of the muscles, varying in depth and strength to keep up the blood supply. If the massage is too strong it increases the irritation in the nerves; it must be just right. When necessary, on a number of occasions he gave her cobra venom.

"Q. As a result of this shock I think you stated your diagnosis was traumatic neurosis, is that right? A. The exact diagnosis is traumatic neuritis in the right arm and a post-traumatic neurosis. Q. Will you explain to the court traumatic neuritis and then traumatic neurosis? A. Traumatic neuritis is inflammation of the nerves due to an injury. Post-traumatic neurosis is a mental state entering into an injury and continuing beyond the average time following an injury. After every injury every person has post-traumatic neurosis and that is one of the things they must get over, and they normally get over it. * * * Q. Would these treatments need to be given with the same frequency in the future as they have been given in the past? A. That would vary. Try to lengthen out the time between treatments, and if the muscles don't soften, that is all right; but if the muscles begin to soften, then the treatments aren't given often enough."

He testified that the unfortunate statement made to her by the doctor for the insurance carrier, that he might have to remove her arm, tended to aggravate and help her develop a psychoneurosis, which many patients develop after electric shock; that her condition has been progressively worse as far as the inflammation of the nerves is concerned.

After having cared for her daily during all these months,

her doctor testified that he had prevented an atrophy of the muscles of the right arm, but had not increased its strength; that the contraction strength of the right arm at its greatest point was 30 kilos, while the left arm was 60 kilos; that the tenderness in the arm has varied from time to time; that its temperature is pretty cold most of the time; that the co-ordination of the fingers and the wrist are below normal; that the pain has gone upward into the upper arm and finally into the cervical plexus of the right side of the neck; that nervousness and headache have followed; that, while she can move her fingers, she does have a total loss of the use of the hand for doing any work, and that this is true of the forearm and, to a lesser degree, of the upper arm, and that she is totally disabled from doing the kind of work she was doing at the time of the accident, and that there is nothing to indicate when this total disability might cease.

The defendants, to meet this evidence, called only three witnesses, to wit, a lawyer and two medical experts.

Hymen Evnen testified that he was an attorney working with George Healey for the insurance carrier, and that the day before he testified they went out to plaintiff's place at 1820 South Fifty-second street twice, once about noon, and sat in the car and drove around her home. He saw her out at the chicken-yard, feeding the chickens from a pail in her left hand; that as she walked around she carried her right hand straight down along her side. Mr. Evnen testified that they drove back there about 3:00 p. m., and stayed around and saw her pick up an empty blue kettle in her right hand and swing it rather freely by the handle; that he observed her about 15 minutes; that at one time she was standing with her arms folded, but he is not certain whether the left arm was under the right or the left arm over the right.

A medical expert called by the insurance carrier saw the plaintiff on August 12, 1942, at his office in the Sharp building; he saw her the second time for a moment on August 21 at the cleaning establishment, and these were the only

times that he saw her professionally. He stated that the bluish discoloration, somewhere around an inch in size, which he found in the palm of her hand might have been due to the electric shock, or might have been due to a bruise, but anyway it was there, and when asked if he had not testified in the compensation court that in his opinion the bluish-greenish discoloration was due to an electric shock he answered, "I don't remember. It could have been." He testified that she had had an electric shock, but it was not a severe one. He said she complained of numbness in her hand, especially in the finger-tips, and that there was pain starting in her hand and going up into the right forearm. On cross-examination he was asked this question: "Q. You had no reason to disbelieve her? A. No, I didn't disbelieve her."

The other physician called as a medical expert by the defendants had examined the plaintiff twice, once on December 8, 1942, and again on March 9, 1943, and told of the complaints that she made. He testified that the operation for hysterectomy and oophorectomy was performed on the plaintiff when she was 38 years of age, and that operation produced artificial menopause at a time when the body was not prepared for it, and that such an operation at that time always results in an unstable nervous system. He testified that her physician had given her treatments since the accident which the patient did not need, and that all she needed was merely mental suggestive treatments.

He testified that the plaintiff was suffering from hysteria, partly pure exaggeration, and that it was either hysteria or malingering; that if she is not malingering she has hysteria due to an unstable nervous condition based on her menopause difficulty.

This case, as thus presented to this court, resolves itself into a question of fact. The plaintiff's physician, who has had her under months of observation and has given her daily treatments of various kinds for overcoming her muscular and nervous affliction, which has progressively grown worse, gives it as his positive opinion that the plaintiff's

condition came about from the electric shock, which no one denies she received, while at work in the cleaning establishment while using an iron which was immediately taken to be repaired.

The claim of the defendants that her present permanent disability is in no way the result of an electric shock, or affected thereby, and that she is either a malingerer or that her condition is brought about solely by an operation which took place some three years before the accident, from which she had completely recovered, and had worked steadily since that time and was earning $22 a week at the time of her accident, does not impress this court, and is not supported by the evidence.

"Ordinarily, the employer endeavors to show that the employee is a malingerer. The term is defined in *Great Western Sugar Co. v. Hewitt,* 127 Neb. 790, 257 N. W. 61, as follows:

" 'Malingering, as applied to compensation cases, may be defined as a deception, practiced by a dishonest employee, by feigning, inducing, or prolonging either sickness or injury, for the purpose of securing illegal or fraudulent payments therefor under the workmen's compensation law.'

"Applying the above definition to the facts and circumstances in the instant case, the evidence falls short of establishing with reasonable certainty that the appellant is a malingerer." *Rexroat v. State,* 142 Neb. 596, 615, 7 N. W. 2d 163.

The plaintiff has proved that she had an accident arising in the course of her employment, and that it resulted in a compensable injury. See Comp. St. Supp. 1941, sec. 48-152.

She may be allowed compensation for neurosis if it is a proximate result of her injury and results in disability (*Welchlin v. Fairmont Railway Motors,* 180 Minn. 411, 230 N. W. 897), and where she has been unable to perform any substantial amount of labor, either in her particular line of work or in any other for which she is fitted except for the injury following an accident, she is totally disabled within the meaning of the compensation law. See *Wingate v. Ev-*

ans Model Laundry, 123 Neb. 844, 244 N. W. 635; 98 A. L. R. 732, Annotation; *Micek v. Omaha Steel Works,* 136 Neb. 843, 287 N. W. 645.

In the instant case, defendants waived a hearing before the full bench of the compensation court, electing to appeal directly to the district court for a trial *de novo,* in accordance with section 48-174, Comp. St. Supp. 1941, which section provides that the judgment of the district court may be set aside only upon four grounds, the third ground being that the findings of fact are not conclusively supported by the evidence, and having so found, we have considered the case *de novo* upon the record.

The evidence in this case indicates that from August 21, 1942, to about April 17, 1943, which was a period of 34 weeks, the plaintiff was under the care of her doctor and received daily treatments at his office, and was unable to do any work for pay, and that during said period of 34 weeks she suffered a total disability, for which she would be entitled to 66 2/3 per cent of her wages of $22 a week, or an award of $14.67 for 34 weeks, which amounts to $498.78.

We further find from the evidence given at the trial that upon the termination of her total disability she was partially disabled for some time. It is true that claimant testified that she was totally disabled up to the time of trial. There is also expert testimony to the effect that she was permanently disabled. Claimant was, however, impeached to such an extent that her claim that she was totally and permanently disabled cannot be sustained. The evidence of the medical experts is so conflicting that it will not sustain a finding of permanent total disability. We think the evidence will sustain a finding of partial disability of 50 per cent for 75 weeks following total disabilty. In addition to the total disability awarded, claimant is therefore allowed 50 per cent of 66 2/3 per cent of her wages of $22 a week, the sum of $550. Claimant is allowed $468 for the payment of medical expenses.

The plaintiff asks to be allowed attorney's fees in this court. We have allowed attorney's fees many times where

the employer has appealed and failed to reduce the employee's award, as in *Perkins v. Young*, 133 Neb. 234, 274 N. W. 596.

Section 48-125, Comp. St. Supp. 1941, covers the allowance of attorney's fees in compensation cases. In *Rexroat v. State*, 143 Neb. 333, 9 N. W. 2d 305, the exact point in the instant case was contested, and it was held that, when the employee appeals from an adverse decision in the district court which denied an award of compensation, and this court reverses the district court, and holds that the employee is entitled to compensation, this court is not authorized to allow the employee an attorney's fee under the section of the statute just quoted, and therefore we grant no attorney's fee on this appeal. See *Updike Grain Co. v. Swanson*, 104 Neb. 661, 178 N. W. 618.

The judgment of the district court is set aside, and the cause is remanded with instructions to enter an award for plaintiff in accordance with this opinion.

REVERSED, WITH DIRECTIONS.

IN RE PROCEEDINGS OF BOARD OF SUPERVISORS OF DRAINAGE DISTRICT NO. 1 OF LINCOLN COUNTY, NEBRASKA. DRAINAGE DISTRICT NO. 1, APPELLEE, V. VILLAGE OF HERSHEY, APPELLANT.

15 N. W. 2d 337

FILED JULY 28, 1944. No. 31790.

1. **Constitutional Law.** A judicial hearing in equity to determine the amount or legality of special assessments for drainage improvement benefits, accruing to streets and alleys of a village located in the drainage district, is constitutional.
2. **Municipal Corporations.** Section 31-434, Comp. St. 1929, creating liability against a village for benefits to streets and alleys for drainage improvement within a drainage district, is not in contravention of section 7, art. VIII of the Constitution.
3. **Drains.** The fundamental purpose of drainage improvement is that it will be conducive to health, convenience and welfare of the public and, as such, is a subject of general public concern,

the promotion and regulation of which are among the most important of governmental powers, duties and functions.

4. ———. The assessment of benefit units for drainage improvement to streets and alleys of a village within a drainage district cannot be ascertained to an exact nicety of apportionment.

5. ———. In the instant case, the assessment of benefit units to streets and alleys of the village for drainage improvement and within the drainage district is in conformity with article 4, ch. 31, Comp. St. 1929.

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

Mothersead & Wright and *J. T. Keefe,* for appellant.

Beeler, Crosby & Baskins, contra.

Heard before SIMMONS, C. J. PAINE, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

MESSMORE, J.

The village of Hershey appealed from an assessment made by the board of supervisors of Drainage District No. 1, Lincoln county, Nebraska, against the streets and alleys of the village. The original assessment made December 17, 1921, was set aside and declared void by this court. *Drainage District No. 1 v. Village of Hershey,* 139 Neb. 205, 296 N. W. 879. Thereafter, the board of supervisors of Drainage District No. 1 proceeded, as required under section 31-429, Comp. St. 1929, to reassess the benefits to the streets and alleys of the village.

The drainage district was organized in 1921, pursuant to and in accordance with article 4, ch. 19, Rev. St. 1913, now article 4, ch. 31, Comp. St. 1929. The essential statutory provisions of article 4 may be summarized as follows:

Section 31-434, Comp. St. 1929, provides in part: "When any * * * drainage improvement, located and established under this article * * * drains, or protects either in whole or in part any street, highway, * * * or benefits any * * * streets, * * * the board of supervisors shall apportion and set off to the * * * village, if a street or alley, a portion of

the cost and expense of the whole drainage improvements; the same as to the private individuals and in proportion to the benefits conferred by such drainage improvements on such street, * * * ."

Section 31-414, Comp. St. 1929, provides: "No assessment shall be made for benefits to any lands upon any other principle than that of benefits derived, but all assessments shall be made upon the basis of benefits derived and secured by reason of the construction of such improvements and works in affording drainage, or giving an outlet for drainage, protection from overflow, and damage from water." And section 31-415, Comp. St. 1929, reads in part: "The benefits to public streets and highways, * * * shall be assessed according to the increased efficiency and value added thereto by reason of, and the protection derived from the aforesaid drainage works and improvements."

Section 31-428, Comp. St. 1929, provides in part: "Upon the filing of the transcript and bond the district court shall have jurisdiction of the cause, and the same shall be docketed and filed as in appeals in other civil actions to such court, and the court shall hear and determine all such objections in a summary manner as a case in equity, and shall increase or reduce the amount of benefit on any tract where the same may be required in order to make the apportionment equitable. All objections that may be filed shall be heard and determined by the court as one proceeding and only one transcript of the final order of the board of supervisors fixing the apportionments or benefits shall be required. The clerk of the district court shall forthwith certify the decision of the court to the board of supervisors who shall take such action as may be rendered necessary by such decisions."

The trial court, in consideration of the foregoing statutory provisions and the evidence adduced, found that the assessment was only against the streets and alleys of the village, was not excessive, was made according to the relation of the total benefits received by the streets and alleys in relation to the total benefits in the district, and was not violative of the Constitution of Nebraska.

A judicial hearing in equity, to determine the amount or legality of special assessments for drainage improvement benefits accruing to streets and alleys of a village, located in a drainage district, is constitutional. See *Drainage District No. 1 v. Richardson County,* 86 Neb. 355, 125 N. W. 796.

Appellant contends the court erred in failing to hold that section 31-434, Comp. St. 1929, in so far as it attempts to make a village liable for benefits to streets and alleys for drainage improvement within a drainage district, is void because such section is in contravention of section 7, art. VIII of the Constitution, which provides in part: "The Legislature shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes."

In determining this question, it is well to have in mind the fundamental purpose of drainage improvement which is that it will be conducive to the health, convenience and welfare of the public. *Darst v. Griffin,* 31 Neb. 668, 48 N. W. 819; *County of Dodge v. Acom,* 61 Neb. 376, 85 N. W. 292.

It was held in *Drainage District No. 1 v. Richardson County, supra,* that drainage is a subject of general and public concern, the promotion and regulation of which are among the most important of governmental powers, duties and functions.

In the foregoing case which, in principle, is somewhat analogous to the situation presented in the instant case, the appellant attacked the power of the drainage district to collect from any political subdivision of the state any sum of money for benefits accruing to a highway from the improvement in question, and contended that such power could not be granted by the legislature, citing section 2, art. IX of the Constitution of 1875, now section 2, art. VIII of the present Constitution, which exempts property of the city and county from taxation, and that said section and article are not in conflict with section 6, art. IX, now section 6, art. VIII of the Constitution, vesting the corporate authorities of villages with power to make local improvements

by special assessments, or by special taxation of property benefited.

While the *Richardson County* case does not involve section 7, art. VIII of the Constitution, it bears on the legal proposition here presented. In the opinion the court said (p. 358): "The theory of that provision (Const. art. IX, sec. 2) is that all such property belongs to the state, and it would be an idle proceeding for the state to collect a tax levied and assessed upon its own property. It has long been settled in this state that this section has reference only to taxes assessed by general valuation for general purposes, and has no reference to special taxation of property benefited by the creation of local improvements. *City of Beatrice v. Brethren Church,* 41 Neb. 358.

"The argument of appellant's counsel, however, is that the county is the sole owner and proprietor of the highways assessed, and therefore it should not be required to assess and collect taxes upon its own property. We think this idea is a mistaken one. In *Krueger v. Jenkins,* 59 Neb. 641, it was said: 'A county does not hold the legal title to country roads within its borders; it has no powers of disposition over them. * * * In performing the duties with which it is charged in connection with them, it acts as an agent of the state, and in the interests of the general public.' We can see no reason why the county acting for the general public should not be required to pay for the benefits accruing to the public roads. It is charged with the duty of constructing and maintaining such roads in a suitable condition for public travel, and, if the improvement contemplated by the drainage district materially aids in the performance of that duty, there would seem to be no good reason why the county should not pay for the benefits thus conferred upon it."

There is no difference in applying the same logic and reasoning to a village with reference to its streets and alleys. The drainage district materially aided in the performance of the duties of the village in constructing its streets, maintaining them, and caring for its alleys, in a suitable condi-

tion for the benefit of the public. There should be no good reason why the village, as such, should not pay for the benefits thus conferred upon it by the drainage district.

We hold that the act, as it applies to streets and alleys of villages, within the contemplation of section 31-434, Comp. St. 1929, is constitutional.

Appellant contends the court erred in finding that the assessment on streets and alleys was a correct and fair assessment of the benefit units to the streets and alleys of the village. In this connection the appellant contends that the district engineer used the same form and considered the same matters for the reassessment that were used in the first assessment, held void by this court. *Drainage District No. 1 v. Village of Hershey, supra.* In such case the district court found that the method of assessment used against the village was such a departure from the method prescribed by law as to render void such assessments as were made against the village and rendered the action by which such assessments were made open to collateral attack. Our court affirmed this holding. A review of the form of assessment used in the instant case discloses that it is similar to the assessment form used in the first case, except the finding with reference to the number of benefit units as to the streets and alleys and the elimination of the word "acres." This assignment of error requires a review of the evidence.

The engineer for the drainage district testified he was employed to reassess certain tracts of land, and also the streets and alleys of the village. To do so, he first obtained all the official records, maps and documents, visited the village, made a physical examination and observation of the conditions, and prepared a report which he filed with the secretary of the district. He ascertained the reduction in the water table and concluded that the benefits accruing to the streets and alleys by virtue of the drainage was the elimination of the problem of perpetual maintenance of streets, perpetual equipment and subgrading. Previous to the drainage improvement, the streets and alleys were in

an unsuitable condition, and the drainage made more suitable conditions for construction and maintenance. In formulating the reassessment, he took into consideration the fact that the district, as a whole, had a mile of road for every 308 acres. The street and alley mileage totaled an average of one mile of street for every 57 acres. He likewise considered the functions of the streets and alleys in comparison with the normal functions of the roads in the rural district and compared them with the assessments and benefits made to the Lincoln highway, which is north of the village, running east and west. He testified he compared the streets and alleys in the village with the highways, and the original benefits assessed to the highways from these were 2,800 units "for a drainage accomplishment caused by the reduction in the water table of 2.8 feet, which was the condition accomplished at Hershey, and considered then the use and occupancy of a street in the village, assigned the village the benefit of that highway for comparable water table reduction, this being assigned in consideration of the use and occupancy factor of the streets in the village and the traffic density which would be imposed on each in comparison with those of the highway." He determined the total units for alleys to be 2.17 miles at 1,900 units per mile. The first assessment contained the same alley mileage, and the units were fixed at 2,000 benefit units per mile. The district engineer accomplished such finding by figuring the average width of the alleys, in comparison with the average width of the streets, making a total of 4,123 benefit units for the alleys. He stated that the total units for the streets constituted 7.4 miles at 5,600 benefit units per mile (the same in mileage length as in the first assessment, but a reduction of units from 9,000 benefit units per mile), making a total for the assessment of 41,440 benefit units for the streets, and a total for the streets and alleys combined of 45,563 benefit units.

The district engineer, in order to determine whether or not the benefits were equitable, made three other computations to form a basis of comparison, which we need not set

out. It is the appellant's contention that, by such comparisons, and the engineer using them and referring to a formal assessment, meaning the assessment made with respect to the streets and alleys, the engineer was taking into consideration property not within the drainage district, and, as a consequence, making the assessments in violation of the court's judgment in *Drainage District No. 1 v. Village of Hershey, supra.* The evidence discloses, however, that such matters were for comparison only, and the assessments were specifically made against the streets and alleys. While there was little difference in the form used by the engineer in the reassessment from that formerly used in the original assessment, the form used is not material. The engineer used the unit and benefit system. The object was to find the proportionate part of the cost of the project which should be paid for the streets and alleys of the village. To do so, the engineer had to take into consideration what the units were on such assessments, to determine a proper apportionment of benefits to be assessed against the streets and alleys.

Exhibit 2, made by the engineer testifying for the village and received in evidence, discloses the following: Streets platted within the corporate limits of the village used by the public, 46.46 acres, mileage length, 5.94; streets platted within the corporate limits of the village not used by the public, 11.96 acres, mileage length, 1.60; streets platted outside the corporate limits of the village not used by the public, 7.15 acres, mileage length, 0.77; alleys platted within the corporate limits of the village used by the public, 3.07 acres, mileage length, 1.33; alleys platted within the corporate limits of the village not used by the public, 2.06 acres, mileage length, 0.84; alleys platted outside the corporate limits of the village not used by the public, 1.62 acres, mileage length, 0.67.

Exhibit 2 indicates that the streets platted within the corporate limits of the village constitute 7.54 miles; the alleys platted within the village, 2.17 miles. The streets and alleys outside of the corporate limits, shown on exhibit 2,

were not taken into consideration in making the assessment. A witness for the village testified that exhibit 2 correctly indicated the streets and alleys of the village that were open to the public and in use from and after the year 1918. The result of the reassessment from the engineer's report shows that it amounted to 64.5 per cent of the first assessment or a reduction of 35.5 per cent. The village contends that there was a reduction on other lands within the drainage district of 62,634 units, so that the reassessment is 71.7 per cent of the first assessment, or a reduction of 28.3 per cent.

The trial court found that the reduction of the benefit units on other lands in the district was not involved in this action, for the reason that the reassessment of the streets and alleys was to take the place of the void assessment and dates back to December 17, 1921, at the time the original assessment of benefits was made. Consequently, if the reassessment of the other lands is void, then the assessment as against the streets and alleys is not in any manner affected. In this finding the trial court was correct.

The appellant contends that the burden of proof is on the drainage district, and this is conceded by the district. The contention is that section 31-415, Comp. St. 1929, provides the method of making the assessment, and appellant also cites section 31-416, Comp. St. 1929, which provides:

"The engineer shall also classify all lots, tracts, lands, and other property according to the benefit that each may receive from such drainage improvement, and the lots, tracts and lands receiving the greatest percentage of benefits shall be classified at one hundred,—those receiving a less percentage of benefits at such less number as its benefit may determine. The property of public and private corporations may be classified in a list by themselves, each according to the relation its total benefits bears to the total benefit in the district."

In support of its contention the appellant states: "There is not a scintilla of testimony as to the increased efficiency of the streets and alleys or increase in the value thereof.

There is no attempt to justify the apportionment of benefits to the total benefits in the District * * * ."

We are not in accord with appellant's contention in such respect. The district engineer took into consideration several factors, used and considered them in computing the assessment units, taking the total acreage benefited in the district of 8,676.52; total benefit assessment units, 670,553; average benefit assessment units per acre, 77.00; benefit assessment units per acre applicable to the village, 85.00; gross acreage of the village in 1921, 545 acres, and the other elements as heretofore set out.

In *Nemaha Valley Drainage District v. Stocker*, 90 Neb. 507, 134 N. W. 183, the court held: "In such assessments exact nicety of apportionment is impossible." See, also, *Nemaha Valley Drainage District v. Marconnit*, 90 Neb. 514, 134 N. W. 177.

We conclude that the assessment of benefit units to streets and alleys of the village of Hershey for drainage improvement within the drainage district is in conformity with article 4, ch. 31, Comp. St. 1929, and that the trial court did not err in decreeing that the village shall be assessed on the basis of 45,563 benefit units as of date of December 17, 1921, upon the streets and alleys of said village, and in further decreeing that each benefit unit as of that date shall be set at the value of 30.1556 cents.

AFFIRMED.

FIRST NATIONAL BANK OF FAIRBURY, APPELLEE, V. FIRST TRUST COMPANY OF LINCOLN ET AL., APPELLEES: MAX RUHNKE, APPELLANT.

15 N. W. 2d 386

FILED JULY 28, 1944. No. 31780.

Judicial Sales. In the absence of abuse of judicial discretion the district court on motion has the power within the term to set aside an order confirming a judicial sale of real estate.

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

W. J. Moss and *Melvin H. Moss*, for appellant.

Hartigan & Skultety and *Cline, Williams & Wright, contra.*

Heard before SIMMONS, C. J., PAINE, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

YEAGER, J.

Pursuant to a decree in partition in this action certain lands in Jefferson county, Nebraska, were ordered sold by a duly appointed and qualified referee to the appellant, Max Ruhnke, for $12,500. The referee filed his report of sale on November 8, 1943. On November 9, 1943, the court made a finding that the land had been sold for its fair value and entered an order confirming the sale. On November 12, 1943, the defendants in the action for partition filed a motion to set aside the order confirming the sale on the ground that the land had not been sold for its fair value. Thereafter on November 27, 1943, one C. Urbach filed with the clerk of the court an offer to bid not less than $13,500 for the property and to guarantee such bid he deposited with the clerk his certified check for $4,000. This was $1,000 in excess of the bid on which it had been previously sold. Thereafter on December 7, 1943, the court entered an order vacating the order of confirmation entered November 9, 1943, and ordered a resale. This order was entered at the same term as the order confirming the sale.

From the order setting aside the confirmation and ordering a resale Max Ruhnke, the purchaser at the sale which was set aside, has appealed.

The substance of the errors assigned as ground for reversal is that the court was without power under the circumstances to set aside the order of confirmation and to order a resale.

As has been noted the order of confirmation was vacated at the same term that it was entered. The rule in such

cases is that courts of general jurisdiction possess inherent power to vacate or modify their own judgments at any time during the term at which they were pronounced. *Bradley v. Slater*, 58 Neb. 554, 78 N. W. 1069. This rule was announced without qualification in the earlier cases. In the later cases, however, certain qualifications have been attached.

In *Lyman v. Dunn*, 125 Neb. 770, 252 N. W. 197, the court speaking of the power of the court to vacate judgments within the term said: "If the application to vacate the judgment had been heard by the court at the term at which it was filed, appellants concede that the court would have had the power to vacate the judgment. That has been the settled law in this jurisdiction many years, if there has been no abuse of judicial discretion in exercising the power within the same term."

In *Dimmel v. State*, 128 Neb. 191, 258 N. W. 271, it was stated: "The trial court, or district court, has jurisdiction to set aside its own judgment during the term at which it was rendered, if it believes that its former conclusion is erroneous."

In *State Life Ins. Co. v. Heffner*, 131 Neb. 700, 269 N. W. 629, a mistake was made in an advertisement of land sold under mortgage foreclosure. On the basis of this mistake a sale was had and sale confirmed. The sale and confirmation were set aside during the term. The first point of the syllabus which is a summary of the holding in the opinion is the following: "The district court has the right and power to vacate, set aside, amend or correct any judgment or order made by it during the same term at which it was rendered if it appears that its former judgment was the result of fraud, accident or mistake."

Thus it would appear that the true rule is that the district court has power to vacate or modify its own judgments at any time during the term at which they were pronounced for the purpose of correcting error or to relieve against fraud, accident or mistake, also the power may be exercised without regard to error, fraud, accident or mistake in the absence of an abuse of discretion.

In the light of subsequent events as shown by the record, namely that at least an additional $1,000 could be obtained for the parties interested we cannot say that the court abused its discretion in vacating and setting aside the confirmation and ordering a resale of the property. See *Siekert v. Soester*, 144 Neb. 321, 13 N. W. 2d 139.

The judgment of the district court is affirmed.

AFFIRMED.

STATE EX REL. WILLIAM HERMAN, RELATOR, APPELLEE, V. CITY OF GRAND ISLAND ET AL., RESPONDENTS, APPELLANTS.
15 N. W. 2d 341

FILED JULY 28, 1944. No. 31804.

1. **Constitutional Law: STATUTES.** The policy or impolicy of statutory provisions is the exclusive function of the lawmaking body and not of courts. Therefore, where the language of a statute is unambiguous, there is no necessity for construction, and courts cannot change the clear language thereof.
2. **Municipal Corporations.** A fireman employed by a city of the first class, having a paid fire department, "elects to retire from active service," as provided by section 2439, Comp. St. 1922, if, having served 21 years, he resigns and requests that he be placed upon the retired list.
3. ———. Such fireman's election to retire from active service is optional on his part, but when exercised by him every prerequisite of the statute is complied with, and his right to a pension under existing law is perfect, whereupon it becomes the statutory duty of the city to put him upon the retired list and pay the pension to which he is lawfully entitled.
4. **Mandamus.** The discretion of a public officer cannot be controlled by mandamus, but when a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus.
5. ———. Where a specific duty is provided by statute mandamus may be invoked to enforce it, if denied; and the party entitled to such relief will not be forced to pursue his remedy by a circuitous and dilatory action at law.

6. ———. Mandamus is a proper remedy to require a city of the first class having a paid fire department to place a fireman upon the retired list and pay him a pension after he has served 21 years and elects to retire from active service as provided by section 2439, Comp. St. 1922.
7. ———. The mere fact that there is another remedy at law will not prevent the issuance of a writ of mandamus unless the other remedy is adequate to afford relief upon the very subject matter involved, a remedy appropriate and effectual to enforce the right or compel performance of the particular duty in question, and a remedy to which the relator may at all times resort for full relief against the party from whom the duty is owing as distinguished from one against a third person.

APPEAL from the district court for Hall county: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

C. E. Cronin, P. C. Holmberg and *A. G. Abbott,* for appellants.

Harold A. Prince, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CHAPPELL, J.

This is a mandamus action filed by relator, appellee, in the district court for Hall county against the city of Grand Island, its mayor and councilmen, respondents, appellants, praying that they be required to place relator on the city retired firemen's pension roll under the provisions of section 2439, Comp. St. 1922. After hearing upon the issues presented the trial court found in favor of relator and by peremptory writ of mandamus ordered that respondents place relator on the city pension roll as a pensioned fireman as of February 9, 1943, at $83.75 per month, payable in the same manner as firemen on the active list are paid.

Respondents appeal from the judgment, contending that the trial court erred in finding that relator had retired from active service; that because of equitable considerations in a war emergency the writ should not be awarded; that mandamus is not a proper remedy for the enforcement of relator's rights; that relator has another action pending in the

district court for Hall county which bars mandamus; and that the decree is not supported by the law and the evidence. We find that the law and the record in the instant case do not support these contentions.

We have presented for decision in this appeal only questions of law under admitted facts. The undisputed evidence is that the city of Grand Island at all times concerned was a city of the first class, maintaining a paid fire department. William Herman, relator, entered the service of the city's fire department on August 8, 1921, and served as a paid fireman therein continuously up to and including February 8, 1943, a period of 21 years and six months.

On September 3, 1941, relator was appointed and qualified as assistant fire chief. He continued to serve in such capacity to and including February 8, 1943, the last day of active service in the department. At the time of his retirement from active service his salary, as provided by city ordinance, was $167.50 per month, that is, $83.75 payable on the 5th and 20th of each month. On February 11, 1943, after a conference with the mayor, relator delivered to the city the following application: "February 11, 1943. To the Honorable Mayor and City Council: Having served the City of Grand Island as a paid fireman for a period exceeding twenty-one years, and having elected to retire from active service and go upon the retired list, I hereby make application for pension as provided by laws of the State of Nebraska. Yours very truly, (Signed) W. J. Herman."

Thereafter on May 19, 1943, by resolution, and not by settlement or agreement with relator, the mayor and city council placed relator upon the city firemen's pension list at $73.75 per month which was $10 less than 50 per cent of the amount of salary he was receiving at the time of his retirement as required by section 2439, Comp. St. 1922. The city paid him at that rate from February 9, 1943, to and including May 31, 1943. Relator then filed a claim with the city for $37.14, a sum representing the difference between the amount of pension allowed by the city and that required by statute during such period. This claim was disallowed,

and, in addition thereto, on June 16, 1943, without notice to relator or his attorney, and in their absence, the mayor and city council passed the following motion: "On motion of Starr, seconded by Krieger, William Herman was cut from the pension payroll until the court decides whether or not he is a retired fireman." Thereupon the city refused to pay his pension. From the disallowance of relator's $37.14 claim by the city, he appealed to the district court for Hall county, and thereafter filed this mandamus action to be restored to the pension list.

We have recently held "that a statute providing for firemen's pensions is a matter of state-wide concern applicable to all cities within the designated class, whether they be home rule cities or not." *Axberg v. City of Lincoln,* 141 Neb. 55, 2 N. W. 2d 613. The effect of such ruling is that the firemen's pension law as a state law controls municipal action. The statute involved in this action is chapter 21, art. II, section 2439, Comp. St. 1922, which, in so far as it is material here, provides: *"Firemen's pension on retirement.* All * * * cities of the first class having a paid fire department, shall pension all firemen of the paid fire department, whenever such firemen shall have first served in such fire department for the period of twenty-one years, and shall elect to retire from active service and go upon the retired list. Such pension shall be paid by the city in the same manner as firemen upon the active list are paid, and such pension shall be at least fifty per cent of the amount of salary such retiring fireman shall be receiving at the time he goes upon such pension list: * * * ." Section 2442, Comp. St. 1922, provides: *"Officers of fire department included.* This article shall apply to officers of paid fire departments in cities of the first class * * * as well as to regularly employed firemen."

Respondents contend that relator did not retire from active service for the reason that after he quit the city fire department he obtained employment in a fire department at an army air base, a separate entity, approximately five miles from Grand Island. It is insisted that relator elected

to retire from active service without in fact retiring; that he just quit or resigned to take other employment, and that the city council was required to exercise discretion or act quasi judicially in determining whether under the statute relator did in fact retire from active service. There is no contention here that relator was not entitled to an honorable discharge.

In a very similar mandamus case, *State ex rel. Haberlan v. Love*, 95 Neb. 573, 145 N. W. 1010, the relator who had served as a paid fireman of the city of Lincoln for more than 21 years, testified, "I just quit." And, in this connection, the court said: "Did Haberlan retire? Haberlan resigned. His resignation was an *election to retire*, and the Standard Dictionary defines 'retire' 'to withdraw from active service, * * * . To separate or withdraw.' (See, also, 54 C. J. 739). In *State v. Mayor and City Council*, 4 Neb. 260, this court say: 'In the absence of some statutory provision, we know of no rule which requires such resignation to be accepted by the municipal authorities, to make it effective. Their refusal, even, to accept it, would not have the effect to compel him to retain the office against his will.'" It would seem conclusive that this court has held specifically that to quit, resign, separate, or withdraw, and retire with respect to the identical law here involved, mean exactly the same thing. Therefore, a fireman employed by a city of the first class having a paid fire department, "elects to retire from active service," as provided by section 2439, Comp. St. 1922, if, having served 21 years, he resigns and requests that he be placed upon the retired list. Such fireman's election to retire from active service is optional on his part, but when exercised by him every prerequisite of the statute is complied with, and his right to a pension under existing law is perfect, whereupon it becomes the statutory duty of the city to put him upon the retired list and pay the pension to which he is lawfully entitled. *State ex rel. Haberlan v. Love*, 89 Neb. 149, 131 N. W. 196, 95 Neb. 573, 145 N. W. 1010; *Pierne v. Valentine*, 291 N. Y. 333, 52 N. E. 2d 890; *Stiles v. Board of Trustees of Police*

Pension Fund, 281 Ill. 636, 118 N. E. 202; *McBride v. Allegheny County Retirement Board,* 330 Pa. St. 402, 199 Atl. 130; *Bausewine v. Philadelphia Police Pension Fund Assn.,* 337 Pa. St. 267, 10 Atl. 2d 446; *Mathewson v. Board of Trustees,* 226 Ia. 61, 283 N. W. 256; *Beronio v. Pension Commission of City of Hoboken,* 129 N. J. Law 557, 30 Atl. 2d 503, 130 N. J. Law 620, 33 Atl. 2d 855; *Roddy v. Valentine,* 268 N. Y. 228, 197 N. E. 260. To hold otherwise would not give either reason to words or effectiveness to the act.

In this connection, it is also urged by respondents that relator, who was 56 years of age at the time of his election to retire, is neither superannuated nor disabled, and, thus being still able to find employment as an employee in another fire department, he is not entitled to retire and receive a pension. The legislative act itself disposed of this contention. Section 2439, Comp. St. 1922, should be read in connection with section 2441, Comp. St. 1922, which is a part of the same act. In doing this it is discovered that in section 2439, Comp. St. 1922, there is no thought or suggestion of any disability requirement. Section 2441, Comp. St. 1922, governs pensions for disabilities from accident or other cause while in the line of duty, which is not involved here in any manner or form. Section 2439, Comp. St. 1922, only is involved, which grants a pension after 21 years of service upon election of the fireman to retire from active service and go upon the retired list. There are no requirements in it that a fireman must be of certain age or disabled. There is no requirement that the fireman shall be unable to do any work or obtain other employment or that he thereafter must desist from such economic activities as his physical condition permits. True, many loyal firemen, particularly in times like these, continue in their employment and do not elect to retire from active service, but after they have served as paid firemen for 21 years they are not required by the act so to do, and under this statute the propriety or impropriety of doing so is not for the city council or courts to decide.

In considering the statute before us we are required to

observe the rule that the policy or impolicy of the statutory provision is the exclusive function of the legislature and not of the courts. We must accept the statute as we find it and no requirement which is not in the statute will be or can be considered to govern our action. The general rule is that, "Where the language of the statute is unambiguous there is no necessity for construction and courts cannot change the clear language of a statute." *Stiles v. Board of Trustees of Police Pension Fund, supra.* See, also, *Beronio v. Police Commission of City of Hoboken, supra.* We can only conclude that it is immaterial that a pensioner entitled to a pension under the provisions of section 2439, Comp. St. 1922, is able to or actually does obtain other employment with a separate entity, there being no such exception in the statute.

With reference to equitable considerations arising from the present war emergency, which respondents contend give discretion in the granting or refusal to grant relator a pension, there is a recent well-reasoned case disposing of this contention adversely to respondents. *Beronio v. Police Commissioner of City of Hoboken, supra,* a similar case, decided during the present war emergency, under a statute similar to our own, and in a mandamus action, like claim was made by the city of Hoboken that for equitable principles, in the exercise of sound discretion, the retirement should be denied. The basis of the claim was that in the war emergency, because of a shortage of experienced man power, the city was unable to fill such vacancies, thereby affecting the safety of persons and property. Under such circumstances it was claimed that the right of relator to retire upon a pension should be subordinated to public welfare. The trial court granted a peremptory writ of mandamus. The case was appealed to the supreme court of New Jersey. That court on February 23, 1943, sustained the judgment of the trial court. Thereupon an appeal was taken to the Court of Errors and Appeals, where on September 16, 1943, the judgment of the supreme court of New Jersey was affirmed. In the opinion, reported in 130 N. J.

Law 620, 33 Atl. 2d 855, the court said: "The duty of the Pension Commission was clear and specific; there was no element of discretion with respect to its execution. Neither the denial nor the deferment of the benefits of the act finds sanction in any equitable consideration. There is no tangible basis for the conclusion that observance of the statutory mandate will work radical public injury. There is no evidence of a public emergency that warrants disregard of the peremptory legislative command. It is not within the judicial province to challenge the wisdom of the economy which permits the retirement of able-bodied policemen and firemen at the age of 50 years (and not infrequently to accept employment in private industry at a rate of pay equal to, or nearly so, that received in the civil service) thus placing upon the taxpayers the burden of pensions which bankrupt pension funds are unable to bear. The policy or impolicy of this provision is the exclusive function of the law-making body. It may well be a perversion of the pension principle and violative of all sound tenets of municipal economy, but we have not the faculty of redressing the wrong. The remedy lies with the legislative branch of the government. * * * The denial of mandamus here would constitute a judicial usurpation of the legislative power. It would annul substantial provisions of the statute."

We turn to the question of whether mandamus is a proper remedy for the enforcement of relator's pension rights. Section 20-2156, Comp. St. 1929, provides: "The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. But though it may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, it can not control judicial discretion." It is generally held that mandamus only lies to enforce the performance of a ministerial act or duty, and not to control judicial discretion. It has been authoritatively said that, "A duty or act is ministerial in the sense here intended when there is no room for the exercise of

discretion, official or otherwise, the performance being required by direct and positive command of the law. It is such an act as an official or agent is required to perform upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed. Where the duty in a particular situation is so plainly prescribed as to be free from doubt, it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there is provision or implication to the contrary." 34 Am. Jur., sec. 70, p. 859. "Where the duty is such as necessarily requires the examination of evidence and the decision of questions of law and fact, such a duty is not ministerial; but an act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act." 38 C. J., sec. 73, p. 598.

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law and must, therefore, in a certain sense, construe it in order to form a judgment from its language as to what duties he is directed by statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law directs him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer." 34 Am. Jur., sec. 72, p. 862. It is generally held that, "The writ of mandamus may issue to compel a public officer to perform a ministerial duty with respect to the allowance or payment of a pension, but it must clearly appear that the duty is one which from its character leaves no discretion in the officer to do or not to do." 40 Am. Jur., sec. 40, p. 993.

In *State ex rel. Pinkos v. Rice*, 98 Neb. 36, 151 N. W.

925, this court held that, "The discretion of a public officer cannot be controlled by mandamus, but when a specific duty is made plain by statute, and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus." It was also held in *State ex rel. Butler County Agricultural Society v. Coufal,* 1 Neb. (Unof.) 128, 95 N. W. 362, that, "Where a specific duty is provided by statute mandamus may be invoked to enforce it, if denied; and the party entitled to such relief will not be forced to pursue his remedy by a circuitous and dilatory action at law." In *State ex rel. Haberlan v. Love,* 89 Neb. 149, 131 N. W. 196, a case almost identical with the one at bar, and involving the same section of the statute, this court said: "This brings us to an important feature of the case, and that is the relator prays for a writ to compel the respondents to enroll him as a retired fireman and place his name upon the pension list. To this extent we are satisfied that the demurrer was improperly sustained." The case was reversed and remanded for further proceedings. After trial on the merits and the granting of a peremptory writ of mandamus by the trial court, the case again reached this court upon appeal. See *State ex rel. Haberlan v. Love,* 95 Neb. 573, 145 N. W. 1010. In the latter opinion this court said: "The judgment of the district court properly granted a peremptory writ of mandamus, * * * . The judgment granting the writ is affirmed, * * * ." See, also, *State ex rel. Rishling v. Allen,* 128 Neb. 675, 260 N. W. 191; *Stiles v. Board of Trustees of Police Pension Fund, supra.* Therefore, it has been the law of this state for more than 30 years that mandamus is a proper remedy to require a city of the first class having a paid fire department to place a fireman upon the retired list and pay him a pension after he has served 21 years and elects to retire from active service, as provided by section 2439, Comp. St. 1922, and we find no valid reason within the law for changing the rule at this time.

State ex rel. Gaddis v. Bryan, 102 Neb. 506, 167 N. W.

783, relied upon by respondents, is clearly distinguishable from the case at bar. In that case relator, a fireman, brought an action in mandamus to require the city of Lincoln to place him upon the pension list because of disability, as provided by section 2441, Comp. St. 1922, as distinguished from 21 years' service as provided in section 2439, Comp. St. 1922. The court in that case rightly held that mandamus would not lie to control judicial discretion in determining from the evidence and the law whether the fireman was in fact permanently disabled from accident or other cause while in line of duty. *State ex rel. Cuming County Farm Bureau v. Tighe,* 124 Neb. 578, 247 N. W. 419, is also distinguishable upon like principles of law. No such questions appear in the case at bar. Here, the facts are admitted; the specific duty of the respondents clearly appears and is made plain by statute, leaving no discretion for them to exercise. Therefore, mandamus is the proper remedy to enforce relator's pension rights.

Finally, respondents contend that relator's appeal from the disallowance of his $37.14 claim by the city, to the district court for Hall county bars the present action. By statute, section 20-2157, Comp. St. 1929, and former precedent of this court, a writ of mandamus "may not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law." However, there is ample authority that the mere fact that there is another remedy at law will not prevent the issuance of a writ of mandamus unless the other remedy is adequate to afford relief upon the very subject matter involved, a remedy appropriate and effectual to enforce the right or compel performance of the particular duty in question, and a remedy to which the relator may at all times resort for full relief against the party from whom the duty is owing as distinguished from one against a third person. *State ex rel. Campbell v. Slavik,* 144 Neb. 633, 14 N. W. 2d 186. This rule in every respect disposes of respondents' latter contention adversely to them.

We conclude that the judgment of the trial court awarding relator a peremptory writ of mandamus in the manner

and form as ordered is supported by both the law and the evidence, and the judgment is hereby affirmed.

AFFIRMED.

EDGAR H. RETTINGER, FOR HIMSELF AND FOR AND ON BEHALF OF THE STANDARD OIL COMPANY (NEBRASKA), A CORPORATION, AND FOR AND ON BEHALF OF ALL STOCKHOLDERS OF SAID CORPORATION SIMILARLY SITUATED, APPELLEE, V. HENRY W. PIERPONT ET AL., APPELLANTS.

15 N. W. 2d 393

FILED JULY 28, 1944. Nos. 31559, 31560, 31561.

1. **Corporations.** In legal effect, a stockholders' suit is one by the corporation conducted by the stockholder as its representative. The stockholder is only a nominal plaintiff, the corporation being the real party in interest. The stockholders' suit is always one in equity, unless otherwise provided by statute. A stockholder cannot sue, as a representative of the corporation, by bringing an action at law, notwithstanding the corporation could have recovered in an action at law. Even where the only relief allowable is a recovery of damages the suit is nevertheless one in equity and not an action at law.
2. **Appeal and Error.** This being an equitable action it will be tried *de novo* in this court pursuant to section 20-1925, Comp. St. 1929, and we will reach an independent conclusion without referring to the findings of the district court. Subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
3. **Corporations.** Within the limits of their authority officers and directors possess full discretionary power and in the honest and reasonable exercise of such power they are not subject to control by the stockholders or by the courts, at the instance of a stockholder. In the absence of usurpation, fraud, or gross negligence, 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.

4. ———. In an action brought by a corporation against its directors or officers for misconduct, the necessary proof is exactly of the same character as in an action brought by an individual against his agents, servants, or employees for like misconduct, and the character of the proof is not at all affected by the fact that the action is brought by the shareholders instead of by the corporation itself.
5. **Conspiracy.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
6. ———. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury.
7. **Fraud.** Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him.
8. ———. Fraud cannot be presumed or inferred without proof in a court of equity any more than in a court of law. However, courts of equity do not restrict themselves by the same rigid rules as courts of law in the investigation of fraud and in the evidence and proofs required to establish it. However, the proof must be sufficient to satisfy the conscience of the court that fraud is really existent, and to do this, it must be sufficient to overcome the natural presumption, which is always of considerable force, that men are honest and act from correct motives.
9. ———. To prove fraud direct evidence is not always essential. Inferences or presumptions of fraud may be drawn from facts and circumstances. But such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred.
10. **Corporations.** An officer or director of a corporation occupies a fiduciary relation towards the corporation and its stockholders, and is treated by courts of equity as a trustee.
11. **Trusts.** Every violation by a trustee of a duty required of it by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.
12. **Corporations: TRUSTS.** Where a contract or other transaction has been entered into by defendants having an interest which conflicts with that of the corporation, it is for them to show that it was fair and free from fraud; and when trust funds are

traced to their hands they have the burden of accounting for them. A third person in possession of alleged corporate assets does not have this burden unless some fraud is imputable to him.

13. **Trusts.** It is the duty of a trustee to fully inform the *cestui que trust* of all facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material for the *cestui que trust* to know for the protection of his interests.

14. **Corporations.** An audit is made from the records of a company as shown by its books and, unless some special reason is shown therefor, an appraisal of the assets is no part of such audit. Ordinarily the officers and directors are entitled to rely on the records of the company as reflecting its true condition.

15. ———. A depreciation charge is an estimate of the average loss in value that a certain class of property will sustain over a fixed period of time. It does not contemplate meeting the exact date when each piece or parcel of that class will no longer be usable or have any value. It is an estimate of what the average of all property of that class will depreciate, recognizing the fact that some will depreciate faster than others.

16. ———. Transactions between corporations having common officers and directors are presumptively fraudulent and the burden is upon the defendants to sustain the transactions by clear and convincing evidence that they were fair.

17. **Contracts.** Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself convincing evidence of fraud.

18. **Corporations.** Many factors have to be considered in fixing the value of property for sale purposes for it is elementary that anything that will affect the selling price in the market enters into the term "value."

19. **Fraud.** Fraud is never presumed and the party alleging and relying thereon must prove it. However, what constitutes fraud is a matter of fact in each case. Deception finds expression in such a variety of ways that courts have studiously avoided reducing its elements to positive definitions. Courts content themselves with determining from the facts in each case whether fraud does or does not exist, for whatever satisfies the mind and conscience that fraud has or has not been practiced is sufficient.

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

Seymour L. Smith, Ellick, Fitzgerald & Smith, Raymond G. Young and *Young & Williams,* for appellants.

Edward J. Peterson, Virgil L. Brown, McKenzie & Dugan, Kennedy, Holland, DeLacy & Svoboda and *Albert D. Jones, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

WENKE, J.

This action was commenced in the district court for Douglas county by Edgar H. Rettinger, for himself and for and on behalf of the Standard Oil Company (Nebraska), a corporation, and for and on behalf of all stockholders of said corporation similarly situated, as plaintiff. He was subsequently joined by Edward J. Peterson, as an intervener. The action is against Henry W. Pierpont, Morse C. Palmer, Standard Oil Company of Nebraska, a corporation, and Standard Oil Company (Nebraska), a corporation, as defendants. From a decree in favor of the plaintiff and intervener, for and on behalf of the Standard Oil Company (Nebraska), for the use and benefit of the stockholders of said corporation, that they have and recover from the defendants, Henry W. Pierpont, Morse C. Palmer, and Standard Oil Company of Nebraska, a corporation, the sum of $1,465,180.73 with interest at six per cent from August 29, 1939, and the sum of $4,500 for services and costs, each of said defendants, Henry W. Pierpont, Morse C. Palmer and Standard Oil Company of Nebraska, a corporation, has separately appealed. For the purpose of briefs, argument and this opinion these appeals have been consolidated.

The intervener died January 6, 1944, and the action as to him was revived in the name of Maxine Peterson, as ad-

ministratrix of his estate. For the purpose of convenience the plaintiff and intervener will be referred to as plaintiffs; the defendant Standard Oil Company (Nebraska), a corporation, as the old company; the Standard Oil Company of Nebraska, a corporation, as the new company; the individuals by their respective names of Pierpont and Palmer; and the Standard Oil Company (Indiana) as Indiana.

The action is a stockholders' derivative suit in behalf of the Standard Oil Company (Nebraska), a corporation, based on an alleged conspiracy by Pierpont, Palmer and associates together with the officers of Indiana to defraud the old company's stockholders by getting them to sell the assets of the old company to Indiana for less than their value.

We will not set out the extended allegations of the amended petition, on which this action was tried, for when the allegations of a petition are denied this court, on appeal, cannot look to them, except in so far as they are admitted by the answers, for the nature of the conspiracy to defraud but must look solely to the evidence.

Nor will we set out the findings of the lower court, for as stated in 13 Fletcher, Cyclopedia Corporations (Perm. ed.) sec. 5939, p. 295, sec. 5944, p. 299: "In legal effect, a stockholders' suit is one by the corporation conducted by the stockholder as its representative. The stockholder is only a nominal plaintiff, the corporation being the real party in interest. * * * The stockholders' suit is always one in equity, at least unless otherwise provided by statute. A stockholder cannot sue, as a representative of the corporation, by bringing an action at law, notwithstanding the corporation could have recovered in an action at law. Even where the only relief allowable is a recovery of damages the suit is nevertheless one in equity and not an action at law." "This being an equitable action it will be tried *de novo* in this court pursuant to section 20-1925, Comp. St. 1929, and we will reach an independent conclusion without referring to the findings of the district court." *Beard v. Morgan,* 143 Neb. 503, 10 N. W. 2d 253. Subject, however,

to the condition that "when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite." *Dier v. Dier*, 141 Neb. 685, 4 N. W. 2d 731.

There are many errors that have been assigned but have not been argued in the briefs or orally and will, therefore, be considered as waived. While many other errors are assigned and discussed in the briefs, we will only discuss those necessary for a determination of the matters involved.

The facts show that the old company was organized in 1906 as a Nebraska corporation but a subsidiary of Indiana. It remained such until 1911 when, by reason of the same being found to be part of a combination in restraint of trade, it was by order of court required to be separated. As a result, in 1911, the old company emerged as an independent and separate Nebraska corporation and one in which Indiana held no stock. However, the old company continued, over the period of its existence, to purchase practically all of its merchandise from Indiana.

It was purely a marketing company engaged in the sale of gasoline, oils, and associated petroleum products. Originally this was done entirely through bulk stations, which included tank wagon delivery service, located along the tracks and on the premises of the various railroads throughout the state. Fourteen of these stations were in operation in 1906 and 312, or 95 per cent, of all bulk stations were constructed during the period of 1906 to 1909, inclusive. Subsequently marketing developed through service stations. The first such station was erected in 1913 at Twelfth and O streets in Lincoln, Nebraska, and from 1913 to 1919, 24 such stations were built. Beginning with 1920 and to and including 1928 it greatly expanded this service throughout the state by building 87 per cent of its service stations.

In connection with this business it had the exclusive use

of the word "Standard" in the state of Nebraska and also of the trade name "Red Crown" for gasoline, "Perfection" for kerosene, "Polarine" for oil and "Mica" for axle grease. From its beginning up to and including the year 1931 the operation of the business was exceptionally profitable and the dividends, both cash and stock, based upon such earnings were exceptionally good.

At the time of the sale of the assets of the old company on August 29, 1939, the officers and directors were Henry W. Pierpont, president; Carl N. Humphrey, vice-president; Morse C. Palmer, secretary-treasurer; Alfred G. Ellick and Earl K. Buck.

There are two matters upon which evidence was offered which, in point of time, are too remote to be relevant to the action herein. However, the appellee contends they show a disposition on the part of the then officers of the corporation, some of whom were still with the old company when the assets were sold on August 29, to use the corporation for private gain. We will discuss them here.

The first of these is a stock transaction had on March 26, 1926, when the then officers and directors of the corporation, consisting of A. H. Richardson, president; G. M. Smith, vice-president; Henry W. Pierpont, secretary-treasurer; W. H. Herdman and Carl N. Humphrey, purchased 1,794 shares of the stock of the old company at $230 per share, which stock had a par value of $100. They paid for this stock by giving their joint note to the Omaha National Bank, United States National Bank of Omaha and the United States Trust Company of Omaha in the amount of $412,620. No money of the old company was in any way used for this purchase. As there were few stockholders of the old company in Nebraska at the time, the purchase was made for the purpose of distributing this stock by selling it to local people with the hope that they might become customers and boosters of the old company. For this purpose the par value of the stock was reduced, after the purchase, to $25 and most of this stock was then distributed by sell-

ing it to people throughout the state. While the evidence does not clearly disclose what the result of this transaction was, it seems that it was not financially profitable to the individuals, although, it does appear that the distribution of the stock throughout the state was desirable and beneficial. We can see nothing wrong in this transaction.

The second is the matter of its annuity plan. It appears that the company had, from its beginning, a retirement plan for its employees and officers in the form of an annuity. This plan was amended in 1918 and again in 1922. Eligibility thereto and the amount thereof was based on length of service and compensation received at the time the officers or employees retired. This was a voluntary plan pursuant to which the employees made no payments for the benefits. The company, in order to take care of the annuity retirement payments that had or would accrue thereunder, had deposited considerable funds in the form of a trust. However, on January 11, 1932, pursuant to notice given the the stockholders, this plan was amended whereby the employees would pay from that date a certain percentage of their salary or wages for such benefits and same became fixed and certain when the right thereto had accrued. To carry out the provisions thereof in behalf of those officers and employees who were eligible thereto a contract was entered into with the Equitable Life Assurance Society of the United States underwriting this plan. There was paid at that time approximately $339,000 to underwrite the amount of the annuities already earned by the various officers and employees based on their period of service and the amount of their salaries. Most of this payment was money previously set aside. Sufficient was added to cover the full amount of the premium. The principal complaint to this transaction is that the action of the officers of the company, particularly President Richardson who thereby secured a the premium paid, was an excessive and unreasonable taking of the assets of the old company and that the notice right to an earned annuity which required $119,641.89 of

sent to the stockholders for the purpose of the meeting of January 11 was not in sufficient detail to authorize such a use of the corporation's funds. However, while it might have been desirable to have placed a maximum on the amount which officers could receive, the annuity plan of the old company had no such limitation prior to January 11 nor was this in any manner changed at that time. The only material changes being from that date the employees were required to pay a part of the cost of their annuity and the same became fixed and certain, based on the length of service at the time of retirement and compensation received. It is significant to note that the salaries of all officers were thereafter immediately reduced, including the salary of the president which was reduced from $25,000 to $16,500 per annum. While it does seem that the amount of retirement pay which Richardson would receive under the annuity plan is very large, the amendment of January 11 in no way increased the amount which he would have received under the old plan. The only change was that it became certain by reason of the action taken in purchasing the policy. We do not think this transaction, under these circumstances, was in any manner an act of bad faith on the part of these officers and directors.

Shortly after the commencement of the trial herein the plaintiffs withdrew from their cause of action the matter of mismanagement of the corporation in such a manner as to practically deplete the assets as follows: Mr. Ellick: "* * * As I understand it, you are withdrawing your claim?" Mr. McKenzie: "That the officers ran the corporation in such a manner as to practically deplete the assets." Mr. Ellick: " * * * You will abandon that?" Mr. McKenzie: "Yes." However, much evidence was offered on many acts and omissions of the officers and directors that are purely matters of corporate business policy and management which are committed to the discretion of the officers and directors and with respect to which their decision is final in the absence of usurpation, fraud, or gross negligence.

The period covered by the following discussion of the old company's management is generally from 1932 down to the date of the sale of the assets on August 29, 1939.

The agency contracts entered into by the old company with its various employees, particularly commission agents, were upon such terms that it was difficult, if not impossible, for the agents to make a reasonable income. This resulted in a constantly high percentage of change in personnel throughout the state and seems to have left a good deal of bad publicity, especially in the smaller communities. Many of these agents were subsequently employed by other gasoline companies and took many of the company's customers with them. On the whole, both as to bulk and service stations, this created a rather unhealthy situation.

It was further developed that the old company either failed to meet or was so slow in meeting price cutting or price conditions in the field that it affected its sales. When, in 1934, it adopted a policy of meeting such price conditions its operating loss was very large and resulted in a net operating loss for that year of $641,624.43. While the evidence discloses that many customers and eventually considerable business was lost by failure to meet the uncertain price conditions that existed during this period, however, whether or not meeting all competition would have been a desirable thing on the part of the officers and directors is a serious question.

At the time of their construction the old company's standard type service station usually included a canopy, one inside toilet, a single drive-in, a visible gravity pump, and a pit for lubrication. During the period of 1929 to 1939 the increase of service stations of all other companies over the state was approximately 149 per cent and certain features of the standard type station became more or less obsolete because of changing conditions. With the increase of truck transportation considerable gasoline patronage was lost because the canopy either interfered with or made it impossible for trucks to be serviced at these stations. The in-

creased speed of automobiles and the desirability of a quick drive-in caused the one side drive-in for both ingress and egress to become an undesirable feature. Likewise, with the increase of tourist traffic, the single inside toilet did not meet the demands of the public and was not an inducement to their patronage. Through the development of the electric computer pumps, which permitted quicker service, the visible gravity pump became less desirable. Also, the pit was replaced by the more desirable modern lift lubritorium and lighting by bulbs was replaced with neon or indirect systems. All of these factors had their effect upon the appeal of these stations to the public as service stations and had their influence in the decrease of its business. Because of the expense involved the officers and directors did not enter into a program of modernization except for a few stations.

The bulk stations of the company were constructed adjacent to the tracks of the various railroads throughout the state and generally on premises which the company leased from them. They had inside loading with gravity or hand pumps and in the beginning served their customers with small 300-350 gallon mule drawn tanks. More modern facilities would have recommended outside loading to give more inside room, power driven pumps for quicker unloading of tank cars and the loading of service tanks. But due to the gradual decrease of bulk stations the company did not engage in modernizing its bulk stations except in the instance of a few larger places. It did provide larger tank service with motor transportation. Whether this materially affected the business is not certain.

In this connection the evidence shows the old company, for a considerable period of time, failed to meet a situation in the field by supplying what is known as "hot" tractor fuel which apparently affected its sales of that product.

One of the major factors which affected the profitable operation of the entire system was the development of motor transport for hauling gasoline. Until the entry of truck

transports into the field of transportation all gasoline was shipped by rail. All the bulk stations were located on railroad trackage with facilities for rail transportation and with but few exceptions were located on leased premises. At the time of the entry of this new type of transportation the officers and directors seriously considered the matter of the old company entering the field by purchasing a fleet of transports. Upon carefully considering the extensive investment necessary to purchase the transports, the expense of rebuilding both its bulk and service stations for transport facilities, the possibility that the railroads might cancel its leases and make necessary its moving its bulk stations, with the hope and expectation that the railroads would meet this new competition by rate adjustment and in view of the then existing business depression, the officers and directors decided not to enter the field and to continue to ship by rail. In view of what subsequently transpired, when the railroads failed to adjust their rates and the old company had to meet this ever increasing type of competition, the policy adopted is questionable. The gross margin on gasoline was materially reduced and was unquestionably the major factor in the inability of the management to continue to operate the company at a profit. But whether or not this was a wise business policy for the company to pursue is not for this court to decide.

There is evidence to indicate that part of the company's financial difficulties may have been due to the management's operating the company with an excessive personnel. This is disclosed by a survey made in the forepart of 1939 pursuant to which a reduction in personnel permitted a decrease in operative overhead of approximately $115,000 per annum.

It further appears that during the years 1936 to 1938, inclusive, the board of directors adopted a policy of retiring stock by purchasing it on the market and for this purpose expended some $331,000. This transaction on its face would appear to have been beneficial to the company for it

appears that it was purchased for much less than its book value and much less than was received for the balance of the stock when the assets were sold to Indiana.

During the period when the old company was constructing most of its service stations the state had not definitely fixed and determined its system of permanent highways and subsequently, when such highways were permanently located, 48 of the stations which had formerly been built on highways were removed therefrom. Due to these changes 25 of these 48 stations were closed because of the loss of business. The amount of gasoline the others were able to sell was materially reduced. The company generally made no effort to change its stations to other locations on the highways although in some instances it purchased a new location and opened a new station.

The evidence further shows that the company spent about $100,000 a year advertising its products under the trade names and marks of which the company had exclusive use.

The old company, during the years of 1935 to 1938, inclusive, was able to obtain $248,160.76 in the form of rebates from Indiana based on a showing of loss due to price conditions in Nebraska.

As stated in *Johnson v. Radio Station WOW,* 144 Neb. 406, 13 N. W. 2d 556, as quoted from 19 C. J. S., sec. 743, p. 83: "Within the limits of their authority directors or trustees possess full discretionary power, and in the honest and reasonable exercise of such power they are not subject to control by the stockholders or by the courts at the instance of a stockholder, * * * in the absence of usurpation, of fraud, or of gross negligence, courts of equity will not interfere at the suit of a dissatisfied minority of stockholders, merely to overrule and control the discretion of the directors on questions of corporate management, policy, or business." And in *Royal Highlanders v. Wiseman,* 140 Neb. 28, 299 N. W. 459: "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 de-

cision 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."

As stated in *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827:

"We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

"Some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity."

As stated in *Benedict v. Columbus Construction Co.*, 49 N. J. Eq. 23, 23 Atl. 485: "If stockholders in a corporation disapprove of the company's management, which is conducted without fraud, or by action *ultra vires*, or in gross abuse of trust, or shall consider their speculation a bad one,

their remedy is to elect new officers or sell their shares and withdraw."

Looking backward it would appear that some of these business policies of management, as adopted and carried out by the officers and directors of the old company, especially between 1932 and the date of the sale in 1939, did not work out for the best interests of the company. But it is altogether too easy to be critical of the actions of others based on hindsight rather than foresight. Especially is this true in view of the economic uncertainties of this period due to what is generally referred to as a business depression. But examining the actions taken by the officers and directors, we find nothing that tends toward usurpation, fraud or gross negligence and in their absence nothing for which they should in any way be held legally liable for damages.

For many years the old company had been operating on a very successful basis. But commencing with 1932 and continuing through 1938, except for 1936, it was not able to operate at a profit and during those years sustained net losses as follows:

1932	$152,355.14
1933	285,233.12
1934	594,849.86
1935	41,607.67
1936	34,390.07*
1937	96,125.42
1938	111,731.25

* Profit

This condition was due to many causes already discussed, such as: Price cutting, competition from truck transports (the old company transporting its products by rail) which caused a sharp decline in the margin of gross profit per gallon sold, competition from a large increase of service stations particularly in view of their containing more modern facilities, changes of state highways leaving stations isolated and off well-traveled roads, management's policy of han-

dling its agents, and operative overhead. This continued loss, over a period of years, caused considerable restlessness on the part of stockholders, particularly the local ones, and created a desire to dispose of the company's assets or to merge it with some integrated company that had producing and refining together with marketing.

In July of 1938, in realization of this fact and after having been contacted by a stockholder in New York, Pierpont, on his return through Chicago, contacted Seubert, president, and Barkdull, executive vice-president, of Indiana, and suggested this situation to them and that they do something—looking toward the purchase or merger of the old company with Indiana. As a result of this contact Indiana, in the forepart of August, sent out Boatwright, head of the research department, Naylor of the sales department and Hanna and Perrenot of the accounting department, who, for a period of some two weeks, checked the affairs and business of the old company. After their return to Chicago, Pierpont, on September 21, 1938, again contacted the officers of Indiana and they advised him they were not interested in acquiring the assets and business of the old company either through purchase or merger. But, from the survey made, they thought that certain economies could be made in the operation of the old company and were willing to permit their research department to be used for that purpose. Pierpont brought this information to the attention of his board of directors and pursuant to their authorization made arrangements with Indiana to have their efficiency experts come out for the purpose of making an efficiency survey of the old company.

On January 23, 1939, Hughes of the accounting department and Jones of the sales department of Indiana came to Omaha and started their survey. They completed this survey about June 30, 1939. Their method of procedure was to take some department, study and survey its operations, then make a written memorandum of proposed changes and send a copy to Boatwright, head of the research department

of Indiana, and deliver a copy to Pierpont. A conference was then had between the officers of the department, the officers and directors of the old company and either Jones or Hughes, whoever had made the survey of that particular department, and the proposed recommendations were either rejected, approved or modified and, as approved or modified by the directors, put into effect. The estimated total of all economies put into effect was in the amount of $115,078 and had all been acted upon when the survey was completed.

Jerome A. Newman, of the firm of Graham-Newman Corporation, owners of 1,500 shares of stock of the old company, through appointment called on Pierpont March 6, 1939, to discuss matters relating to this investment. When he called Pierpont gave Newman all the information he wanted about the company, including an opportunity to see some of its different properties. Newman, who was experienced in buying controlling interest in the stock of corporations, indicated to Pierpont that he might be interested in making an offer of $11.50 per share for the stock. At Pierpont's suggestion he decided to wait until after the annual stockholders' meeting of April 10, 1939, when two additional directors were to be elected.

Newman was advised that the policy of the company did not permit him to have a list of the stockholders and their addresses but he made arrangements with the officers and directors to supply them with the offer in printed form, the company to address the envelopes, and he to actually mail them. On April 20, 1939, he brought to Omaha his printed offer dated April 17, 1939. The company addressed and he actually mailed the offer, paying the expense thereof. This offer was for $12 per share conditioned on the acceptance of 107,000 shares or approximately 66 per cent, same to be deposited according to the offer by May 4, 1939, with an option on his part to extend the date to May 18, 1939. This option he exercised but at the end of the extended period the owners of somewhere between 33 and 46 per cent of the stock had accepted the offer. Newman then withdrew the

offer and the deposited stock was returned to the owners.

The directors, considering the offer as a matter directly between the stockholders, did not send any recommendations in regard thereto to the stockholders nor did the special stockholders' committee, appointed at the stockholders' meeting of April 10, 1939, do so. The committee, considering the offer too small, at first contemplated doing so and had Ellick prepare such a letter. They were not satisfied with the letter he prepared and upon further consideration by the full committee decided to abandon the idea.

During the time the offer was in effect Pierpont received inquiries in regard to the company from stockholders and parties representing stockholders. To these inquiries he made extended replies which included the following statements:

"We have consistently carried on our regular depreciation charges as set up by the government several years ago. No revaluation of properties or adjustment of depreciations have been made since that time, so we believe even with depressed conditions that the book value as shown in our statement is a reasonably close value of the present assets of the company."

"You will note the current assets—which could probably be converted into cash in a comparatively short time—amount to a little over Mr. Newman's offer of $12 per share. Over and above that figure are the fixed assets of $17.31 per share, making the total book value on our stock $29.33 per share."

On March 17, 1939, the statement of the old company as of December 31, 1938, was mailed to all stockholders. Also, an operating statement for the year 1938 showing a net loss of $111,731.25. With these statements Pierpont sent a letter showing that most of this loss was overcome by the company's purchase of 5,000 shares of its stock on the open market for $34,730.50 which resulted in $90,269.50 addition to capital surplus leaving, as he states, "The book value per share at the end of 1938 amounted to $29.33 as com-

pared with $29.36 a year ago. Net current assets per share at the close of 1938 amounted to $12.02 as compared with $11.94 at the end of 1937."

After Newman's call on March 6, 1939, and after the 1938 annual statement had been sent out, Pierpont again called on the officers of Indiana on March 24, 1939, but they again advised him they were not interested in acquiring the old company's assets and business.

At the annual meeting of the stockholders held on April 10, 1939, Ellick and Buck were elected to the board of directors in place of Herdman, deceased, and Richardson, retired, making the new membership of the board Pierpont, Humphrey, Palmer, Ellick and Buck. At this meeting considerable discussion was had relative to merging with an integrated company, that is, one having production and refining as well as marketing. A stockholders' committee, consisting of Terry Reimers, who acted as chairman, Frank J. Fitzgerald and Lawrence Brinker, was appointed to advise with the management.

On April 13, 1939, and after the stockholders' meeting, Pierpont and Ellick went to Chicago where Ellick met the officers of Indiana and they generally discussed the affairs of the old company but Indiana continued to show no interest in acquiring the old company.

During all of Pierpont's negotiations with Indiana he kept the directors fully advised thereof but none of the stockholders, including the stockholders' committee, was given any information in regard thereto until the release to the press on July 26, 1939. All negotiations were handled by personal contact until the submission of the formal offer on July 21, 1939.

Under date of May 5, 1939, Terry Carpenter of Scottsbluff, Nebraska, an operator in the refining, wholesale and retail distribution of petroleum products, sent a letter, the terms of which he immediately released to the press, containing an offer of $13 per share for 51 per cent of the stock, subject to conditions as therein provided, or an ex-

change of stock with Terry Carpenter, Inc., upon some method to be determined by the parties. On May 8, 1939, reply was made that the management would make their facilities available so the offer could be made to the stockholders the same as the Newman offer and that the board of directors would be glad to confer with him in regard to the suggested merger. Carpenter never replied to this letter either by mail or in person and never attempted to complete either the proposed offer to purchase or any plan for merger.

After Newman's offer was sent out and after Carpenter's letter was received and its contents released to the press, Pierpont, on May 16 again called on the officers of Indiana but they were still not interested but suggested that if he had any further reasons, not already discussed, why he thought they should acquire the business and assets of the old company they would be glad to consider them.

Pierpont then prepared a written memorandum of reasons why Indiana should be interested in acquiring the business and assets of the old company. Reciting the business conditions of the company, the uneasiness of the stockholders due to continued losses, the offers already made for the stock, and other matters, most of which have been recited in this opinion, he pointed out that whoever acquired the old company would have the exclusive use of the name "Standard Oil Company" and the trade-mark brands owned by the company in Nebraska. This extended memorandum was delivered to the officers of Indiana.

After this memorandum was presented the officers of Indiana became interested and at a meeting in the forepart of June, Stephens, general counsel for Indiana, presented a plan for an exchange of stock. When the plan was presented to Ellick, general counsel for the old company, he advised the plan was not feasible for the reason that it was not legal under Nebraska law.

However, on June 20, 1939, Ellick and Pierpont went to Chicago and had a conference with Seubert, Barkdull and

Stephens and suggested to them that they purchase the assets of the old company. Ellick, in analyzing Stephens' proposal of exchange, suggested that it would reasonably yield the stockholders $17.50 per share. Seubert, however, refused to consider a cash offer of more than $15. Upon their return the directors of the old company discussed and considered Indiana's suggested offer of $15 per share but decided it was too low and that they could not recommend it to the stockholders.

In the meantime the adjourned annual stockholders' meeting of April 10, 1939, reconvened on June 12, 1939, with 46 stockholders present. At this meeting Reimers, chairman of the stockholders' committee appointed on April 10, gave an oral report of their activities. It may be said here that the committee had full co-operation from the officers and employees of the old company in obtaining information and had free access to the books and records. They were, in keeping with the company's policy, denied the names and addresses of the stockholders although they were advised that any information they wished to send to the stockholders would be addressed and mailed. Among the many things discussed in his report Reimers stated the company's loss in assets (as shown by its annual statements) over the period from 1930 to 1938, inclusive, and stated the loss for the first quarter of 1939 to be $76,581.79. Pierpont, in his remarks at this meeting, stated that as a result of changes due to the efficiency survey by the men from Indiana the company, over a period of a year's time, would make a savings in operative costs of around $115,078 all of which would be in effect by June 15, 1939. This information was at the time given publicity in the World Herald of June 12, 1939.

Upon a motion being made to adjourn the annual meeting for 60 days Pierpont suggested that it would not be for the best interests of the company to again adjourn the meeting. After considerable discussion by the stockholders present he stated: "As far as I am concerned—and I know the other

Directors back me up—if this company is given a reasonable time (and I mean by 'reasonable' say up to the next annual meeting) to work out our different problems, whatever they may be: and if they cannot work these out—then to submit a proposition to the stockholders which will get them their money out of the company." The meeting adjourned *sine die*.

On July 6, 1939, Pierpont and Ellick returned to Chicago and advised the officers of Indiana that they were not willing to recommend $15 per share but Ellick suggested that they increase their offer to $17.50. The officers and directors of Indiana, who were present, had an informal meeting and then advised that they would recommend to the full board an offer of $17.50 per share. With this tentative offer as a basis, Ellick was to prepare a proxy for submission to the S.E.C. for approval. Pierpont, at this time, insisted that the offer contain a provision for a deposit of $800,000 to show the good faith of the bid and to keep out, as he stated, "fly-by-night bidders." Indiana, although objecting to the necessity of this requirement because of their financial standing, agreed to include it as a part of their offer and subsequently did so. It was agreed that the offer was to be kept confidential between the officers and directors of both companies in order that no one, either stockholder or outsider, might gain by trading in the stock on the market because of such inside information.

Ellick then prepared the proxy. On July 12 he and Pierpont stopped in Chicago on their way to Washington to see Stephens, general counsel of Indiana, who had prepared the tentative offer. Stephens inspected and approved the proxy. Ellick and Pierpont then proceeded to Washington where on July 14 they consulted Anderson, counsel for the S.E.C., as to the form of the proxy. Anderson suggested a later date than December 31, 1938, for a statement of the company and that the proxy include a statement of what the stock had been selling for on the exchange. As a result of these suggestions a statement of the company as of May 31,

1939, and a statement of the high and low prices of the stock on the New York curb exchange from July 1, 1937, to June 30, 1939, were added to the proxy.

With these additions the proxy was again submitted to the S.E.C., but no changes or additions were suggested.

On July 19, 1939, Buell Jones, of the legal staff of Indiana, came to Omaha and discussed with Ellick and Pierpont the final draft of the offer. At the same time Boyle and Hanna came out to verify the cash, check the investments of the company in the form of securities and to check and verify their last monthly statement.

On July 21, 1939, Indiana submitted its formal written offer to the old company by depositing it in the mail at Chicago. This offer the old company received on July 22, 1939. On July 24 the board acted favorably on Indiana's offer and decided to recommend it to the stockholders and informed Indiana of this fact. Although a special stockholders' meeting could be called in ten days the directors called the meeting to consider the offer for August 29, 1939.

Although the officers and directors of both companies had agreed not to release any information as to the offer until it was submitted to the stockholders, however, Pierpont, because of increased activity of the stock on the curb exchange, called Seubert and explained this situation. It was then decided that there might be a leak and that in fairness to the stockholders it should be released at once. This was done and wide publicity was given the offer and its terms in the Omaha World Herald and many other papers including Chicago and New York. It also received publicity in publications devoted exclusively to the petroleum industry.

Following the release of this news the employees of the old company became considerably disturbed as to their future if Indiana should acquire the assets of the old company. Pierpont called Seubert and with his approval informed the employees there need be no fear of losing their jobs for if Indiana acquired the assets it intended to con-

tinue to operate the business and would retain all employees whose work was satisfactory.

Subsequent to the board of directors' call of a special meeting of the stockholders on August 29, 1939, to consider Indiana's offer of $17.50 per share, net, for the 161,403 shares of the old company, the board of directors had prepared and sent to each of the stockholders under date of July 28, 1939, a proxy statement.

This proxy statement sets forth Indiana's offer that it would purchase "all of the assets of said Standard Oil Company (Nebraska) of every class, character and description, including, but without limitation, the good will and all trademarks, trade names, copyrights, patents, patent rights, or other incorporeal hereditaments heretofore acquired by the said Standard Oil Company (Nebraska), and including also the right to use the name of 'Standard Oil Company' in Nebraska, it being understood that the purchaser shall succeed to and acquire all of the properties, rights and privileges now owned by the Standard Oil Company (Nebraska), including those acquired by usage" and pay therefor "a sum sufficient in amount to yield to the stockholders of Standard Oil Company (Nebraska), in complete liquidation of said company, the sum of Seventeen Dollars and Fifty Cents ($17.50) per share at Omaha, Nebraska."

It further states that no director or officer of the company has any interest in the matter of the purchase, either directly or indirectly, and sets forth the shares of stock owned by each director as follows:

Henry W. Pierpont	308 shares
Carl N. Humphrey	988 shares
Morse C. Palmer	316 shares
Alfred G. Ellick	100 shares
Earl K. Buck	830 shares

It contains a statement of income and surplus for the period of three years and five months, ending May 31, 1939, showing the net loss for the first five months of 1939 to be $100,137.32. It also contains a balance sheet of the company as of December 31, 1938, and May 31, 1939.

The May 31, 1939, statement is as follows:

	ASSETS		
Current Assets:			
Cash		$384,480.85	
Investments	$821,901.89		
Less reserve to reduce to quoted market values	132,631.89	689,270.00	
Customers accounts receivable	458,375.58		
Less allowance for doubtful	1,000.00	457,375.58	
Inventory		750,658.38	
Other current assets		36,752.57	$2,318,537.38
Properties:			
Real estate		1,424,374.67	
Buildings & equipment	3,512,801.03		
Less reserve for depreciation	2,220,830.13	1,291,970.90	2,716,345.57
Prepaid and deferred charges, miscellaneous items			9,755.88
			$5,044,638.83
	LIABILITIES		
Current Liabilities:			
Accounts payable—Trade		292,622.03	
Accrued liabilities		122,583.60	415,205.63
Capital:			
Common stock (Par $25.00—Authorized 200,000 shares) Outstanding 161,403 shares		4,035,075.00	
Surplus:			
Capital	678,171.81		
Earned—deficit*	83,813.61*	594,358.20	4,629,433.20
			$5,044,638.83

It further states: "The loss of $100,137.32 for the first five months of 1939, as shown in the statement of Income and Surplus, is not necessarily representative of the remaining seven months of the current year, because the major portion of a calendar year's business is done during the warmer months of the year."

"The highest and lowest market prices of the stock of the Company on the New York Curb Exchange during each quarter for the period July 1, 1937 to June 30, 1939 were as follows:

YEAR	QUARTER	HIGH	LOW
1937	Third	11 1/4	8 1/8
	Fourth	9 1/4	8
1938	First	7 1/2	6 1/8
	Second	7	6 1/4
	Third	8 3/4	6 1/4
	Fourth	8	5 1/2
1939	First	6 7/8	6
	Second	11	6 1/8

"The Company owns no producing or refining properties or pipe lines, and its operations have been confined exclusively to distribution in Nebraska, at wholesale and retail, of petroleum products and some automobile accessories. The management attributes the operating losses that the Company has suffered in six of the past eight years largely to wholesale and retail marketing conditions in the State of Nebraska. Nothing is indicated to the management that these conditions are likely to materially improve in the reasonably near future. In view of the effect of these conditions on the ability of the Company to operate at a profit, the Directors after a careful study of the situation, feel that the best interests of the stockholders will be served by a sale of all of the assets at this time, to avoid further depletion thereof by operating losses. If no better offer is made than the one quoted above, the Directors recommend its acceptance."

Accompanying this proxy statement was a notice to the stockholders of the special meeting on August 29, 1939, at 10 a. m. (CST) to consider Indiana's offer, which provided as follows: " * * * and to consider and act upon any other CASH OFFER, in excess thereof, accompanied by a like performance guarantee deposit, for said assets, that may be submitted in writing to the Board of Directors or to the stockholders at any time before any of such offers shall

have been accepted by the stockholders at said special meeting or at any adjournment or adjournments thereof."

Two forms of proxy accompanied this notice. The proxy against the sale provides in part: " * * * AGAINST A SALE of the assets of the Company for any sum whatsoever." While the proxy for the sale provides in part: " * * * FOR A SALE of all the assets of the Company for a cash sum that will yield to the stockholders in complete liquidation of the Company the sum of at least Seventeen and 50/100 ($17.50) Dollars per share at Omaha, Nebraska. In the event one or more better cash offers for said assets shall be submitted in writing by a responsible party, before the stockholders shall have accepted any offer herein authorized to be accepted, then the undersigned hereby authorizes the said proxies to vote FOR an acceptance of such better cash offer as said proxies shall, in their sole discretion, determine to be such."

Both forms of proxy appoint Pierpont, Buck and Ellick proxies to represent and vote the stockholder's shares at the special stockholders' meeting as in the proxy provided.

Between the time these proxies were mailed and the date of the special meeting employees of the company contacted stockholders and asked them to vote. On August 14, 1939, the company sent out a follow-up letter to the stockholders who had not voted and urged them to do so because of the importance of the matter submitted. But in no instance were the stockholders told or advised as to how to vote. When a stockholder voted both proxies, as the evidence shows some of them did, both were promptly returned with the suggestion that they vote only one.

At the special stockholders' meeting the notice of the meeting was read and then the offer of Indiana. At the conclusion thereof the chairman stated that no other cash offer or other offer for the assets of the company had been submitted in writing or otherwise to the board of directors or the officers of the company and asked if there was any person present desiring to submit any such offer. There being no response, the offer of Indiana was then submitted for

consideration. The offer was accepted by a vote of 130,750 shares for and 3,451 shares against and the officers and directors authorized and directed to do all things necessary to carry out the acceptance and to dissolve the old company within a period of not more than six months.

After Indiana made their formal offer for the assets of the old company, Stephens, general counsel, made arrangements for and Buell Jones had prepared the articles of incorporation of the new company for immediate filing if their offer was accepted. This was done to avoid any lapse and thus prevent any possible loss of the use of the name of the old company "Standard Oil." On August 29, 1939, Buell Jones, counsel for Indiana, was in Omaha to consummate all matters in connection with their offer and upon being advised that it had been accepted immediately communicated with the proper parties in Lincoln and had the articles of incorporation of the new company filed. Indiana owned all the stock of the new company.

The assets of the old company were shortly thereafter transferred to the new company and the stockholders of the old were, as soon as possible, paid the sum of $17.50 per share. Edward J. Peterson, who voted his 51 shares against the sale of the assets, surrendered his certificate of 32 shares for cancellation on September 12, 1939, and received $17.50 per share and on September 19, 1939, surrendered his certificate for 19 shares and received $17.50 per share. Edgar H. Rettinger and wife, Velma M., who held 100 shares as joint tenants with right of survivorship, sent in their stock for cancellation and retirement on September 12, 1939, and received their check for $1,750 in liquidation thereof dated September 13, 1939. The check of the company being signed for it by Rettinger himself.

In connection with the purchase taxes had accrued and remained unpaid in the sum of $44,406.44 but were not listed as a liability by the old company on their statement. Indiana was required to pay these taxes and it increased their bid by that amount.

During the time these negotiations were being carried on

with Indiana others, besides Newman and Carpenter, contacted Pierpont seeking to work out a plan of exchange of stock, merger or a purchase of the assets of the old company.

On July 23, 1937, George D. Locke, former vice-president of Barnsdall Oil Company and at the time engaged in special work, wrote Pierpont relative to the possibility of getting the old company and the Champlin Refining Company together which "would make Nebraska an integrated company overnight." This letter was answered August 4 with the reply that he would be very glad to go over the matter with him when he returned from Europe and suggested that he bring certain material with him so they would be able to discuss the matter intelligently. In the early part of September Locke came to Omaha and advised that he had been over the matter with Mr. Champlin and he was not interested. As a result these negotiations never developed into any definite proposition or offer.

In the early part of 1938, when Pierpont was in New York, L. V. Nicholas contacted him relative to a possible merger with some other company but did not disclose the principal. This resulted in another meeting in New York in August and Nicholas coming to Omaha about the middle of the month. On August 23, 1938, they had a conference in Kansas City with Vickers and Henderson, president and vice-president of the Vickers Petroleum Company, who were interested in a list of the stockholders as they wanted to go out and buy up the stock of the company the best they could. Pierpont refused them this information but stated he would be glad to accept any proposition they might make and would submit it to the stockholders. Vickers then decided they were not interested and no further negotiations were had.

At the time Pierpont was in New York about the middle of 1938 he was contacted by J. B. Huffard, a stockholder of the old company, relative to helping work out a deal whereby the company might become integrated. However, on August 9, 1938, Huffard wrote advising that the party he

was dealing with was not interested so this transaction fell through.

On April 24, 1939, following the publication of the Newman offer, Pierpont received a telegram from Thurman Hill advising that the Bay Petroleum Company thought they could offer a more advantageous plan and would like to confer with the management. This was followed by a letter from C. U. Bay, president of Bay Petroleum Company, dated April 25, confirming Hill as his representative, pursuant to which a meeting took place with Hill. Thereafter Bay and Roland V. Rodman, vice-president and general manager of the Bay Petroleum Company, came to Omaha and had a meeting with Pierpont and Ellick on Sunday, June 1, 1939, at which time they discussed the possibility of a merger between the old company and the Bay Petroleum Company. After a telephone call from Rodman on June 26 asking for additional information, which Pierpont sent him on the following day, nothing further transpired until after the Indiana offer. On August 3, 1939, Bay wrote Pierpont to the effect that he thought they could make a more advantageous offer than the one they had through the purchase of the assets of the old company by an exchange of stock. In his reply on August 5 Pierpont pointed out Ellick's viewpoint that a stock exchange would not be practical as it would take the unanimous consent of the stockholders, which would be very hard to get, and suggested that the only feasible way to handle the situation was a cash offer for the assets. He advised that the Indiana offer was open and the proxies provided that a better offer could be accepted. With this letter he mailed all of the enclosures sent to the stockholders with reference to Indiana's offer. No further negotiations were had after this letter as Indiana's offer was in excess of what they thought the assets were worth.

J. M. Doroshaw, president of the First Mid-Continental Corporation, came to the office about May 10, 1939, and advised he represented a company that had some of the old company stock and wanted to know about the Newman of-

fer. Pierpont advised him they had nothing to do with the offer but they were willing to give him such information about the company as he wanted. Following this meeting Doroshaw wrote inquiring about the investment portfolio and the freight rate situation as compared with transport, which information he was given. Then nothing was heard from Doroshaw until a letter dated July 12, 1939, was received suggesting a merger with Socony-Vacuum Oil Company. Pursuant to this letter a conference was had on July 25 at which time Doroshaw admitted he did not represent the Socony-Vacuum Oil Company and he was advised he did not represent the old company. However, on August 1, 1939, Doroshaw again wrote the old company, as president of the Investment Corporation of North America, and asked for facilities to mail a communication to the stockholders. On August 4 reply thereto advised the number and cost thereof and that it would be mailed. On August 23 Doroshaw mailed to the old company 2,700 copies of a letter dated August 22, together with the necessary envelopes, to be sent to the stockholders. This letter stated Manilow & Company, Inc., of Chicago, had completed negotiations with Hester & Wise, Inc., of Houston, Texas, with a view to that concern making a better offer to purchase all of the assets than the offer submitted by Indiana and contained the following: "In the event Hester & Wise, Inc., shall be satisfied with the report to be rendered by their Accountants, it has been indicated that their offer to purchase all of the assets of the company will be on a basis that should yield the stockholders at the rate of $20.00 per share for their holdings." He, however, requested that the actual mailing of these letters be withheld until a definite offer had been made, which was to be included with the letter. On August 24 he advised that the letters must be mailed by Saturday, August 26, before 1:00 p. m. On August 25 Doroshaw wired not to send out the letters and to please return the expense money that he had sent them. On August 7 N. Manilow, president of Manilow & Company of Chicago, wrote inquiring about the Indiana offer and if a better of-

fer in a similar form would be acceptable. Being advised that it would on August 14 he wrote advising their client was prepared to submit a better offer than that offered by Indiana and that they desired to make an examination of the affairs of the company and that they would send their men to Omaha for that purpose. Accordingly, Paul E. Wise, vice-president of Hester & Wise, Inc., and L. V. Brinton, manager of the accounting firm of Ernst & Ernst, came to Omaha on August 22. Brinton examined the books while Wise examined the properties and they were given all the information and assistance for which they asked. After they made a report of their investigation to their principal it was decided they were not interested in making a higher bid than Indiana's offer because they did not think the assets were worth any more and advised Pierpont to that effect.

During the latter part of June, 1939, L. L. Marcell, manager and secretary of the southern division of the Socony-Vacuum Oil Company, accompanied by Mering, contacted Pierpont in Omaha. Referring to a letter he had received from Doroshaw, he wanted to know if he represented the company. Being advised that he did not they then discussed the possibility of some kind of a merger or a purchase. They were given all the information they desired but subsequently notified Pierpont they were not interested in any further negotiations. After Indiana's offer was received and about July 24 or 25 Pierpont called Marcell on the telephone and advised him of the offer and its terms but Marcell advised they were not interested in making a better offer and nothing further was ever done.

On August 30, 1939, after Indiana's offer was accepted, Buell Jones of Indiana, who was in Omaha handling all matters for Indiana in connection with the offer, contacted Pierpont and asked him if he would care to work for Indiana in connection with the new company. As a result of this contact Pierpont accompanied Jones to Chicago where, on August 31, after a conference with the officers of Indiana, including Seubert and Barkdull, he was employed to

be president and a director of the new company at a salary of $15,000 per year, the same as he received with the old company. Palmer, secretary and a director of the old company, was also employed as secretary and a director of the new company at $5,000 per year the same as he was receiving with the old company. Humphrey, who had been vice-president and a director of the old company, was employed and made a director of the new company but at a reduced salary, being cut from $12,500 to $8,500. Their employment began on September 1, 1939. There is no evidence in the record that the employment of these men by Indiana was ever discussed or considered in any way prior to August 30, 1939. Their testimony and the testimony of the officers of Indiana is to that effect and there is nothing in the records otherwise.

Shortly after Indiana acquired the assets of the old company and had them transferred to the new company, they sent Donalin from the Chicago office to value the properties acquired, other than current assets, to allocate their value for the purpose of establishing a basis for income tax returns. He appraised these properties at $1,876,645.60 and approximately 50.9 per cent of this appraisal was allocated on the books to the balance of the purchase price, other than current assets, in the total of $955,636.89.

Shortly after Humphrey began his work with the new company he discussed with Pierpont the matter of his retiring because of a heart condition which was affecting his health. While many witnesses testify that he appeared in good health, Dr. F. Lowell Dunn testified to a nervous condition which he had arising out of a previous hernia operation. Pierpont took up the matter of Humphrey's desire to retire with Barkdull when he was in Omaha in November of 1939 and as a result an agreement was drawn up with the new company permitting Humphrey to retire on December 1, 1939, and providing "That if you will hold yourself available so that the management of this or its predecessor company may consult and advise with you with regard to the problems of either or both of said companies, as occasion

may require, that this company will pay you, in equal quarterly installments, the sum of $2,500.00 per year, for so long as you may live but not in excess of four years. Such arrangements shall commence on December 1st, 1939, and the first quarterly payment will be made on March 1st, 1940. The arrangements just mentioned are to be conditioned upon your agreement that you will not, during such four-year period, in anywise, directly or indirectly, engage or participate in any activities, employment or business that would be in competition with, or inimical to, the interests of this company or the interests of its predecessor company, Standard Oil Company (Nebraska). This company reserves the right to be the sole judge as to your compliance with the last mentioned conditions. * * *

"We may add that it is not our intention that the arrangements herein proposed would necessitate your future residence in Nebraska, nor at any other fixed or definite point, nor would they render you again eligible for participation in the company's present or any future Annuity Plan."

On December 1, 1939, Humphrey retired and shortly thereafter left Omaha and traveled for his health. He did not return to Omaha until the trial. During his travels he hiked and fished and at the time of the trial seemed to be in good health. He was carried on the records of the company as an employee.

Sometime in the forepart of 1938 Indiana considered the construction of a pipe line from its Sugar Creek, Missouri, refinery to Council Bluffs, Iowa. In September of 1938 they investigated the feasibility of such a pipe line and its location. Nothing further was done until on June 28, 1939, when the directors of Indiana approved its construction and actual work thereon was begun on August 22, 1939. A tank farm or terminal of this pipe line is located in Council Bluffs. A petition setting forth the location and specifications of this line was filed in Iowa on July 10, 1939. General newspaper publicity was given the authorization and construction of this pipe line and tank terminal at the time.

"The same general rules of pleading and proof which are applied in other actions must be applied in actions brought by a corporation against its directors for official misconduct." *Gerdes v. Reynolds,* 281 N. Y. 180, 22 N. E. 2d 331.

"In an action brought by a corporation against its directors or officers for misconduct, the necessary proof is exactly of the same character as in an action brought by an individual against his agents, servants, or employees for like misconduct, and the character of the proof is not at all affected by the fact that the action is brought by the shareholders instead of by the corporation itself." *Kavanaugh v. Commonwealth Trust Co.,* 181 N. Y. 121, 73 N. E. 562.

" * * * a 'civil conspiracy' is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means." *National Fireproofing Co. v. Mason Builders' Assn.,* 169 Fed. 259, 26 L. R. A. n. s. 148.

"The principle element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury." *Reid v. Brechet,* 117 Neb. 411, 220 N. W. 590.

"To constitute a conspiracy there must be a combination of two or more persons; * * * a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy." 15 C. J. S., sec. 2, p. 997.

As stated in 13 Fletcher, Cyclopedia Corporations (Perm. ed.) sec. 6026, p. 424: "If relied on by plaintiff, he must prove fraud, * * * ." We have on numerous occasions held that fraud is never presumed. As stated in *Giles & Son v. Horner,* 97 Neb. 162, 149 N. W. 333: " 'Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him.' *Davidson v. Crosby,* 49 Neb. 60." In *Glissmann v. Orchard,* 139 Neb. 344, 297 N. W. 612: " 'Fraud is never to be presumed. It must be proved. * * * Evidence simply justifying a suspicion is not sufficient. * * * .' *Bank of*

Commerce of Grand Island v. Schlotfeldt, 40 Neb. 212, 58 N. W. 727." *In re Estate of Sheerer*, 137 Neb. 374, 289 N. W. 529: " * * * fraud will not be imputed where circumstances and facts upon which it is based may be consistent with honesty of purpose." In *Ashby v. Peters*, 128 Neb. 338, 258 N. W. 639: "The presumption is that all men act honestly, and therefore fraud is never presumed, but must be proved by the plaintiff."

However, to prove fraud direct evidence is not always essential. Inferences or presumptions of fraud may be drawn from facts and circumstances. But such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred. As stated in *Lebs v. Mutual Benefit Health & Accident Assn.*, 124 Neb. 491, 247 N. W. 19: "It is a well-established rule that presumptions and inferences may be drawn only from facts established, * * * ." But as stated in *Blid v. Chicago & N. W. Ry. Co.*, 89 Neb. 689, 131 N. W. 1027: " * * * circumstantial evidence cannot be said to be sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such a nature and so related to each other that the conclusion reached is the only one that can fairly and reasonably be drawn therefrom."

That Pierpont and Palmer stood in a fiduciary relationship to the stockholders and the old corporation is without question. "An officer or director of a corporation occupies a fiduciary relation towards the corporation and its stockholders." *Fisher v. National Mtg. Loan Co.*, 132 Neb. 185, 271 N. W. 433. "A director of a corporation bears to it and its stockholders a fiduciary relation and is treated by courts of equity as a trustee." *Howell v. Poff*, 122 Neb. 793, 241 N. W. 548. The nature of the trust is stated in *Whaley v. Matthews*, 134 Neb. 875, 280 N. W. 159, as follows: " 'Every violation by a trustee of a duty required of it by law, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness,

is a breach of trust.' *First Trust Co. v. Carlsen,* 129 Neb. 118, 261 N. W. 333."

We have often announced the rule that, "the burden of proof is upon a party holding a confidential or fiduciary relation to establish the perfect fairness, adequacy and equity of a transaction with the party with whom he holds such relation; * * * ." *Barber v. Martin,* 67 Neb. 445, 93 N. W. 722. "But where a fiduciary relation exists between the parties to a transaction the burden of proof of its fairness is upon the fiduciary." 10 R. C. L., sec. 46-47, p. 898. "Where a contract or other transaction has been entered into by defendants having an interest which conflicts with that of the corporation, it is for them to show that it was fair and free from fraud; and when trust funds are traced to their hands they have the burden of accounting for them. A third person in possession of alleged corporate assets does not have this burden unless some fraud is imputable to him." 13 Fletcher, Cyclopedia Corporations (Perm. ed.) sec. 6026, p. 425.

This is not an action in which the officers or directors of the corporation purchased property of the corporation or sold their own property to it or where they used the assets of the corporation to obtain a profit for themselves. Here the officers and directors entered into negotiations for the sale of its assets and recommended the acceptance of the offer received.

As stated in *First Trust Co. v. Carlsen,* 129 Neb. 118, 261 N. W. 333: "It is the duty of a trustee to fully inform the *cestui que trust* of all facts relating to the subject-matter of the trust which come to the knowledge of the trustee and which are material for the *cestui que trust* to know for the protection of his interests."

"It is a well-settled principle of the law of fraud, applied particularly by courts of equitable jurisdiction, that it is the duty of a person in whom confidence is reposed by virtue of the situation of trust arising out of a confidential or fiduciary relationship to make a full disclosure of any and all material facts within his knowledge relating to a con-

templated transaction with the other party to such relationship, and any concealment or failure to disclose such facts is fraud." 23 Am. Jur., sec. 81, p. 858.

"Directors and other officers must exercise the utmost good faith in all transactions touching their duties to the corporation and its property, * * *. They must order their conduct so as to place the performance of their corporate duties above their personal concerns." 3 Fletcher, Cyclopedia Corporations (Perm. ed.) sec. 850, p. 162. "A trustee must dispose of trust property upon the most advantageous terms which it is possible for him to secure for the benefit of the estate which he represents." *Clark v. Provident Trust Co.*, 329 Pa. St. 421, 198 Atl. 36. Should get all they can. *Wheeler v. Abilene Nat. Bank Bldg. Co.*, 159 Fed. 391.

When relief on account of fraud is sought the burden of proving the existence of any fiduciary or confidential relationship or of any unequal footing is upon him who may allege such a status and the existence of such a status, when proved, does not change the position of the burden of proving the existence of fraud. Such a status may be sufficient to cause fraud in a proved transaction to be legally inferred and thus to place the burden of going forward with the evidence upon the party charged with fraud. In this connection the phrases "burden of proof" and "burden of going forward with the evidence" should not be confused. *Leichner v. First Trust Co.*, 133 Neb. 170, 274 N. W. 475; *Miles v. Pike Mining Co.*, 124 Wis. 278, 102 N. W. 555; 22 C. J., sec. 13, p. 67; *In re Estate of Hagan*, 143 Neb. 459, 9 N. W. 2d 794.

" 'Fraud cannot be presumed or inferred without proof in a court of equity, any more than in a court of law.' * * * However, courts of equity do not restrict themselves by the same rigid rules as courts of law in the investigation of fraud and in the evidence and proofs required to establish it. * * * the proof must be sufficient to satisfy the conscience of the chancellor or court that fraud is really existent, and to do this, it must be sufficient to overcome the nat-

ural presumption, which is always of considerable force, that men are honest and act from correct motives." 19 Am. Jur., sec. 43, p. 66.

While Indiana, sole owner of the new company, is a third party it can hardly be said that it dealt at arm's length with the officers and directors of the old company because of the long established close and confidential relationship between the two as disclosed by the record and hereinbefore set forth. Under these circumstances a court of equity will examine all of the facts disclosed by the record and apply the rules herein discussed to see if any conspiracy to defraud the stockholders of the old company was entered into by the parties whereby the stockholders were induced to sell the assets of the old company for less than their value and to satisfy itself whether or not the dealings had between the parties were fair and honest.

All negotiations with Indiana were carried on by personal contact until the formal offer of July 21, 1939, and were confined strictly to the officers and directors until the release to the press of July 26, 1939. It had been agreed between the officers and directors of the two companies to keep the negotiations secret in order that no one, either stockholder or outsider, might take advantage of this information for his personal gain by dealing in the stock on the curb exchange. That such advantage could be taken is evident from the market price during this period:

May, 1939	High 8 7/8	Low 7 1/2
June, 1939	High 11	Low 8
July, 1939	High 15 1/2	Low 9 1/4

However, the sale of the stock on the market started to rise sharply. The number of shares sold during May, June and July being as follows:

May, 1939	1,300 shares
June, 1939	3,600 shares
July, 1939	12,900 shares

There were sold on July 24, 700 shares, on July 25, 2,000 shares and on July 26, 1,200 shares. Pierpont, on the latter date, called Seubert and discussed this sharp increase

in sales of the stock. Feeling there was a leak some place they then decided to release the offer to the press although it had not been sent to the stockholders. It was mailed to the stockholders on July 29. The reasons for keeping these negotiations secret are apparent and reasonable and protected the stockholder. We find nothing of a fraudulent nature therein.

Plaintiffs suggest that the excessive operative overhead, as disclosed by the efficiency survey, was the cause of the old company's inability to operate at a profit and by the failure of the officers and directors to inform the stockholders thereof in the proxy they were derelict in their duties and the same is evidence of bad faith and fraud. Whether or not the old company could have operated at a profit during the years of 1932 to 1938, if its operative overhead had been cut down in accordance with the suggestions of the efficiency experts, is highly speculative. As soon as these suggestions were agreed upon during the survey, conducted from January to June of 1939, they were put in effect. Notwithstanding these economies the old company, during its operations for the first eight months of 1939, sustained substantial losses and, during the entire year of 1939, its losses, under both the old and new company, were $194,000. This may have been due to the loss in realization on sales, which, during the first 8 months of 1939 as compared with the same period in 1938, was $123,169.33. The operation of the company, the handling of employees and the control of operative overhead are matters of management and the mishandling thereof is not a badge of fraud in the sale of the assets.

No reference to these economies was contained in the proxy statement. However, there was no effort made to conceal the fact that the survey was being made and put into effect. The employees knew it. Pierpont made a statement thereof to the stockholders present at the meeting of June 12, 1939, although all the economies proposed were not then fully in effect. Publicity was given in the press showing a possible total savings annually of $115,078. Just

what its total effect would have been upon the successful operation of the old company is uncertain and very speculative.

In 1921 the old company, with the approval of the Department of Internal Revenue, adopted a straight line depreciation, retroactive to 1906, whereby an annual depreciation was taken on buildings, tanks, pipes and fittings of 4 per cent, machinery and tools of 7 1/2 per cent, furniture of 10 per cent and miscellaneous articles of 8 1/3 per cent. Plaintiffs' witnesses testified that as a result of this policy considerable of the company's property was fully depreciated that was still valuable and in use. That other items, which had been charged to expense, were likewise of value and being used in the old company's operations. They then offered testimony to establish the value of all the fixed assets of the old company as of the date of the sale. Plaintiffs contend that the depreciation taken was in excess of actual loss; that the proxy statement did not properly reflect the true condition of the company; and that, in order to properly and correctly inform the stockholders of the condition of the company, an appraisal should have been made of the fixed assets of the company as a basis for the statement contained in the proxy. Particularly in view of Pierpont's statements, contained in his answers to stockholders' inquiries about Newman's offer, that he believed the book value to be a reasonably close value of the properties and Roser's testimony that in June of 1939 he told Pierpont, in the presence of Hughes, McCauley and Kastl, that many items fully depreciated were still assets of the company. This statement Pierpont, McCauley, Kastl and Hughes deny he made.

It is admitted that the statements of the old company, as set out in the proxy statement, correctly reflect the condition of the old company as shown by its books. An audit is made from the records of the company as contained in its books and, unless some special reason is shown therefor, an appraisal of the assets is no part of such audit. Ordinarily the officers and directors are entitled to rely on

the records of the company as reflecting its true condition.

A depreciation charge is an estimate of the average loss in value that a certain class of property will sustain over a fixed period of time. It does not contemplate meeting the exact date when each piece or parcel of that class will no longer be usable or have any value. It is an estimate of what the average of all the property of that class will depreciate, recognizing the fact that some will depreciate faster than others. That some will last beyond the period is to be expected and others, of course, will not.

Plaintiffs' appraised value of the fixed assets of the old company is $2,519,615 while the book value thereof, as reflected in the statement of May 31, 1939, was $2,716,345.57. This latter figure is from the statement sent to the stockholders with the offer. Under these circumstances we can see no reason why the officers and directors should have had an appraisal made. What benefit would thereby have been gained by the stockholders? The plaintiffs' appraised value of the fixed assets is less than the book value. The latter the stockholders had before them when they voted to accept the offer.

Plaintiffs point to the requirement that an $800,000 deposit accompany a bid, as was required of Indiana, as a method used to stifle or chill competitive bidding on the assets. With the exception of Carpenter, whose testimony is hereinafter discussed, all of the parties with whom the negotiations were had or witnesses who were interested in a similar business testified that such a requirement was not unreasonable and in no way did it or would it have deterred them from making a bid on the assets. We do not find such a requirement unreasonable and that it in fact stifled or chilled competitive bidding.

Plaintiffs object to the manner in which the assets were sold. They point to the fact that no bidders were solicited, except Indiana; that the assets were not advertised for sale; and that no auction of the assets was held at the stockholders' meeting of August 29. The directors' and the stockholders' committee discussed the matter of advertis-

ing the assets but decided not to do so because it might appear to the public to be a distressed sale, when in fact it was not, and thereby tend to decrease its value. Wide publicity was given the offers and proposed offer. The numerous contacts made by parties in the same business and interested in acquiring the assets show that this publicity brought it to their attention. Advertising could have accomplished no more. No officer or director of the old company ever solicited any prospect except Indiana. However, others did negotiate with the old company with regard to a possible merger or purchase. Pierpont freely and fully negotiated with these prospects giving them all the information they desired. The evidence fails to disclose any one who would have been interested in the assets but who lacked knowledge that the same were for sale. In the absence of such a showing it would be purely speculative to say that such failure to advertise or solicit in any way prevented a better or higher bid from being received. There is nothing in the proxy statement or proxies, for or against the sale, that indicates an auction of the assets would be held at the stockholders' meeting of August 29. In keeping with the proxy statement and proxy for a sale the question was asked at the meeting whether any one wished to make a bid before Indiana's offer was acted upon. No one appearing who was interested the offer of Indiana was accepted. An auction sale is not an absolute right. From the evidence it is apparent that an auction at this meeting would have served no purpose for the evidence fails to show any other bidders present. These objections all raise the question of how to obtain the best sale price. There is nothing in the evidence to show that this was not accomplished.

There were others negotiating with the old company, some seeking to buy controlling interest in the stock, others to buy the assets. The evidence discloses that Indiana and its officers had no interest in these negotiations, either directly or indirectly. In fact, they were not even acquainted with the individuals carrying on the negotiations or the

companies they represented. In this we are not overlooking the letter of Doroshaw to Barkdull of May 17, 1939, wherein he expresses his opinion that the purchase price could be materially reduced if Pierpont was retained in some official capacity by the purchaser. There is no evidence that Barkdull or any other officer of Indiana ever acted on this communication. It merely represents Doroshaw's opinion and has no relation to the negotiations here involved.

The only interest any of the officers and directors of the old company had in the new company was their employment by Indiana shortly after the old company had accepted the offer, Pierpont and Palmer at the same and Humphrey at a reduced salary. They acquired no ownership in the new company. Plaintiffs claim that this employment was prearranged and the failure to advise the stockholders thereof was evidence of a conspiracy to defraud. There is no evidence that such employment was prearranged. Under the situation here, we do not think the fact that these officers were employed by Indiana to be active in the management of the new business at no increase of salary and, in one instance, at a substantial decrease established a conspiracy to defraud. *Mitchell v. Highland-Western Glass Co.*, 19 Del. Ch. 326, 167 Atl. 831; *Allaun v. Consolidated Oil Co.*, 16 Del. Ch. 318, 147 Atl. 257; *Price v. Fraser*, 119 Neb. 806, 231 N. W. 18.

Shortly after his employment by the new company Humphrey suggested to Pierpont that he would like to retire because of his health and later discussed it with Barkdull. As a result of these conferences an agreement was drawn up permitting Humphrey to retire December 1, 1939, under the terms as set out in our statement of facts. Plaintiffs offered evidence to show that Humphrey had always been in good health and points to the contract as a payoff to Humphrey for his part in the conspiracy to defraud. That Humphrey had been in ill health due to a nervous condition is shown by the testimony of Dr. Dunn. Just how sick he was at the time is not definitely shown but he

appears to have been in good health at the time of the trial. Humphrey had been with the old company a long time and was familiar with the retail merchandising of gasoline throughout the state and had wide experience and acquaintances. That the new company felt he could be valuable to them and to others in the same business seems reasonable in view of the size of the business and the extent of its operations. Such contracts are often made in the business world and we can find nothing wrong therewith.

The old company had the exclusive use in Nebraska of the trade name and mark of its products as hereinbefore set forth plus whatever goodwill the company had by reason of its past operations. In advertising these products it had been spending about $100,000 per year. These were not carried on the books of the company as an asset nor included as such in its financial statement.

The old company had been losing money for a period of years. Courts seem to be divided on whether there is any value in the goodwill of a business which has been losing money over a period of years. That such goodwill has no value, see *Ahlenius v. Bunn & Humphreys,* 358 Ill. 155, 192 N. E. 824; *Crawford v. Mexican Petroleum Co.,* 130 Fed. 2d 359; *Nahtel Corporation v. West Virginia Pulp & Paper Co.,* 134 Fed. 2d 197; and to the contrary, see *Macfadden v. Jenkins,* 40 N. D. 422, 169 N. W. 151; *Rookwood Pottery Co. v. Commissioner of Internal Revenue,* 45 Fed. 2d 43; *Barden Cream & Milk Co. v. Mooney,* 305 Mass. 545, 26 N. E. 2d 324.

That they had value to Indiana is evidenced by the interest shown by its officers when, in his written memorandum, Pierpont called their attention to their possible loss, by the fact that they were expressly included in Indiana's offer and by the immediate incorporation of the new company to prevent any possible loss thereof. There was no concealment by the officers and directors of the old company that it owned these trade names and marks and that the offer included them, together with the goodwill, because the offer of Indiana was fully set out in the proxy

statement. Just what their value might be is difficult to say. The only evidence in the record as to their value is the testimony of Terry Carpenter that they were worth $500,000.

Let us here consider the testimony of this witness. On May 5, 1939, he released to the press an offer of $13 per share for 51 per cent of the stock of the old company. A total of $2,098,239 for the 161,403 shares outstanding. This proposed offer he sent to the old company plus a suggestion of merger. When they immediately replied they would submit his offer to the stockholders he did nothing further to carry out his proposal. At that time no requirement was made of a deposit of $800,000 which he testifies would deter bidders for the assets. This was at a time when the old company still owned the assets and a bid could have been accepted by the stockholders. At the time of the trial, when the assets had been sold and any possibility of buying them was past, he testifies he would have been willing to give $4,750,000 had he been given an opportunity to bid for the assets in his own way. There is nothing in the record to show he was prevented from making any investigation that he desired of the old company nor to prevent him from attaching such conditions to the offer as he wished. Such testimony has little weight or credibility. It impresses the court that his real opinion of the value of all the assets was expressed at the time of his proposed offer, when the assets could still be purchased, rather than subsequently when that possibility was gone.

What the value of the trade names and marks together with goodwill was might differ with each person's opinion. The officers were under no obligation to give an opinion of their value as long as they properly disclosed to the stockholders that they were included in the offer.

Plaintiffs point to the failure of the proxy to contain any information as to the pipe line of Indiana from its refinery at Sugar Creek, Missouri, to its tank farm at Council Bluffs, Iowa, as evidence of fraud. This pipe line was built by Indiana and at the time of its authorization and con-

struction received wide publicity in the press. While it is probable that the old company, being a good customer of Indiana, might receive some benefits from this pipe line in the way of reduced rates, particularly in the Omaha area, but to what extent is very uncertain. Whether there would be any adjustment in freight rates was also uncertain for during the many years of truck transport competition no adjustment had been made by the railroads. The record discloses no effort to conceal the authorization and construction of the pipe line.

Plaintiffs point to the policy of the old company in refusing to give any one the list of stockholders and their addresses as a badge of fraud. This had been the policy of the company for many years and not one newly established by those negotiating the sale of the assets. The evidence shows that the officers and directors of the old company always made it possible for everyone, either stockholder or outsider, to communicate with the stockholders on matters affecting the company. While we do not approve this policy as to stockholders, in this case it did not prevent any one, either stockholder, stockholders' committee, or outsider, from sending an offer or communicating with the stockholders on any matter affecting the negotiations or sale of the assets. We fail to see how it in any way affected or influenced the stockholders in their decision to accept Indiana's offer.

This court has followed the rule as stated in *Price v. Fraser, supra*: "Transactions between corporations having common officers and directors are presumptively fraudulent and the burden is upon the defendants to sustain the transactions by clear and convincing evidence that they were fair." But it has no application here. At the time Indiana made its offer none of its officers or directors were officers or directors of the old company and the same is true as to the officers and directors of the old company as to Indiana. Nor does the fact that Pierpont, Palmer and Humphrey became officers and directors of the new company, with Indiana as the sole owner, after the offer was

accepted bring it within the rule. However, for the reasons already stated, we will consider and determine if the contract was in fact fair and for an adequate consideration.

The officers and directors of the old company made no effort to gain any financial advantage through the sale of the assets. During the time negotiations with Indiana and others were being carried on and known only by them, and the parties they were dealing with, the price of the stock on the curb exchange was such that they could have benefited themselves handsomely. There is no evidence that they dealt therein, either directly or indirectly, even to the extent of one share. These directors personally owned a total of 2,542 shares. For these shares they recovered the same as all other stockholders. They acquired no interest in the new company either by gift or purchase. Pierpont, Palmer and Humphrey were employed by the new company either at the same or a reduced salary. If these officers and directors had been seeking to defraud the stockholders for their personal gain, many opportunities presented themselves whereby they could have done so. We ascertain and determine that they did not seek to make any profit, not common to all stockholders, and that they acted for the best interests of the stockholders.

Plaintiffs call attention to other specific facts and circumstances, such as, the form of the proxies sent to the stockholders to vote for and against the sale, the material parts of which have been set forth in our statement of facts; the failure to correct Reimer's statement at the stockholders' meeting of June 12, 1939, which was, as stated, a correct statement of losses in assets as shown by the annual statements of the old company; and the claim that the special stockholders' meeting of August 29, 1939, was hurriedly called when, in fact, 30 days' notice was given and the articles of incorporation and bylaws required only 10. We have carefully examined the record and find that the negotiations with Indiana and others who were interested in either merging with or buying the assets were honestly and fairly conducted; that the proxy statement and prox-

ies fully stated the offer, the condition of the old company and placed before the stockholders a full picture of their company; and that the directors were honest and faithful in their recommendation for its acceptance if no better offer was received.

Was the amount Indiana paid for the assets so shockingly inadequate as to justify a finding of conspiracy, fraud and breach of trust? "Value of property is always a matter of judgment, and a contract based upon inadequate consideration will not be set aside for that reason alone, unless, as the rule is generally stated, the inadequacy is so great as to furnish of itself convincing evidence of fraud." *Price v. Fraser, supra.*

The evidence shows that Indiana paid $17.50 per share for 161,403 shares of outstanding stock owned by 2,463 stockholders or a total of $2,824,552.50 plus $44,406.44 taxes that had accrued, but not shown on the books of the old company, for all the assets. These assets, after deducting current liabilities, had a book value, as shown by the statement of May 31, 1939, of $4,629,433.20. This did not include any value for the company's exclusive right to use certain trade names and marks in Nebraska or goodwill. These were not carried on the books of the company as assets. They were, however, expressly included in Indiana's offer. These assets, including trade names and marks and goodwill, were appraised by plaintiffs' witnesses at $4,932,703.21 or approximately 6.5 per cent more than the book value. It should be remembered that this is not a case where the property of a corporation was purchased by its officers and directors but by a third party, as Indiana was the sole owner of the new company, although not dealing at arm's length.

"When all is said, value is nothing more than what people will pay for the shares, given as wide an opportunity for bidders to come in as is reasonably possible." *Borg v. International Silver Co.,* 11 Fed. 2d 147. "Mere book value should not govern in determining the value of the shares of objecting stockholders (*Homer v. Crown Cork and Seal Co.,*

155 Md. 66), and appraisal values are not necessarily controlling (*Allied Chemical & Dye Corp. v. Steel and Tube Co. of America, supra*), (14 Del. Ch. 64, 122 Atl. 142). * * * 'Everyone knows that the value of shares in a commercial or manufacturing company depends chiefly on what they will earn, on which balance sheets throw very little light. When all is said, value is nothing more than what people will pay for the shares, given as wide an opportunity for bidders to come in as is reasonably possible.'" *Ahlenius v. Bunn & Humphreys, supra.*

How much could the corporation get for its assets and did the officers and directors of the old company act fairly and honestly with their stockholders in recommending the acceptance of Indiana's bid? What is a fair price for which to sell property is always a matter of opinion and honest opinions on value vary widely. Value can only be determined by a careful consideration of every relevant and material fact and circumstance bearing upon an actual sale of the property. In proportion to the distance the property in question is removed from the quality of simplicity and common familiarity, the difficulty of ascertaining the question of its fair selling value is increased. "It is elementary that anything that will affect selling price in the market enters into the term 'value.'" *Gilmore v. Central Maine Power Co.*, 127 Me. 522, 145 Atl. 137. Many factors should be considered in fixing the value of stock for sale purposes. *Matter of Fulton*, 257 N. Y. 487, 178 N. E. 766. See, also, *Borg v. International Silver Co., supra; Ahlenius v. Bunn & Humphreys, supra; Homer v. Crown Cork and Seal Co., supra; Price v. Fraser, supra; Allied Chemical & Dye Corporation v. Steel and Tube Co., supra.* No one factor is controlling. Many factors controlled its value; including, the diversity of its location over the entire state and the difficulties arising in its operation by reason thereof; its past earning power and its present and possible prospect for earnings and ability to pay dividends; the location of its various properties and their one purpose function; increase of competition; the condition of its proper-

ties, particularly as to obsolescence of its facilities; and unfavorable marketing conditions. There is no proof that any greater offer was ever made for the assets or that any one was ready, able and willing at the time to pay a greater price for it. In fact, in all the negotiations with those interested in acquiring the assets and business of the old company no one offered anywhere near the amount of Indiana's offer nor is there any evidence that any one would have offered a better price. That the assets were for sale was given wide publicity. That those interested in the petroleum business had knowledge thereof is well established by the evidence. That others acquainted with the assets and engaged in the same business either declined to make a bid or bid much less than the bid accepted is strong evidence that the sale price was fair.

Considering the appraisals made of the property by the witnesses and the basis thereof—the value of the property as shown by the books, the evidence on the many factors that affected its value, together with the fact that no other person or company was ready, able and willing, at the time to pay a greater price for it, we do not think the officers of the old company breached their fiduciary obligations to the stockholders in recommending the sale. We find that the assets of the old company were sold for their fair value.

While fraud is never presumed and the party alleging and relying thereon must prove it, however, what constitutes fraud is a matter of fact in each case. Deception may find expression in such a variety of ways that most courts have studiously avoided reducing its elements to positive definitions. Courts should content themselves with determining from the facts in each case whether fraud does or does not exist, for whatever satisfies the mind and conscience that fraud has or has not been practiced is sufficient. Without repeating any further facts or discussing them, we have come to the conclusion that there was no conspiracy between any of the officers and directors of the old company and any of the officers and directors of Indiana to defraud the old company and its stockholders out of

the assets of the old company by buying them for less than their actual value, and that in fact the stockholders of the old company received a fair and adequate consideration for the assets of the old company. The judgment of the lower court is therefore vacated and set aside and the action dismissed at plaintiffs' cost.

REVERSED AND DISMISSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1944

LENORA MARGRET BURNS, APPELLEE, V. JOHN CHARLES BURNS, APPELLANT.
15 N. W. 2d 753

FILED OCTOBER 6, 1944. No. 31748.

1. Divorce. If requirements for residence within the state have been complied with, then the district court has jurisdiction to hear and determine an action for divorce in any county in the state where the parties, or one of them, reside.
2. ———. It is elementary and it is the universal rule that residence in a community is determined by the intention of the parties.
3. ———. Where the unity of the marriage relation is breached by the husband's misconduct, the wife may acquire a separate domicile.

APPEAL from the district court for Custer county: ELDRIDGE G. REED, JUDGE. *Affirmed.*

Samuel L. O'Brien, for appellant.

Evans & Lee, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

PAINE, J.

Plaintiff was decreed a divorce from bed and board, with custody of minor son, with $40 a month for support of

child and $35 a month for support of wife, and attorney's fees of $300, from which defendant appeals.

On July 16, 1943, plaintiff filed petition for separate maintenance, alleging that the parties were married in Broken Bow, Nebraska, on October 2, 1941; that defendant is a resident of Alliance, Box Butte county, Nebraska, and plaintiff is a resident of Broken Bow, Custer county, Nebraska; that as a result of said marriage a child, John Patrick Burns, was born to said parties on August 11, 1942, said child being in the custody and possession of defendant in Alliance.

Plaintiff alleges that she has at all times conducted herself toward defendant as a chaste, obedient and dutiful wife; that defendant has been guilty of extreme cruelty toward plaintiff; that he required her to live in an apartment above the apartment occupied by two of his sisters, and that said sisters have attempted to dominate her every act and interfered with her care and treatment of her child, and that defendant, by subterfuge and conniving with his sisters, had her taken to Omaha and examined by a psychiatrist, and caused plaintiff to be locked up in Clarkson Hospital and restrained of her liberty for several days, and then defendant took her to the State Hospital for the Insane at Ingleside, near Hastings, and procured her commitment by false testimony, where she was confined for 16 days until she was able to communicate with her foster father, P. J. Kelly, of Broken Bow, who had a habeas corpus action brought in the district court for Adams county, and on July 15, 1943, plaintiff was released from the hospital by the superintendent, and she immediately returned to the home of her foster father, P. J. Kelly, at Broken Bow, where she established her residence and intends to live in the future.

The plaintiff further alleges that she has been publicly humiliated and branded with the stigma of insanity, when in truth plaintiff has at all times been sane and of sound mind and possessed of usual and ordinary intelligence, all of which was well known to defendant; that the conduct of

defendant has created a great fear in the mind of plaintiff, and she is afraid he may do her bodily harm and injury, and that such cruel and inhuman treatment has utterly destroyed all the legitimate objects and purposes of matrimony and she is no longer able to live with defendant as his wife.

Plaintiff states that defendant is 22 years of age, able-bodied, healthy and strong, and earns a salary in excess of $200 a month, and that plaintiff and defendant have accumulated assets, and defendant is able to provide for plaintiff and for the care and maintenance of their child; that plaintiff is a fit and proper person to have the care and custody of the child, but is entirely without means to support herself or said child, and without means to prosecute this action. Wherefore, plaintiff prays that she may be divorced from the bed and board of defendant, that he be required to pay suit money and attorney's fees, that she be given custody of the son, with support for him, and recover suitable alimony from defendant, and for such other and further relief as justice and equity may require.

On August 14, 1943, the defendant filed answer, admitting the marriage, his residence in Alliance, and the birth of the child on August 11, 1942, that from Ingleside plaintiff went to the home of P. J. Kelly at Broken Bow, and denying the other allegations of the petition.

For further answer defendant alleges that shortly after their marriage the parties established their home in an apartment in Alliance; that after plaintiff left Hastings she went to the home of said Kelly and on the following day, without having acquired a residence in Broken Bow, filed her petition.

Defendant further alleges that several months after their marriage plaintiff became physically and mentally ill, and of her own volition consulted Dr. G. F. Johnston, who cared for her during her pregnancy and childbirth; that after her release from the hospital plaintiff showed mental disturbances and was unable to properly care for her baby, and defendant placed the baby in St. Joseph's Hospital in

Alliance, and as a result the child immediately gained in strength and is now well-nourished, strong and healthy.

The answer further alleges that on June 29, 1943, upon the suggestion of Dr. Johnston, defendant took plaintiff to Omaha, where she was examined and was admitted to Clarkson Hospital for observance and treatment; that thereafter, upon the doctor's advice, defendant took plaintiff to the state institution at Hastings, where she was examined and left for observation and treatment, and that the treatment was progressing nicely when interrupted by the malicious move of P. J. Kelly, who procured a writ of habeas corpus against the state institution and its officers, who released the plaintiff without a hearing and without notifying defendant.

Defendant also alleges that during plaintiff's stay in the Clarkson Hospital and in the state institution she wrote defendant friendly letters, and showed no desire to leave either the Clarkson Hospital or the hospital at Hastings, and defendant charges that P. J. Kelly has caused this family disruption, and alleges that the petition is not the voluntary act and deed of plaintiff, but was induced and caused to be filed by the aforementioned P. J. Kelly, and defendant prays that the action be dismissed. No reply was filed.

The decree states that trial occurred October 11 to 13, 1943, both parties appearing personally and by counsel. The court finds that defendant has been guilty of extreme cruelty, as alleged, that plaintiff was unlawfully deprived of her liberty and incarcerated in the State Hospital for the Insane at Ingleside, and that upon being released from such institution she immediately returned to Broken Bow and there established residence, and at the time this action was commenced she was a *bona fide* resident of Custer county, and intended to reside therein.

The court further finds that, in truth and in fact, plaintiff was perfectly sane and normal, but that defendant, by false statements and misrepresentations, induced plaintiff to accompany him from the Clarkson Hospital to the State Hospital for the Insane in Adams county, and there by de-

ceit, subterfuge and misrepresentations caused plaintiff to be committed and confined in said insane hospital at a time when plaintiff was perfectly sane and normal, and that such willful and malicious misconduct on the part of defendant amounted to extreme cruelty.

The court further finds that plaintiff is a fit and proper person to have the care and custody of the child; that defendant earns an annual income of $2,340, and that plaintiff is without any means of support and entirely dependent upon defendant for maintenance.

It is therefore considered, adjudged and decreed by the court that plaintiff be granted a divorce from the bed and board of defendant, and that she be awarded the custody of the minor child, subject to visitation by defendant; that defendant be ordered to pay the sum of $35 monthly for the support and maintenance of plaintiff and $40 for the support and maintenance of the child, or a total sum of $75 monthly, and that plaintiff be awarded all furniture and household effects in the home of the parties at Alliance, reserving from the award only the articles of personal clothing and personal pictures or effects of defendant; that defendant is ordered to pay the costs of the action, including the sum of $300 attorney's fees for the benefit of plaintiff.

Among the errors relied upon for reversal are the following: That the decree is contrary to law and to the evidence; that defendant's motion to dismiss should have been sustained at the close of the testimony; that the court was without jurisdiction to try the case in Custer county; that the alimony and attorney's fees, as well as the support for the child, are excessive; that defendant was prevented from having a fair trial by disturbances in the courtroom; that the court erred in overruling defendant's motion for a new trial.

We will first discuss the question of residence. Section 42-301, Comp. St. 1929, provides that "A divorce from the bonds of matrimony may be decreed by the district court of the county where the parties, or one of them, reside, * * * ." This language indicates that a wife may have a

residence in one county and her husband in another.

" * * * the district court has jurisdiction to grant a divorce in a proper case in any county where the parties, or one of them, reside" is said in *Williams v. Williams,* 101 Neb. 369, 163 N. W. 147, in which case it is stated in the text: "It is elementary and it is the universal rule that residence in a community is determined by the intention of the parties. * * * Defendant's argument that a wife cannot have a residence separate and apart from that maintained by her husband is not supported by statute nor by the authorities. * * * *McConnell v. McConnell,* 37 Neb. 57. *Eager v. Eager,* 74 Neb. 827, holds that the district court has jurisdiction 'to hear and determine an action for divorce in any county in the state where the parties, or one of them, reside.' The rule is generally recognized."

It is clear that many exceptions to the rule that the domicile of the wife is determined by that of her husband must obtain, and where the unity of the husband and wife is dissolved by the institution of divorce proceedings the wife's domicile may be separate and apart from that of her husband. See 9 R. C. L., sec. 8, p. 545.

Where the unity of the marriage relation is breached by the husband's misconduct, the wife may acquire a separate domicile. See 17 Am. Jur., sec. 47, p. 620.

In 1 Beale, Conflict of Laws (1935), sec. 28.3, p. 203, it is said: "Not only when the husband has been guilty of conduct that would justify a separation, but also in cases where the wife is living apart from the husband with his consent, she may claim a separate domicil."

The plaintiff's testimony is that she positively decided while confined in the Clarkson Hospital that she would never return to Alliance, and the trial judge, from a careful consideration of all the evidence, finds that when she returned to Broken Bow she did so with the intention of becoming a *bona fide* resident of Custer county, and we find that the trial court of that county had jurisdiction to try the case.

The defendant denies that the evidence of cruelty is suf-

ficient to establish grounds for a decree. The law is that whether or not an unsuccessful attempt of a husband to commit his wife to an insane asylum constitutes cruelty justifying a decree of divorce depends upon the evidence in each case. If such attempt was made in good faith, and from the best of motives, and with an honest and sincere belief that her mental condition required such confinement, such act would lack the essential elements which indicate cruelty.

On the other hand, it is the first duty of a loving husband to protect his wife. A neglectful, unsympathetic attitude toward a very young wife of highly nervous temperament, who has lost 30 pounds in weight since the birth of her baby, is rather indicative of a husband who is wanting in proper care for his wife. If, in addition, he questions her sanity, and without just cause takes her to a state asylum and there secures her confinement therein, it has been held that such act, with all the other facts in evidence, is sufficient to justify granting a decree. *Michels v. Michels,* 120 Me. 395, 115 Atl. 161, 18 A. L. R. 570; *Harrison v. Harrison,* 115 La. 817, 40 So. 232; 27 C. J. S., sec. 28, p. 558; *Berdolt v. Berdolt,* 56 Neb. 792, 77 N. W. 399; 19 C. J., sec. 95, p. 53. In the exhaustive case of *Newton v. Newton,* 1 Western Weekly Reports (1924) 999 (Manitoba), in which many English cases are reviewed, such conduct is held to constitute legal cruelty and be a ground for divorce from bed and board.

The trial court awarded the custody of this little two-year-old son to the mother, and nothing in the evidence indicates that this is not entirely proper and for the best interests of a child of tender years, which is the controlling consideration. *Swolec v. Swolec,* 122 Neb. 837, 241 N. W. 771; *Feather v. Feather,* 112 Neb. 315, 199 N. W. 533; *Dier v. Dier,* 141 Neb. 685, 4 N. W. 2d 731.

In the errors relied upon for reversal, it is charged that the alimony is excessive, as well as the support money for the child. A careful examination of the evidence leads us to the conclusion that the amounts fixed in the decree of

the trial court are reasonable, and justified by the facts, and should be sustained. *Yost v. Yost,* 143 Neb. 80, 8 N. W. 2d 686; *Lippincott v. Lippincott,* 141 Neb. 186, 3 N. W. 2d 207.

Objection is also made to the attorney's fees allowed. We believe the award complies with the rule that "Fees in a divorce case must be reasonable in amount, and can only be awarded after a careful examination into the nature of the case, the skill necessarily devoted to the preparation and presentation of the questions, the character and standing of the counsel, together with a consideration of the amount involved and the results obtained for the client." *Jensen v. Jensen,* 144 Neb. 857, 15 N. W. 2d 57. See, also, *Beatty v. Beatty,* 128 Neb. 258, 258 N. W. 461; *Tyler v. Winder,* 89 Neb. 409, 131 N. W. 592.

Finding no reversible error, the decree of the trial court is hereby affirmed.

AFFIRMED.

MERVYN J. WARREN, APPELLEE, V. COUNTY OF STANTON, APPELLANT.
15 N. W. 2d 757

FILED OCTOBER 6, 1944. No. 31767.

1. **Counties.** County authorities are, by section 5, art. VIII of the Constitution, prohibited from assessing taxes the aggregate of which shall exceed fifty cents per one hundred dollars actual valuation as determined by the assessment rolls, except for the payment of indebtedness existing at the time of the adoption of the constitutional provision, unless authorized to do so by a vote of the people.
2. ———. By section 26-116, Comp. St. 1929, it is unlawful for the county board of any county to issue warrants for any amount exceeding the aggregate of eighty-five per cent of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same.
3. ———. By the terms of the same section it is unlawful for the

county board to issue any certificate of indebtedness in any form in payment of any account or claim, or to make contracts for or incur indebtedness in any form in payment of any account or claim, or to make contracts for or to incur indebtedness against the county in excess of the tax levy for county expense during the current year.

4. ———. Also by the same section a county is prohibited from making any expenditure and the county board is prohibited from contracting for indebtedness to be paid out of the funds of the county in excess of the amount levied for the particular fund.
5. ———. By the terms of section 26-118, Comp. St. 1929, where warrants have been issued in violation of section 26-116, Comp. St. 1929, the county shall not be liable therefor, but action may be had against the county board or any member thereof.
6. **Municipal Corporations.** An *ultra vires* contract of a municipal corporation is one which the corporation has no power to make under any circumstances or for any purpose.
7. **Counties.** Warrants issued by a county in excess of the limitation fixed by law are void, and no action may be maintained therefor and their payment may be enjoined.
8. **Limitation of Actions.** The statute of limitations does not begin to run against county warrants until after it appears that taxes levied to create a fund for the payment of the warrants have failed and will continue to fail to produce payments to the fund, or until there is sufficient money in the fund upon which they are drawn, or the proper officers have had opportunity to provide funds to pay them and have refused or neglected to do so.
9. **Estoppel.** The doctrine of estoppel cannot be applied as against a county to validate a contract which it had no power to make or where it was made in express violation of a prohibitory law.
10. **Judgment.** When a writ of mandamus was denied because it was not a proper remedy, the judgment rendered cannot be properly pleaded as *res adjudicata*.
11. ———. It is a general rule with respect to domestic judgments that they cannot be collaterally impeached by the parties for collusion or fraud not going to the jurisdiction and that consent judgments are as conclusive on collateral attack as judgments rendered after a trial.
12. ———. There is a recognized exception to the general rule in cases involving public interests where the public was a party by representation only. In such cases the persons represented may show fraud or collusion in obtaining the judgment.
13. ———. If the judgment was collusive or by the consent of an officer as to a matter with respect to which he had no authority to bind the public, and it was not a decision by the court after

a hearing on the merits, it does not afford a basis for a plea of *res adjudicata* as against the public interest involved.

APPEAL from the district court for Stanton county: CLOYDE B. ELLIS, JUDGE. *Reversed, with directions.*

Robert R. Moodie and *Walter D. James*, for appellant.

Gross & Crawford, Crofoot, Fraser, Connolly & Stryker and *Abbott, Dunlap & Abbott, contra.*

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

CARTER, J.

This is an action by Mervyn J. Warren, plaintiff, against the county of Stanton, defendant, to recover a judgment on 193 warrants issued by the county to the Standard Bridge Company and registered for nonpayment in the years of 1921 and 1922. The trial court allowed a recovery on the theory that defendant was estopped to assert the defenses pleaded. The county appeals.

The record shows that in the years 1919, 1920, 1921 and 1922, floods, high water and other causes required the replacement of many bridges in Stanton county. The county thereupon entered into numerous "unit price" contracts for the construction and repair of a large number of bridges with one Robert Z. Drake, doing business as the Standard Bridge Company. The total contract price for the bridges constructed and repaired under the contracts thus made amounted to $617,607.77. During the period in which the work was being done the county levied taxes for all bridge purposes in the amount of $140,594.84, and the amount collected on these levies was paid on the indebtedness. In addition thereto, a levy of $34,311.69 was made in 1921 for what was designated as "Old Indebtedness Fund." The money collected on this levy was used largely as partial payments on the indebtedness created by the foregoing bridge contracts.

During the progress of the work Drake presented five claims to the county board as follows: August 19, 1920,

$104,137.23; June 22, 1921, $87,623.72; July 14, 1921, $180,336.75; January 24, 1922, $150,341.64; and September 16, 1922, $95,168.43. The first four claims were allowed and the amounts due thereon for which there was no money in the treasury for their payment were evidenced by warrants. A total of 1,089 warrants was issued, 247 warrants totaling $174,097.70 were drawn against the Bridge Fund and 842 warrants totaling $364,933.98 were drawn against the Old Indebtedness Fund. All warrants were registered in 1921 and 1922.

The fifth claim was disallowed by the county board and Drake appealed to the district court where judgment was entered thereon for $75,168.43. This judgment was subsequently paid in full. The present action was brought to recover the amount due on the unpaid warrants given in payment of the first four claims filed.

The record further shows that each year, after the issuance and registration of the warrants against the Bridge Fund to and including 1938, levies were made and taxes collected for the payment of these warrants. In this manner all except 62 warrants in the amount of $77,765.90, including interest, were paid. Likewise, annual levies were made for the Old Indebtedness Fund to and including 1937 for the payment of outstanding warrants on that fund. In this manner all except 131 warrants in the amount of $161,358.33, including interest, were paid. The judgment entered by the trial court against the county of Stanton was for these amounts.

It is the contention of the county that the action is barred by the statute of limitations, that the warrants sued upon were issued in violation and in excess of the power of the county to issue warrants, that the contracts upon which the claims were based and the warrants issued were *ultra vires*, that the warrants were issued in violation of section 5, art. VIII of the Constitution of Nebraska, and that a judgment in a former action was *res adjudicata* of the validity of the warrants in question.

The plaintiff by way of reply denied the allegations of

the anwer and alleged that the defendant is estopped to assert that the warrants sued upon were issued in violation and excess of the powers of the county to issue such warrants, that the issuance of such warrants was not in fact in violation and in excess of such power, that defendant is estopped to assert that the warrants were issued in violation of section 5, art. VIII of the Constitution, that the issuance of such warrants was not in fact a violation of any constitutional provision, and that a judgment procured in an action in the district court for Stanton county, Nebraska, wherein the Standard Bridge Company was plaintiff and the defendant, here, with others were defendants, constituted an adjudication of the validity of the warrants and is *res adjudicata* of all defenses pleaded by the defendant in the present suit.

With reference to the statute of limitations, the record shows that annual levies were made for the Old Indebtedness Fund to and including 1937. The record does not affirmatively establish a failure to levy taxes for the payment of registered warrants drawn on the Bridge Fund prior to August 1, 1936. Consequently, we find from the evidence that there was a failure for the first time to make a levy to pay registered warrants drawn on the Old Indebtedness Fund on August 1, 1938, and that the first failure to levy taxes to pay registered warrants drawn on the Bridge Fund was on August 1, 1936. This action was commenced on July 31, 1941. The applicable rule is that the statute of limitations does not begin to run against county warrants until after it appears that the taxes levied to create a fund for the payment of the warrants have failed and will continue to fail to produce funds for the payment of the warrants. *Daniels v. City of Gering*, 130 Neb. 443, 265 N. W. 416. In *Rogers v. City of Omaha*, 82 Neb. 118, 117 N. W. 119, the rule is stated as follows: "The statute of limitations does not commence to run against warrants issued by a municipal corporation, payable out of a special fund to be created, until such fund has in fact been created, and there is sufficient money in the fund with which to

pay the warrants." See, also, *Bacon v. Dawes County,* 66 Neb. 191, 92 N. W. 313. It is evident that the creation of a fund for the payment of these warrants failed when no levy was made in 1938 as to one and in 1936 as to the other. The failure occurred within five years of July 31, 1941, the date this suit was commenced. There being insufficient amounts in the respective funds on August 1, 1938, and August 1, 1936, to pay the warrants sued upon, and there being no evidence that the officers of the county had refused or neglected prior to that time to provide the funds to retire the warrants, the statute of limitations did not operate to bar the action.

The contention of the defendant that the warrants sued upon are absolutely void is based upon the claimed violation of the following constitutional and statutory provisions:

Constitution of Nebraska, art. VIII, sec. 5: "County authorities shall never assess taxes the aggregate of which shall exceed fifty cents per one hundred dollars actual valuation as determined by the assessment rolls, except for the payment of indebtedness existing at the adoption hereof, unless authorized by a vote of the people of the county."

Comp. St. 1929, sec. 26-116: "It shall be unlawful for the county board of any county in this state to issue any warrants for any amount exceeding the aggregate of eighty-five per cent of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same; nor shall it be lawful for the county board to issue any certificate of indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness in any form in payment of any account or claim, nor to make any contracts for or to incur any indebtedness against the county in excess of the tax levy for county expense during the current year; nor shall any expenditure be made, or indebtedness be contracted to be paid out of any of the funds of said county in excess of the amount levied for said fund."

Comp. St. 1929, sec. 26-117: "Each warrant shall specify the amount levied and appropriated to the fund upon which it is drawn, and the amount already expended of such fund."

Comp. St. 1929, sec. 26-118: "Any warrant drawn after eighty-five per cent of the amount levied for the year is exhausted, and where there are no funds in the treasury for the payment of the same, shall not be chargeable as against the county, but may be collected by civil action from the county board making the same, or any member thereof."

It is established beyond question that the constitutional provision cited and the provisions of sections 26-116 and 26-118, Comp. St. 1929, were violated when the warrants sued upon were issued. The warrants on their face evidenced the fact that sections 26-116 and 26-118 were violated at the time of their issuance. Defendant contends that the violation of these constitutional and statutory provisions renders the warrants absolutely void, *ultra vires* and unenforceable. Plaintiff contends that the issuance of these warrants was not *ultra vires*, and, at most, they were voidable only upon the taking of appropriate steps at the proper time, but the county having approved the claim, retained the benefits, acquiesced in the disposal of the warrants by notifying the holders thereof and calling upon them for presentment for payment in the order of registration as funds became available and by making annual levies for their payment for a long period of years, the county is now estopped to assert the illegality of the warrants.

It must be conceded that the county had the power to make contracts for the construction and repair of bridges within the county. The provisions of the Constitution and statutes cited recognize that power but seek only to provide limitations upon the exercise of the power. An *ultra vires* contract of a municipal corporation is one which the corporation has no power to make under any circumstances or for any purpose. A contract of a municipal corporation is *ultra vires* in its proper sense when the corporation has no

power under existing legislation to enter into such a contract. *Rogers v. City of Omaha*, 80 Neb. 591, 114 N. W. 833; *Stickel Lumber Co. v. City of Kearney*, 103 Neb. 636, 173 N. W. 595. It is within the general powers of a county to contract for the construction and repair of bridges, hence it cannot be said that the contracts are strictly speaking *ultra vires* although absolutely void because issued in excess of limitations imposed by constitutional and statutory law. The latter rule has not been departed from in this state and is amply supported by the following cases: *Grand Island & W. C. R. Co. v. Dawes County*, 62 Neb. 44, 86 N. W. 934; *National Life Ins. Co. v. Dawes County*, 67 Neb. 40, 93 N. W. 187; *State ex rel. Boxberger v. Burns*, 132 Neb. 31, 270 N. W. 656. We necessarily conclude that the warrants in suit are absolutely void, whether the liability was incurred under the emergency powers of the county board or otherwise, and being nonnegotiable instruments, an assignee acquires them subject to all defenses which were available against the original payee. *Union Nat. Bank v. Village of Beemer*, 123 Neb. 778, 244 N. W. 303.

Plaintiff urges that the county is estopped to assert that the warrants sued upon are void. It is elementary that an illegal and void contract cannot be made the groundwork of an estoppel. Such a situation is different from that in which a municipal corporation acts irregularly within the scope of its powers. In the latter case the municipal corporation, as well as corporations contracting with it, may be estopped to deny that it has complied with all legal formalities. But such is not the rule where the act is absolutely void. In the leading case of *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 60, 11 S. Ct. 478, the court said: "When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact

have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws. * * *

" * * * 'nothing which has been done under it, nor the action of the court, can infuse any vitality into it;' * * * ." See, also, *Pennsylvania R. Co. v. St. Louis, Alton & Terre Haute R. Co.*, 118 U. S. 290, 6 S. Ct. 1094.

"A municipality cannot be estopped to aver its incapacity to make a contract by receiving benefits thereunder. That is, it cannot be made liable either on the theory of estoppel or implied contract, where it had no capacity to make the contract or where it was made in express violation of law." 3 McQuillin, Municipal Corporations (2d ed.) (Rev.) sec. 1358.

"If warrants are construed to constitute indebtedness, and the debt limit of the municipality has been exceeded at the time of the issuance of warrants, the municipality cannot estop itself by its conduct or otherwise to deny its liability when sued upon such warrants." 6 McQuillin, Municipal Corporations (2d ed.) (Rev.) sec. 2418.

This court has followed this principle. In *State ex rel. Sorensen v. Plateau State Bank*, 126 Neb. 407, 253 N. W. 433, we said: "Where there is a positive law prohibiting the village treasurer from depositing village funds in any bank not designated by the board of trustees as a depository, the village is not estopped by any act done in violation of said law by the village treasurer."

In a somewhat similar case we said: "Void action by a city council in allowing the city clerk unlawful compensation and in ordering a city warrant to pay it, if positively inhibited by statute, does not have the effect of an appealable judgment, but is open to collateral attack and does not estop the city to seek redress for resulting damages by means of a suit on the official bond of the city clerk." *City of Scottsbluff v. Southern Surety Co.*, 124 Neb. 260, 246 N. W. 346.

It is the general rule that the doctrine of estoppel cannot be applied as against a municipal corporation to validate a contract which it has no power to make, or where it was made in express violation of a prohibitory law. See *Neisius v. Henry,* 142 Neb. 29, 5 N. W. 2d 291; *Village of Bellevue v. Sterba,* 140 Neb. 744, 1 N. W. 2d 820; *Paxton Irrigation District v. Conway,* 94 Neb. 205, 142 N. W. 797.

The defendant urges that a former judgment in the case of *State ex rel. Warren v. Raabe,* 140 Neb. 16, 299 N. W. 338, is *res adjudicata* of all issues involved in the present case. We do not think there is any merit to this contention. This suit was one in mandamus to compel the proper officers of the county to proceed to collect the funds necessary to pay off the warrants in suit in the present action. The court held that the action was not a proper remedy in that case and affirmed the judgment of the trial court in dismissing the suit. While we do not question that a final judgment rendered upon the merits of an application for a writ of mandamus may constitute the basis for a plea of *res adjudicata,* the rule has no application where the applicant misconceived his remedy and suffered a dismissal on that ground. In *Hoffman v. Silverthorn,* 137 Mich. 60, 100 N. W. 183, the rule is aptly stated as follows: "It does not follow, because the mandamus was denied, that the court passed upon the merits of plaintiff's application. That mandamus may have been denied because no case was made that appealed to the discretionary power of the court, because relator had a manifest legal remedy of which he could not be deprived, or because mandamus was not the proper remedy. If the mandamus was denied for either of these reasons, no authority need be cited to the proposition that that decision was not res judicata." See, also, *Fuller-Warren Co. v. Harter,* 110 Wis. 80, 85 N. W. 698; *Carter v. Schrader,* 187 Ia. 1245, 175 N. W. 329.

The plaintiff contends that the judgment obtained on the fifth claim filed was *res adjudicata* as to the validity of the warrants in suit and is a bar to the defense of invalidity asserted by the county. The record shows that the fifth

claim was disallowed on September 16, 1922, and an appeal promptly taken. When the transcript was filed in the district court on appeal, it contained not only the fifth claim, but also the four claims which had been previously allowed and on which warrants had been issued, the warrants in suit being a part thereof. A petition denominated a petition in equity was then filed. It alleged the making of the contracts, the construction and repair of the bridges in accordance therewith, the allowance of the claims and the issuance of warrants therefor, and the balance remaining due. The petition also alleges the right of plaintiff to recover upon *quantum meruit*. The prayer was for an accounting and for judgment for the amount found due, and for a determination of the validity of the warrants previously issued.

To this petition the three county commissioners who had been made parties filed an answer. It was in part as follows: "The defendants further allege that each of the several warrants set forth in plaintiff's petition were duly and properly issued by the proper officers of Stanton County, Nebraska in payment of services justly and lawfully rendered by said plaintiff; that prior to the issuance of the aforesaid warrants set forth in plaintiff's petition, there had been filed with the Board of County Commissioners of Stanton County, Nebraska, a properly verified bill for the amount of material and services rendered as set forth in plaintiff's petition. That said bills were duly allowed at the regular meeting of the said Board of County Commissioners; that no appeal was taken from the allowance of any of said claims and the aforesaid order of allowance still remains in full force and effect; and that the aforesaid warrants were duly and properly issued after the time for appeal had expired and are just and valid warrants and obligations of Stanton County, Nebraska; and that Stanton County is entitled to credit for the same upon the amount set forth in the aforesaid petition; that as to any balance claimed by the plaintiff after crediting the warrants described in the petition, the defendants are not advised and

therefore require plaintiff to make strict proof of the same." No evidence was taken by the trial court. Judgment was entered on the fifth claim for $75,168.43, which was subsequently paid in full. It contains a finding that the warrants issued, including those in the present suit, were valid obligations of the county. Neither the county commissioners, nor any one else for the county, pleaded any of the defenses now asserted by it as a defense to the fifth claim.

The evidence shows that in March, 1922, the taxpayers of the county became concerned about the large number of warrants that were being issued and interested themselves in the transactions. Meetings were held and pressure brought to bear upon the county commissioners to reduce the scope of their action in building and repairing bridges. Drake was present at some of these meetings on behalf of the Standard Bridge Company and at one of these meetings he offered to take back at the contract price any bridges that had been built which the county did not want. This resulted in an inspection of all bridges by a committee representing interested taxpayers and an agreement as to the bridges that were to be retained and paid for. It is evident that when this agreement was reached the parties to the litigation got together through their attorneys, formulated the pleadings as we have heretofore stated, and caused a judgment to be entered which was in accordance with the conclusions reached by the parties and the interested taxpayers. In other words, it was intended by all that the Standard Bridge Company should recover judgment in the manner and form in which they did recover it.

This is further borne out by undisputed facts in the record. The fifth claim was disallowed on September 16, 1922. On September 21, 1922, a notice of appeal was filed by Drake. On September 29, 1922, the "petition in equity" and answer of the county commissioners were verified. On September 30, 1922, the appeal was docketed and the petition and answer filed. On October 2, 1922, the judgment was entered without evidence being adduced. There is evi-

dence that Drake suggested to the county board that the fifth claim be rejected so that he might obtain a judgment against the county. The petition on appeal from the disallowance of the claim was for an accounting, for judgment for the amount due and for a determination of the validity of the warrants previously issued. The petition stated a cause of action on the warrants and one on a *quantum meruit* basis. We will not discuss the question whether such a petition can properly be filed on appeal from the disallowance of a claim by a county board. We will content ourselves with the statement that it was vulnerable to attack and that the allegations of validity of the warrants previously issued should have been stricken if objection had been made thereto. In other words, such allegations were injected into the litigation by consent or acquiescence. It is urged that county officers cannot so consent, either by stipulation or acquiescence, and thereby give validity to their unlawful acts as against the public interest. We think the evidence shows by the undisputed testimony that the judgment entered was one that all participating parties intended should be entered without a hearing upon the merits and that it was in effect a consent judgment. The answer of the members of the county board is conclusive evidence of that fact. The question posed is whether such a judgment constitutes a basis for a plea of *res adjudicata.*

The general rule with respect to domestic judgments is that they cannot be collaterally attacked or impeached by the parties for fraud or collusion not going to the jurisdiction and that consent judgments are as conclusive on collateral attack as judgments entered after a trial. There is, however, a recognized exception to this general rule. In cases involving public interests where the public was a party merely by representation, the persons represented may show fraud or collusion in obtaining the judgment. If the judgment was collusive or by the consent of an officer as to a matter with respect to which he had no authority to bind the public, and it was not a decision by the

court after a hearing on the merits, it does not afford a basis for a plea of *res adjudicata* as against the public interest involved. 1 Freeman, Judgments (5th ed.) p. 1100.

We think the present case clearly falls within the exception. The judgment pleaded as *res adjudicata* was not a judgment which was contested by the parties. The answer filed, the method employed in preparing and filing the pleadings on appeal, the entry of judgment within two days without any contest whatever, together with other evidences in the record that the judgment was rendered with the tacit consent of the members of the county board, convinces us that it was not one of those solemn adjudications which should be recognized as binding upon the parties and afford a basis for a plea of *res adjudicata.* The authorities generally sustain this position.

In a case very similar in nature the Iowa court said: "The contract for the seats was made by one Green, who was the agent of the plaintiffs in the sale of the seats. He knew when he made the sale that the contract was void. But it is wholly immaterial whether he knew the amount of the indebtedness or not. A party who becomes the creditor of a municipal corporation must, at his peril, take notice of the fact that its indebtedness is in excess of the constitutional limitation. * * *

" * * * We have said that there is no direct evidence of collusion between the plaintiffs and the directors; that is, the evidence does not show that the plaintiffs and the directors held a meeting, and made a compact or agreement that the plaintiffs should commence an action upon the illegal claim, and that the directors should make no appearance, and thus enable the plaintiffs to enforce a void obligation against the district. But fraud and collusion is not required to be shown by direct evidence. It may be proved by facts and circumstances, and, in our opinion, the evidence in this case shows that both of the parties to that action intended that the plaintiffs should recover judgment.

"Having found that the judgment was a fraud upon the district, the next question to be determined is, can the dis-

trict be relieved from the payment of the judgment? It is true as a general proposition, as claimed by counsel for appellant, that it cannot be said that the court did not have jurisdiction to render the judgment. It had jurisdiction of the subject-matter of the suit; that is, it had jurisdiction to render judgment on a money demand, and by the service of process it had jurisdiction of the parties; and if this were a judgment against a private person it may be that, under the facts, it should be held valid. But the school district is the real party. The directors are the trustees or managers of its affairs. The real parties in interest are the taxpayers of the district. It appears that these agents or officers of the district had attempted to involve it in debts to the amount of nearly fifty per cent. of the assessed valuation of its taxable property, and, to make these fraudulent obligations more binding, the directors deliberately and solemnly determined at a meeting of the board that they would not appear to the action, but allow judgment to be entered by default. An examination of the case of *Ind. Dist. v. Schreiner,* 46 Iowa, 172, will show some of the methods adopted by officers of a previous board in this same district. No question was made in that case that it was competent for the district to attack the judgment for fraud, and the judgment was set aside on that ground. In the case of *Kelly v. Town of Milan,* 127 U. S. 139, 8 Sup. Ct. Rep. 1101, the municipal authorities of a city brought suit to enjoin perpetually the collection of certain municipal bonds, on the ground that they were issued without authority of law. By consent of the parties, it was ordered that the preliminary injunction be dissolved, and the cause was disposed of by a compromise, by which it was agreed that the town, for a certain consideration, should let a decree be entered in favor of the validity of the bonds, and the decree was so entered. It was held that, as the bonds were invalid, the officers of the town had no greater power to agree to an entry of judgment declaring their validity than they had to issue the bonds originally, and that the judgment entered by consent did not estop the town, in a

subsequent action upon the bonds, from pleading the invalidity of their issue. Inasmuch as we have found that the facts in this case justify the finding that the judgment was rendered by the tacit consent of the members of the board then in office, the case above cited would appear to sustain us in holding that this judgment is not one of those solelm adjudications which should be recognized and binding upon the parties.

"It is to be remembered that, in every case determined by a court of last resort, it is important to consider the consequences which must necessarily follow the decision rendered. It is a matter of common knowledge in this state that many of our cities have contracted debts to the extent of the constitutional limitation; and in one city there was a time when its business was transacted under the restraint of an injunction forbidding the contracting of additional indebtedness. If we were to sanction judgments like the one obtained in this case, it would be a license to officers of municipal corporations to incur any indebtedness in any amount, and then allow judgments by default, and thus defeat and override the constitutional limitation. It is requiring rather too much vigilance on the part of the taxpayer to require him to be in attendance in the clerk's office, and in the courts, and upon the meetings of city councils, that he may know whether the indebtedness contracted is valid, and enjoin such actions." *Kane & Co. v. Independent School District of Rock Rapids*, 82 Ia. 5, 47 N. W. 1076.

In *Green v. Hutsonville Township High School District*, 356 Ill. 216, 190 N. E. 267, the court said: "Regardless of the general rule that a judgment cannot be collaterally attacked and that it is conclusive and final as between the parties, there is a further rule which has been repeatedly sustained in this court, and, so far as we know, in all other courts. That rule is, that whenever a judgment is procured through fraud and collusion for the purpose of defrauding some third person, such third person may show collaterally the fraud and collusion by which the judgment was obtained and escape the burdens and injuries thus

thrust upon him. * * * It is further the rule that to constitute *res adjudicata* it must appear that the former adjudication was upon a matter contested between the parties. (*Wadhams v. Gay*, 73 Ill. 415.) If a suit is devised for the purpose of having a certain judgment entered, it will not be binding upon the public or those who are not parties to the scheme adopted for that purpose. * * * A taxpayer is not estopped by a consent judgment upon an unlawful contract, (*People v. Illinois Central Railroad Co. supra,*) neither can a legal liability be established by such a judgment."

In *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 562, 11 S. Ct. 402, the court said: "The prior decree was the consequence of the consent and not of the judgment of the court, and this being so, the court had the right to decline to treat it as *res adjudicata;* * * * ."

We are in accord with the principles expressed in the foregoing authorities and hold that the judgment obtained in the district court for Stanton county on appeal from a disallowance by the county board of the fifth claim can afford no basis for a plea of *res adjudicata* as against the public. It seems to us that the county board can have no more power as against the public interest in validating warrants by consenting to, acquiescing in, or furthering the entry of a judgment than they had in approving the liability and issuing the warrants in the first instance. If constitutional and statutory prohibitions could be evaded in this manner, they would in effect be completely nullified and constitute no restraint against the evils they were intended to correct.

We have examined all other assignments of error and find they are without merit.

We conclude that the trial court was in error in withdrawing the case from the consideration of the jury and rendering judgment in favor of the plaintiff. It seems to us that the defendant was entitled to a peremptory instruction as to all the issues presented by this appeal. Certain issues were reserved by agreement, pending the final dis-

position of this appeal. The judgment of the district court is therefore reversed and the cause remanded to the district court with instructions to adjudicate all issues reserved by the stipulation of the parties and to enter such a judgment as the facts and law justify in the light of this opinion.

REVERSED.

YEAGER, J., dissenting.

I find no difficulty in agreeing with the portion of the majority opinion dealing with the subjects of estoppel and *ultra vires* and I also concur in what has been said with regard to the effect of the judgment in the case of *State ex rel. Warren v. Raabe,* 140 Neb. 16, 299 N. W. 338, but from that point on I must respectfully dissent from the opinion of the majority.

I am firmly convinced that the judgment entered on October 2, 1922, on appeal from the action of the county board, referred to as a judgment on the fifth claim, is valid and binding, conclusive and *res judicata* upon all rights involved here except that of the statute of limitations, and that the statute of limitations is no defense to the action of plaintiff in the light of the annual levies of taxes made after the rendition of the judgment for the payment of the obligation thereof.

In September, 1922, after all or substantially all of the work was done and material furnished under all of the contracts, the Standard Bridge Company, predecessor in interest of the plaintiff herein, filed its claim, general in terms, with the county board for $95,298.43 with deductions which indicated that there was a balance due the claimant in the amount of $75,168.43. This claim was disallowed by the county board and from the action the Standard Bridge Company appealed to the district court.

In the appellate proceeding in the district court the Standard Bridge Company filed a petition wherein as the basis for the claim it set forth the letting of the contracts in question, the work and labor performed and material furnished thereunder, the various items of cost and charge, the payments received, the number and amount of war-

rants issued by the county and received by the claimant in payment and asked an accounting of all matters done and performed under the contracts, an adjudication of the validity of the claim and warrants, and alleged that the amount represented by the claim was the balance due after accounting on all of the contracts and prayed judgment for this balance.

To this petition the defendant here filed an answer the details of which I deem unnecessary to set forth.

The cause came on for trial in the district court and the court by its judgment made the accounting requested, found that of the warrants issued $119,637.23 had been paid, and that the county was entitled to a credit of $17,778.07 which was not given by the Standard Bridge Company, that the total credit due Stanton county on the contracts by payment in money, warrants and otherwise was $560,217.41, that the unpaid warrants, which included the warrants in suit here, were legal and binding obligations of the county, that after such accounting there was a balance due in the amount of $75,168.43, for which judgment was rendered.

It is this judgment that plaintiff insists is *res judicata* on the matter of the validity of the warrants sued upon in this action.

It may be stated here that the judgment in that case was never in the case itself, by appeal or application to set it aside, attacked. It may also be stated that in no independent action instituted for that purpose which has proceeded to final judgment has this judgment been directly attacked.

The attack of the defendant upon this judgment being collateral we are now called upon in this connection to determine but two questions. The questions are: Is there a jurisdictional infirmity which renders the judgment void? Is it in fact and in law an adjudication of the validity of the warrants?

As to the first question there is little controversy. The defendant does not seriously contend that the judgment is void. It appears to be conceded that there is a valid judgment for $75,168.43. As to the second it contends that the

findings with reference to the accounting, payments by money and warrants, credits and validity of warrants constituted no part of the adjudication.

The position of the plaintiff in this connection is that these findings were, and of necessity had to be, adjudicated in arriving at the judgment to which the Standard Bridge Company was entitled under the issues presented by the claim, as elaborated by the petition on which the case was presented to the district court, and that in consequence that judgment is *res judicata* here on the question of the validity of the warrants in suit.

The applicable rule with regard to collateral attack is that a judicial order or judgment is not subject to attack in a collateral proceeding unless affected by some jurisdictional infirmity. *Dryden v. Parrotte,* 61 Neb. 339, 85 N. W. 287; *Wharton v. Jackson,* 107 Neb. 288, 185 N. W. 428; *In re Estate of Kierstead,* 128 Neb. 654, 259 N. W. 740.

The applicable rule of the decisions of the court with regard to *res judicata* is that the doctrine includes not only the things which were determined in the former suit, but also any other matter properly involved which might have been determined therein. See *Orcutt v. McGinley,* 96 Neb. 619, 148 N. W. 586; *Shepard v. City of Friend,* 141 Neb. 866, 5 N. W. 2d 108; *Wightman v. City of Wayne,* 144 Neb. 871, 15 N. W. 2d 78.

The case of *Orcutt v. McGinley, supra,* contains the following statement which is peculiarly apropos here: "If one has a defense which he neglects to make, it is at his peril, * * * ." In the action before the county board and again on appeal to the district court Stanton county could have set up the invalidity of the contracts, the warrants and the claim. This it neglected to do. The peril of this neglect must fall upon the county.

It is substantially contended by defendant that there was a failure of evidence, in fact that there was no evidence adduced, in the district court in Standard Bridge Company v. Stanton County to sustain the finding of the court. Whether or not that was true is a matter foreign to the in-

quiry here. This is a collateral attack upon a judgment containing no jurisdictional infirmities. The rule which must be applied is that all presumptions are in favor of the regularity of the proceedings of courts of record when collaterally attacked, and where a decree or judgment contains the findings of a fact specially, which are pleaded in the petition, it must be presumed that sufficient evidence was submitted to the court to justify such findings. *Hilton v. Bachman*, 24 Neb. 490, 39 N. W. 419; *Chase v. Miles*, 43 Neb. 686, 62 N. W. 35; *Cizek v. Cizek*, 69 Neb. 797, 96 N. W. 657.

It follows that the judgment in the case of Standard Bridge Company v. Stanton County rendered in October, 1922, is *res judicata* on the question of the legality of the warrants in suit.

I desire now to direct attention to the textbook and the citations on which the majority opinion relies for support for its view that this judgment is subject to collateral attack. The first to which I shall call attention is the reference to 1 Freeman, Judgments (5th ed.) p. 1100. The rule of the opinion is not the rule of the text.

The rule of the opinion is the following: "If the judgment was collusive or by the consent of an officer as to a matter with respect to which he had no authority to bind the public, and it was not a decision by the court after a hearing on the merits, it does not afford a basis for a plea of *res adjudicata* as against the public interest involved."

The rule of the text is the following: "If the judgment was collusive or was by consent of an officer or taxpayer as to a matter with respect to which he had no authority to bind the public by such consent, and not a decision by the court after a hearing on the merits, it may be refused recognition as res judicata against the public interest involved. Hence if the decree shows that it was the result of a compromise by which the merits were not considered and adjudicated, it is not conclusive upon the public or persons represented."

The breadth of the departure of the rule of the majority

opinion from that of the text is readily discernible. It is clear that the rule of the text can have no application in a case unless the decree or judgment itself shows that it was the result of a compromise and that the case was not considered and adjudicated on its merits. That is not the situation here. The judgment here shows on its face a consideration and adjudication on the merits. The showing to the contrary is wholly collateral.

I call attention next to the case of *Kane & Co. v. Independent School District of Rock Rapids*, 82 Ia. 5, 47 N. W. 1076. This was an action to enforce payment upon bonds similar to the situation involved here. The answer was collateral but there was a cross-bill wherein there was equitable attack as distinguished from collateral attack in an action at law. The question of collateral attack is not directly determined therein.

The case of *Green v. Hutsonville Township High School District*, 356 Ill. 216, 190 N. E. 267, is not in point here. This case was an attack in equity by injunction.

The case of *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, 11 S. Ct. 402, is not beneficial in the determination of the questions involved in this case, and I may say that I find no fault with the quotation employed if it is considered in the light of the situation where it originated. In that case a party was seeking the benefit of a contract and a decree which called for the interpretation of rights under that decree, and the following from the opinion is sufficient to make clear that the case is not enlightening on the questions presented in this case: "This, in plaintiff's view, left that decree incomplete, and therefore it seeks in substance to have it pieced out and then enforced under the prayer for general relief. There is no prayer in the bill that the preliminary injunction be made perpetual, but that would result if plaintiff succeeded, by a decree under the general prayer, in subjecting this defendant to the operation of the prior decree. But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as re-

spects the relief to be granted on the new bill."

The conclusion and decision of this court should be that the trial court did not err in withdrawing the case from the jury and rendering judgment in favor of the plaintiff. It was, however, in error in rejecting the contention of plaintiff that the judgment entered in October, 1922, in the case of Standard Bridge Company v. Stanton County was *res judicata* on the question of the legality of the warrants in suit, and in rendering judgment on the theory that defendant was estopped to assert the illegality of the warrants. The judgment in Standard Bridge Company v. Stanton County, having been *res judicata* in the matter indicated on the record presented, conclusively therefore the plaintiff was entitled to a judgment in the amount for which judgment was rendered. There was nothing to be passed upon by the jury.

CHAPPELL, J., concurs in the dissent.

FRANK DIEZ ET AL., APPELLANTS, V. EARL P. ROSICKY, ADMINISTRATOR, ET AL., APPELLEES.
16 N. W. 2d 155

FILED OCTOBER 20, 1944. No. 31771.

1. **Statute of Frauds.** In a suit to enforce an oral agreement within the statute of frauds on the ground of part performance, the part performance must refer to, result from, or be in pursuance of the oral contract sought to be enforced, and not from some other relation.
2. ———. To sustain such an oral agreement the evidence must be clear, satisfactory and unequivocal.

APPEAL from the district court for Boyd county: DAYTON R. MOUNTS, JUDGE. *Affirmed.*

W. A. Meserve, for appellants.

W. Keith Peterson and *W. L. Brennan, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CARTER, J.

This is a suit in equity in which plaintiffs seek to compel specific performance of an oral contract alleged to have been entered into by Wenzl Diez, now deceased, and his wife, Matilda Diez, by the terms of which said Matilda Diez is alleged to have agreed to devise and bequeath one-half of the estate of her husband existing at her death and one-half of her own estate to the plaintiffs, who are the brothers and children of deceased sisters of Wenzl Diez. The trial court denied the relief prayed for and plaintiffs appeal.

The record shows that Wenzl Diez and Matilda Diez were married on January 14, 1893, and lived together as husband and wife until the death of Wenzl Diez on November 25, 1933. Matilda Diez never remarried, and died on December 9, 1942. Both parties died without issue. On April 25, 1914, Wenzl Diez executed a will by which his entire estate was left to his wife. This will was probated after the death of Wenzl Diez and all of his property was assigned to and became the property of Matilda Diez. Matilda Diez died intestate, leaving her mother, Theresia Kurka, as her sole heir. Theresia Kurka passed away on January 12, 1943, leaving a will by which she left her estate to her living sons and daughters and to the children of a deceased daughter. The plaintiffs are the brothers and children of three deceased sisters of Wenzl Diez. The defendants are the sons, daughters and the children of a deceased daughter of Theresia Kurka; Earl P. Rosicky, administrator of the estate of Matilda Diez; and William J. Svoboda, administrator with will annexed of the estate of Theresia Kurka. The property involved was stipulated to be of the value of $55,000.

Plaintiffs contend that at the time Wenzl Diez made his will on April 25, 1914, it was pursuant to an agreement between his wife and himself that in case she survived him

she would will and bequeath one-half of his estate existing at the time of his death and one-half of her estate existing at the time of her death to his brothers and sisters and the children of any deceased brothers and sisters, and pursuant to the further promise that if he survived her he would will and bequeath one-half of his estate to her heirs. The question presented is the sufficiency of the evidence to sustain the agreement.

The plaintiff produced the testimony of one R. H. Harris, then a banker at Lynch, Nebraska, who stated that between March 15 and March 25, 1931, he had a conversation with Wenzl Diez in the bank in substance as follows: "I asked him if he had made a will, and he said he had, willing all his property, both personal and real to Matilda Diez, that was his wife; then he wanted to know if I considered that a sufficient will. I asked him if his will contained those statements, he said it did not, that it was a personal agreement between he and her, that in case he died before she did then she was to make a will, willing half of the property that he had at his death—that they were possessed of at that time, to his side of the family." There was other evidence to the effect that Mrs. Matilda Diez said in her lifetime that "they were both agreed that after her death that half of the property should go to his side and the other half to her side; * * * ." There was other evidence that Wenzl Diez wanted one-half of the property to go to the Diez side and one-half to his wife's side of the family. There is other evidence that Matilda Diez said both sides would be provided for and that she was going to make a will.

Defendants' evidence, outside of that which is purely negative in character, is that of persons who had visited with Wenzl Diez with reference to his property, during which conversations he made statements that "I have fixed it so Matilda has her money to do with as she pleases;" "I don't want the Van Burens to have it;" "and after their death he didn't care a darn which way it went" and "when she got through with it she could do as she damned pleased."

It is the rule in this state that an oral agreement to devise or bequeath property is void and unenforceable as being within the statute of frauds, unless there has been part performance by the promisee which is solely referable to the contract sought to be established and not such as might be referable to any other contract or situation. *Taylor v. Clark,* 143 Neb. 563, 13 N. W. 2d 621. It is evident that the making of a will whereby all of testator's property is left to his wife is not of itself evidence of the existence of a contract between the testator and his wife. Nor is it evidence of part performance of a contract in the absence of other evidence indicating clearly that it was made pursuant to such an agreement. We do not think the record shows by clear, definite, satisfactory and unequivocal evidence that a contract was made. Declarations of intention or of the wishes of the parties do not tend to support any such conclusion. Neither will an alleged agreement made after the execution of the will afford a valid consideration for any such an agreement.

In *Overlander v. Ware,* 102 Neb. 216, 166 N. W. 611, this court said: "In considering cases of this character, where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory, and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him."

The evidence was conflicting to such an extent that we cannot say that a contract was established by clear, satisfactory and unequivocal evidence. But irrespective of this

conclusion, plaintiffs' case must fail for the reason that it is not shown that the part performance relied on imports the existence of the pleaded agreement and no other. The record shows nothing which could be interpreted as part performance of the alleged contract, other than the fact that Wenzl Diez did make a will, leaving all his property to his wife. There is nothing unusual about a husband leaving all his property to his wife, in fact it is more or less the usual thing that is done. To meet the requirements of the rule, the act alleged to constitute part performance must be such that its existence can be accounted for only by the existence of the pleaded agreement. It must refer to, result from, or be in pursuance of the oral contract sought to be enforced, and not from some other relation. The evidence produced does not meet this test.

We are of the opinion therefore that the trial court was right in holding that the evidence fails to establish a contract outside the scope of the statute of frauds.

AFFIRMED.

IDEAL CEMENT STONE COMPANY, APPELLANT, V. FRED J. DOHSE ET AL., APPELLEES.
16 N. W. 2d 151

FILED OCTOBER 20, 1944. No. 31796.

1. Mechanics' Liens. It is clearly the purpose of the mechanics' lien statute (Comp. St. 1929, ch. 52, art. 1) to protect the diligent subcontractor if he acts in a specified and limited time.
2. ———. Where material has been furnished by a party under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by the statute for that purpose.

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

Ritchie & Swenson and *B. E. Vinardi,* for appellant.

J. C. Travis, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

MESSMORE, J.

This is an action to foreclose a mechanic's lien under the provision of article 1, ch. 52, Comp. St. 1929.

Plaintiff's petition alleges that on or about April 15, 1941, defendant Fred J. Dohse employed A. S. McGimsey, a contractor, for the purpose of constructing a dwelling and garage on defendants' premises; that between April 15, 1941, and June 14, 1941, both inclusive, the plaintiff sold certain materials to McGimsey and delivered the same on the defendants' premises for the purpose above stated; that McGimsey promised and agreed to pay plaintiff the fair and reasonable value of the materials so furnished. Plaintiff filed a mechanics' lien August 13, 1941, claiming $296.91, with interest at 6 per cent per annum from June 14, 1941, and one dollar for filing.

The defendants' answer alleges: Shortly before April 15, 1941, defendant Fred J. Dohse entered into a contract with McGimsey to furnish the materials and perform the labor for the basement walls and chimney of the dwelling for the agreed price of $325. The materials listed in exhibit A, attached to plaintiff's petition, as being delivered on or about the dates of April 15, 1941, and May 2 of the same year, were furnished to the contractor under said contract. Thereafter, or shortly before June 14, 1941, the same defendant entered into a second contract, independent of the first, with McGimsey, to furnish the materials and perform the labor for a cement basement floor in the house and in a garage attached thereto. The materials listed as being delivered June 14, 1941, were furnished McGimsey under the second contract. Before defendants had notice of plaintiff's lien or its filing, the contractor was paid all the amounts due him under both contracts. Being advised of the plaintiff's lien, shortly before December 31, 1941, defendant Fred J. Dohse informed plaintiff that its lien had not been filed in the statutory time as to the first

contract, and offered to pay and tendered into court the amount of $70 for materials furnished under the second contract. The plaintiff's reply alleges that the material furnished was at all times furnished under a continuous running account, constituting one account, and plaintiff was not informed and did not know that there was more than one contract existing between defendants and their contractor and had no notice of any kind or character that separate contracts were being entered into between the defendants and their contractor.

The trial court decreed that the plaintiff's claim for a lien on materials furnished on or before May 6, 1941, be dismissed, rendered judgment against defendants on items delivered June 14, 1941, in the sum of $70, plus $8.60, costs accruing to and including February 5, 1942, taxed all costs subsequent to such date to the plaintiff, and decreed that the plaintiff had no lien, claim or demand of any kind or description against the defendants or their property. From this decree and the overruling of a motion for a new trial, plaintiff appeals, assigning as error that the decision was contrary to the evidence and the law. The record discloses:

Defendant Fred J. Dohse started the excavation of the basement for a house, with garage attached, to be constructed on his premises. In the forepart of April, 1941, he entered into an oral agreement with A. S. McGimsey to furnish the material and perform the work necessary to put in the footing, the walls of the garage, the chimney and the porch pillars. About the same time McGimsey contacted A. V. Johnson, vice-president of the plaintiff company, and told him that Fred J. Dohse was going to build a house and that he, McGimsey, was going to build the foundation and do the work for him. Thereafter, McGimsey, as the contractor, ordered out material, the first delivery being made on the Dohse property April 15, 1941. About the 10th or 12th of June, 1941, Fred J. Dohse entered into another oral agreement with McGimsey, by which the latter should furnish the material and do the work in constructing the basement floor in the house and the garage

and two steps leading from the basement to the garage. Prior to the awarding of the latter contract, a bid was submitted by another contractor and rejected. The contract price for the first contract was $325, and for the second $118. The plaintiff's account shows materials ordered out from and after April 15, 1941, to May 2 of the same year, and thereafter on June 14, 1941. Defendant Fred J. Dohse did the excavating, all of the rough carpenter work, the cement work on the sidewalks and driveway, and the cement steps from the porch to the sidewalk and painted the house with a prime coat.

Payments were made pursuant to the contracts in the following manner: April 19, 1941, in the amount of $75; May 5, 1941, $175; May 10, 1941, $50; total, $300, leaving a balance of $25 withheld by defendant Fred J. Dohse on the first contract, for the reason that McGimsey had not completed the job under the first contract. There remained to be finished off the sills for the basement windows and the pillars for the porch. Further payments were made: On June 21, 1941, the sum of $50 for cement work; June 26, 1941, $50 for cement work; August 2, 1941, in full for labor and material, cement work, $43. The work provided for in the first contract was not entirely completed when the work under the second contract was commenced. The job under the first contract was completed with the material furnished from April 15 to and including May 2, 1941, and the material furnished June 14 was used exclusively under the second contract. There remained on the premises a certain quantity of screened sand and cement which, plaintiff contends, were used in the work covered by the second contract by a finisher smoothing off the cement floors. The finisher did not testify as to where these materials came from. The materials, as shown by plaintiff's account from April 16 to May 2, 1941, inclusive, were of the value of $231.33, and the materials obtained on June 14, 1941, of the value of $65.58.

Plaintiff's evidence is to the effect that in furnishing materials, and, until after filing its mechanic's lien, it had no

knowledge that the materials were being used in the performance of two separate contracts between Dohse and his contractor, but believed the same were being furnished for one continuous job. The vice-president of the plaintiff testified that he understood the materials were for the construction of a house, treated the orders as one job, and furnished the materials accordingly. Further, it is asserted, the receipt (exhibit 4) for the payment made under date of June 21, 1941, referred to, does not contain any separation of the items under the two contracts, but merely recites that said payment was made for cement work.

The plaintiff contends that a running account for materials furnished for the same improvement is deemed one entire transaction for the purpose of a mechanics' lien; therefore, the materialman has the statutory period from the date of the last item in which to file his lien for the entire account, citing 36 Am. Jur. 96, sec. 138, in which it is said: "The time for filing a mechanic's lien begins to run from the time the last item of the account is furnished, when the entire account is a continuous and connected transaction or running account, such an account being deemed an entire contract." In conformity with the above contention and rule, we consider the Nebraska cases cited by the plaintiff on the subject.

In *Ballou v. Black*, 17 Neb. 389, 23 N. W. 3, there was only one contract involved. The question was with reference to the delivery of lumber on different dates. The lumber furnished for the construction of the defendant's building was delivered in five parcels of nearly equal value, one on the 12th, the 14th, the 17th, the 20th and the 28th days of September. The lien was filed November 25 of the same year. It was held that "the same constituted but one delivery, and that the lien was filed in due time to cover the whole." The test is whether separate orders are given under one or separate contracts.

In *Bradford Lumber Co. v. Creel*, 93 Neb. 573, 141 N. W. 145, the court held: "A subcontractor who furnished at different times materials for a house, pursuant to a con-

tinuous course of dealing under a single contract, is entitled to a mechanic's lien for the balance due him, where he filed a proper statement with the register of deeds within the statutory period." While three distinct contracts were claimed by the defendant, the court found there was one contract. Applying the test, heretofore mentioned, in the instant case, plaintiff admits the defendants pleaded and proved two contracts. Obviously, plaintiff's contention, under the circumstances, is erroneous.

Plaintiff concedes the rule against tacking of two separate contracts for the purpose of enabling the mechanic's lien claimant to protect his lien, in so far as earlier items are concerned, is well established in this state. The rule is: "Where labor or material has been furnished by a party under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by the statute for that purpose." *Henry & Coatsworth Co. v. Halter,* 58 Neb. 685, 79 N. W. 616.

Plaintiff contends, however, that the rule does not apply where the materials were furnished for the same improvement and where the fact that there were two separate contracts between the owner and the principal contractor was not made known to the materialman, and the latter furnished all of the materials upon one running account and under the belief that they were all furnished pursuant to one contract; that in such case the materialman has the full statutory period from the date of furnishing the last item in which to file his lien; relying on *Valley Lumber & Mfg. Co. v. Driessel,* 13 Idaho 662, 93 Pac. 765, followed in *Gem State Lumber Co. v. School District No. 8,* 44 Idaho 359, 256 Pac. 949. For brevity, we state the rule as it appears in the latter case (p. 363):

" * * * where a defendant seeks to defeat plaintiff's right to recover in an action to foreclose a mechanic's lien by showing that the material was furnished on two separate and distinct contracts, and that the lien was not filed in time to secure the claim for the material furnished on the first contract, the burden of proof is on the defendant to

show either that the plaintiff had actual notice that the material was furnished and used on two separate contracts, or else show such circumstances as would impute to plaintiff constructive notice, and put him on his inquiry to ascertain that two or more contracts did in fact exist." *Gem State Lumber Co. v. School District No. 8, supra.*

The rule announced in *Valley Lumber & Mfg. Co. v. Driessel, supra,* finds support in *Darlington Lumber Co. v. Harris,* 107 Mo. App. 148, 80 S. W. 688, although premised on a different conclusion. The following annotation of the cases appears in 15 L. R. A., N. S., 302: "In *Darlington Lumber Co. v. Harris, supra,* the general doctrine was stated that a completed transaction for which a lien will lie will not be seized by the law as a means to resuscitate a defunct lien pertaining to an entirely distinct transaction; but an exception to this doctrine was recognized where material was furnished by a materialman to a general contractor under substantially one continuous arrangement (One continuous arrangement is not shown in the instant case). In such a case, the fact that this material was used by the contractor in carrying out separate contracts with the owner was held not to affect the right of the materialman to include in his claim for a lien all the material furnished, although a part thereof had been used by the contractor under a contract as to which the time to claim a lien under ordinary circumstances had expired."

Likewise, in the case of *Jones & Magee Lumber Co. v. Murphy,* 64 Ia. 165, 19 N. W. 898, where the material was furnished to the contractor practically continuously, to be used by him in carrying out separate contracts with the owner but relating to the same building, the fact that these contracts were separate was held not to affect the right of the materialman to a lien for all material furnished. See Annotation, 15 L. R. A., N. S., 302. According to *Darlington Lumber Co. v. Harris, supra,* and *Jones & Magee Lumber Co. v. Murphy, supra,* and other cases which follow them, the fact to determine is whether or not a materialman's lien may be filed for all deliveries and to ascertain

whether the various orders placed by the original contractor with the materialman are for the same general construction and constitute one transaction and a continuous running account.

Plaintiff concludes that the rule as announced in *Valley Lumber & Mfg. Co. v. Driessel, supra,* and *Gem State Lumber Co. v. School District No. 8, supra,* is not in conflict with the decisions of this court, for the reason that in the Nebraska cases the party claiming the lien was himself a party to the separate contracts which the court held could not be tacked; that is, that the lien claimant, as a materialman, had actual and constructive knowledge of the existence of the two contracts and, for the purposes of a mechanic's lien, was bound thereby.

In the instant case the contractor informed the materialman that defendant Fred J. Dohse was going to construct a house with garage attached and that he was going to build the foundation and do the work for him. Plaintiff implies from this that the words, "do the work for him," meant the construction of the house and attached garage. From the very nature of the materials delivered to defendants' premises from April 15 to and including May 2, 1941, it is obvious that such materials were those used in building the foundation for the house.

Plaintiff raises the question that some of the material furnished under the first contract was used after the second contract was commenced, presumably to show the continuance of the work as one job. The fact that a certain amount of screened sand and cement, which had been delivered under the first contract, still remained on the premises when the delivery of materials on June 14 was made, and some of the first material was used by the finisher on the basement floor, is immaterial. The plaintiff admits that the defendants pleaded and proved two contracts. On June 14, 1941, about five and a half weeks after delivery of materials made on May 2, other materials of like nature were delivered by plaintiff to defendants' premises which were used under the second contract. While this lapse of time

is referred to as not being unreasonable or unusual, from the nature of the materials used and the work performed under the contract, we conclude that the materialman had sufficient notice to place the plaintiff in a position to ascertain the facts with reference to the two contracts, had it used reasonable diligence.

In *Disbrow & Co. v. Peterson,* 136 Neb. 719, 287 N. W. 220, this court said: "It is clearly the purpose of the statute (mechanics' lien statute) to protect the diligent subcontractor if he acts within a specified and limited time." In the *Disbrow case* there remained to be delivered two window screens which were within the contemplation of the parties under the original contract. The final delivery of all purchases, except two window screens, was made on October 30, 1936. The contractor was billed November 12 following. On May 6, 1937, the two window screens were delivered. July 1, 1937, plaintiff filed a mechanic's lien. This court held that the subcontractor as not entitled to a mechanic's lien under the facts. The court indicated that, if the statute for the filing of a mechanic's lien could be extended in this manner, the title to the property may, for an indefinite period, remain in an unsettled and not ascertainable condition with reference to the character and extent of mechanics' liens which may be claimed against such property. In view of this holding, it is quite apparent, where it is admitted that two separate contracts were proved, that they cannot be tacked together for the purpose of extending the time for the materialman to file a mechanic's lien.

The case of *Carr & Neff Lumber Co. v. Krogh,* 94 Neb. 537, 143 N. W. 813, is in point with reference to actual or constructive notice given to the materialman respecting two separate agreements. In that case, defendant Krogh authorized his tenant to purchase certain items to be used in the building of a barn, repairing the house and fences. The materialman furnished the material for these items in June, 1909. Witnesses testified to admissions made by Krogh that he told the tenant he would stand good for the

lumber and material that was necessary to use on the premises, and that, when he was presented with a bill for the whole amount of material furnished, he said: That was all right; he had given an order for lumber, and "when he got through with it he would settle the whole thing." Krogh denied that he gave the tenant authority to buy specific items in the bill, but he did say he would pay for all lumber the tenant had ordered that was necessary on the place. Certain materials were purchased by the tenant from the materialman September 28, to be used in the construction of a potato cellar. The controversy was over whether the material furnished in June was furnished under a separate contract from that furnished in September. If that be true, then the mechanic's lien which was filed more than four months after purchase of the material was void. The materialman was not a party to, nor did he have any knowledge of, the authorization given by defendant Krogh to the tenant, or of any agreements between them with respect to the materials. The court found there were two separate authorizations, two contracts between the landlord and tenant.

In *Rivett Lumber & Coal Co. v. Linder*, 113 Neb. 567, 204 N. W. 77, the owner contracted with a general contractor to build three dwellings. The contractor presented to the materialman a list of lumber and materials necessary for the construction of one of the three dwellings, and a list of millwork, requested prices thereon, informing the materialman that there would be three dwelling houses, each of the same character. The contractor had a contract with the owner to erect a garage and to repair some old buildings on the premises. The plaintiff did not know of such contract. It bid on the bill of lumber and materials which was supplied in triplicate. The court said that such materials were proper items in the lien and payment was secured thereby. "But those items which went into the construction of the garage are not so protected, and, in so far as they are included in the amount found due the plaintiff, such finding and decree are not supported by the evi-

dence"—following the rule announced in *Henry & Coatsworth Co. v. Halter, supra.* It will be observed that the materialman had no knowledge of the existence of the contract involving the construction of the garage and repair of old buildings and was not a party to the separate contracts.

In view of the foregoing Nebraska cases and the rule announced therein, we conclude that the judgment of the trial court is correct.

AFFIRMED.

IN RE APPLICATION OF THEODORE BLACKWELL FOR A WRIT OF HABEAS CORPUS.
THEODORE BLACKWELL, APPELLANT, V. J. J. PSZANOWSKI ET AL., APPELLEES.
16 N. W. 2d 158

FILED OCTOBER 20, 1944. No. 31793.

1. **Evidence.** When a foreign law is relied upon for relief but is not pleaded and proved or admitted the rule is that the laws of the foreign jurisdiction will be presumed to be like our own.
2. **Pardon.** If a convict breaks his parole, he is liable to serve out his maximum term, and the time of his escape, computed from its beginning to its end or time of retaking, is to be considered as not served.
3. ———. Where a convict in the penitentiary is paroled, breaks his parole, and is retaken after a lapse of time, such time will not be counted as time served on his sentence, notwithstanding the declaration of his breaking or violating parole is not made by the prison authorities till after the retaking of the prisoner.

APPEAL from the district court for Douglas county: HENRY J. BEAL, JUDGE. *Affirmed.*

Gordon A. Nicholson, for appellant.

Kelso Morgan and *Clarence E. Walsh, contra.*

Nathaniel L. Goldstein, amicus curiæ.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

YEAGER, J.

This is an appeal from the judgment of the district court for Douglas county, Nebraska, denying Theodore Blackwell, petitioner and appellant, a writ of habeas corpus.

It appears from the bill of exceptions that on August 17, 1943, the governor of the state of California executed and delivered a warrant of extradition to one Harry C. Dupree authorizing the said Harry C. Dupree as agent of the state of New York to take into custody the petitioner and to return him to the state of New York.

Dupree, pursuant to the warrant of extradition, proceeded by train with petitioner in custody from California toward New York. On the way either at Omaha, Nebraska, or Council Bluffs, Iowa, on August 21, 1943, at about 11:15 p. m., petitioner escaped from the train and the custody of Dupree. He remained at large until about September 14, 1943, when he surrendered to the police department of the city of Omaha. Almost simultaneously with his surrender he filed in the district court for Douglas county, Nebraska, his application for a writ of habeas corpus, the pertinent portion of which application is the following: "That the said Theodore Blackwell was on the 14th day of September, 1943, unlawfully and without cause or authority seized by the defendants and their agents, and imprisoned in the City Jail of the City of Omaha, Douglas County, Nebraska, and has been since the 14th day of September 1943 *be* kept, confined and imprisoned in said jail, and is detained without legal authority and without cause for detention, and has been and is unlawfully deprived of his liberty thereby. That no complaint has been filed against this petitioner."

To the application the proper respondents filed answer and return, the pertinent portion whereof was in substance that petitioner was being returned to the state of New York by Harry C. Dupree pursuant to warrant of extradition issued by the governor of California; that petitioner had es-

caped and that he was being held in custody for delivery to Dupree and for return to the state of New York.

A hearing was had on the application and answer and return, and evidence taken, whereupon a writ of habeas corpus was denied.

By recital in the warrant of extradition and in an acceptance of parole by petitioner from the executive department, division of parole, of the state of New York, it appears that on April 23, 1934, petitioner was, in the county court of Albany, New York, sentenced to serve a term of ten years at Clinton Prison for the crime of third degree burglary and that thereafter on January 16, 1941, he was released on parole by the executive department, division of parole, of the state of New York, under conditions which were accepted in writing by petitioner, a copy of which acceptance of parole is contained in the bill of exceptions.

Two of the conditions of the parole which were accepted by petitioner were the following:

"1. I will proceed directly to New York City, the place to which I have been paroled and within twenty-four hours, I will make my arrival report to Mr. J. J. Robertson. * * *

"2. I will not leave the State of New York or the community to which I have been paroled without the written permission of my parole officer."

These two conditions were violated. Petitioner never did report to J. J. Robertson or any one else in New York City and within a short time after his release on parole he left the state of New York and has remained away continuously.

There are four assignments of error. The first is that the court erred in denying the writ, since it appeared from the record that the applicant had been sentenced in the state of New York to a flat penitentiary sentence and had completed the sentence in full with "good time" off by reason of good conduct and work accomplished while in prison.

This contention is without merit when considered in the light of the record presented. Except by recital in the extradition warrant issued by the governor of the state of

California and the further recital in acceptance of parole executed by the petitioner himself, both of which have been hereinbefore referred to, the record here is devoid of information as to criminal action in the county of Albany, New York, or of the judgment of sentence therein. There is no pleading or competent evidence of the judgment sentencing petitioner, of the controlling statutes of New York or of decisions of that state interpretative thereof.

If we assume that the record presents sufficient to permit the courts of this state to pass upon the question of whether or not petitioner had served out his sentence in New York we must do so in the light of the statutes and decisions of this jurisdiction particularly with regard to the law applicable when foreign law is relied upon but not pleaded and proved or admitted, and the effect of paroles from the penitentiary and the violation thereof.

As to the first of these propositions the rule established by the decisions of this court is that in the absence of pleading and proof to the contrary, the laws of another state will be presumed to be like our own. *Haggin v. Haggin,* 35 Neb. 375, 53 N. W. 209; *People's State Bank v. Smith,* 120 Neb. 29, 231 N. W. 141.

The statutes of this state declare the status of a parolee in case of violation of parole as follows: "If any prisoner in the judgment of the board shall violate the conditions of his parole or release as fixed by the board of pardons, he shall thereafter be treated as an escaped prisoner owing services to the state and shall be liable, when arrested, to serve out the unexpired term of his maximum possible imprisonment, and the time from the date of his declared delinquency to the date of his arrest, shall not be counted as any portion or part of time served; and any prisoner at large upon parole or conditional release, who shall commit a fresh crime and upon conviction thereof shall be sentenced anew to the penitentiary, shall be subject to serve the second sentence after the first sentence is served or annulled; said second sentence to commence from the termination of his liability upon the first or former sentence." Comp. St. 1929, sec. 29-2628.

Interpretative of this section it is pointed out by this court in the following language that a parolee is only entitled to have credited on his sentence the time elapsing between the date when he was placed on parole and the date of his violation thereof: "If a convict breaks his parole, he is liable to serve out his maximum term, and the time of his escape, computed from its beginning to its end or time of retaking, is to be considered as not served, * * *." *Sanclaer v. State,* 111 Neb. 473, 196 N. W. 686.

The date of declaration by the board that the parole had been violated is of no importance in so far as the length of time to be served after violation of the parole is concerned. The first point of the syllabus, which is reflective of the holding in the opinion, in *Sanclaer v. State, supra,* is the following: "Where a convict in the penitentiary is paroled, breaks his parole, and is retaken after a lapse of time, such time will not be counted as time served on his sentence, notwithstanding the declaration of his breaking or violating parole is not made by the prison authorities till after the retaking of the prisoner."

It follows then, if we accept the record as a competent basis for the determination of whether or not the petitioner had violated his New York parole, within the meaning of the statutes and decisions of this state, he owed service of time in the New York prison from which he had been released on parole.

The second error assigned is substantially that ten years having elapsed since the imposition of the sentence, the sentence must be considered as having been fully served. What has been said with regard to the first assignment of error is equally applicable here.

The third and fourth assignments have reference to a claim by petitoner in his testimony that in 1942 the state of New York had attempted unsuccessfully to obtain a warrant of extradition for petitioner from the governor of the state of Nebraska.

The record on this question contains no authentic evidence or information. The only evidence in the record is

the testimony of the petitioner which was duly objected to. The record of the requisition upon the governor of Nebraska was not offered in evidence at the hearing.

Assuming that extradition was sought from the governor of Nebraska by the state of New York, there is nothing to identify the basis of the application with the basis of the warrant of the governor of California.

In any event, we have been cited to no rule of law and have found none the tenor or effect of which is to say that the failure of the governor of an asylum state to grant extradition of a fugitive from justice from another state is binding upon the courts and *res judicata* of the right of the demanding state to have the fugitive thereafter delivered to its jurisdiction.

From an analysis of the record it becomes apparent that at the conclusion of the hearing in the light of the limit placed on the inquiry by the petitioner the trial court had but one question to determine and that was the regularity and sufficiency of the warrant of extradition. No question was raised as to its regularity or sufficiency or the sufficiency of the requisition which was its basis, therefore the writ of habeas corpus was properly denied.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. GLEN MCDANIELS, DEFENDANT IN ERROR.

16 N. W. 2d 164

FILED OCTOBER 20, 1944. No. 31840.

1. **Assault and Battery.** Specific intent is an essential element in the crime of assault with intent to inflict great bodily injury and proof thereof is indispensable to sustain a conviction, but such intent is ordinarily inferable from the facts and circumstances, inclusive of the assault.
2. ———. The intent with which an act is done is a mental process, and as such generally remains hidden within the mind where

it is conceived, and is rarely, if ever, susceptible of proof by direct evidence, but may be inferred, or gathered from the outward manifestations, by the words or acts of the party entertaining them, and the facts or circumstances surrounding or attendant upon the assault with which it is charged to be connected.

3. Criminal Law. It is a general rule applicable in all criminal cases, including those where a specific intent is an element of the crime, that accused, if sane, is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed.
4. ———. Such a presumption, although rebuttable in cases where specific intent is an element of the crime, is sufficient to establish a *prima facie* case as to intent and will prevail unless from a consideration of all the evidence the jury entertain a reasonable doubt whether such intention existed.

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

Kelso Morgan, C. E. Walsh and *Theodore L. Kowalski,* for plaintiff in error.

Eugene D. O'Sullivan, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CHAPPELL, J.

As provided by and in conformity with sections 29-2314, 29-2315, and 29-2316, Comp. St. 1929, permission was given the county attorney of Douglas county, Nebraska, to file a bill of exceptions in this court, and by such special proceedings obtain decision of certain questions of law which will hereafter govern prosecutions for violations of section 28-413, Comp. St. 1929.

The record discloses that a complaint, substantially in the language of the statute and in conformity with law (See *Smith v. State,* 58 Neb. 531, 78 N. W. 1059; *Alyea v. State,* 62 Neb. 143, 86 N. W. 1066), was filed in the municipal court for Omaha, Douglas county, Nebraska, charging defendant with the crime of assaulting another (Larry Reiss), with intent to inflict great bodily injury upon him.

After preliminary hearing defendant was bound over to the district court for trial. Thereafter an information, likewise substantially in the language of the statute, was filed in the district court. Upon defendant's plea of not guilty the cause proceeded to jury trial.

At the conclusion of the state's evidence counsel for defendant moved that the trial court dismiss the case or in lieu thereof instruct the jury to bring in a verdict of not guilty for the reasons, in so far as they are here involved, that the evidence did not sustain the allegations of the information, and was not of sufficient probative force to prove defendant's guilt beyond a reasonable doubt, as provided by law. The trial court thereupon sustained the motion solely upon the ground that there was no evidence of specific intent to commit the crime charged. The question for decision is whether the trial court erred in so doing. The answer is in the affirmative.

As provided by section 29-2316, Comp. St. 1929, this opinion can in no manner reverse or affect the defendant's case. The purpose of sections 29-2314, 29-2315, and 29-2316, Comp. St. 1929, when applied in cases like the one at bar, is solely to obtain authoritative expositions of the law to be used as precedent and govern in similar cases then pending or those accruing thereafter, and thereby be of service to the state, the courts, and lawyers, by obtaining a uniform administration of criminal laws in all jurisdictions of the state.

In this connection the rule is that ordinarily in such appeals by the state from dismissal of the case or a directed verdict in favor of accused for the sole reason that the evidence is insufficient to establish the charge, the supreme court will not review the record to determine the correctness of the decision since a factual situation could rarely benefit any one or serve any good purpose in governing similar cases then pending or those arising thereafter. 24 C. J. S., sec 1663, p. 262; *State v. Wickett*, 230 Ia. 1182, 300 N. W. 268.

Therefore, as a rule in such cases this court will not or-

dinarily determine the facts, but it will determine the proper rules of law applicable to the facts. In the case at bar the trial court dismissed the charge solely upon the ground that there was no evidence of specific intent to commit the crime charged. In that respect it is similar to the case of *State v. Woodruff*, 208 Ia. 236, 225 N. W. 254, and presents a question of law for decision by this court.

The evidence of the four witnesses who testified for the state fairly discloses the following: Larry Reiss, complainant, who lived at 2715 Jackson street, Omaha, Nebraska, was a switchman for the Union Pacific Railroad Company. On August 3, 1943, he worked until midnight, arriving at his apartment about 1 o'clock a. m. It was hot in his bedroom and he went out on the porch where he sat down in an armchair with his feet upon the porch railing. Defendant, Glen McDaniels, a passing acquaintance, who lived in the next-door apartment, was also on the porch reclining in a bed-like chair and apparently asleep. Defendant, although not disturbed by complainant, shortly thereafter began an argumentative conversation concerning a paint job which he had undertaken for the landlady, upon which he sought an opinion from complainant relating to a controversial price. Complainant informed defendant that it was nothing with which he was concerned and attempted to avoid the argument, after which defendant became loud, profane, abusive, and vulgar; whereupon a next-door neighbor asked him to "pipe down." Defendant then invited the neighbor to come out and he "would show him how tough he was." Going into his own apartment defendant came out with a hammer and said, "I will fix that guy when he comes out." He thereafter walked to and fro behind the sitting complainant, swinging the hammer and continuing to attempt provocative argument with him. Finally defendant asked complainant, "How would you like to have your head bashed in and sewed up again?" and all of a sudden, without warning, and while complainant sat in the chair with his hands in his lap, defendant struck complainant over the right eye with the hammer and when com-

plainant raised up out of the chair defendant struck him in the jaw with his fist, almost knocking him over the porch railing. Complainant was temporarily unconscious but upon recovering his faculties discovered his bleeding wound, and remembers that defendant then asked him whether he "had had enough." The police were called and investigation followed. Defendant was taken to jail and complainant to a doctor. His wound was sutured with three stitches and he was removed to a hospital where he remained for one week. The police found the hammer under defendant's icebox. Defendant admitted to police that the hammer belonged to him but told the officers that complainant pulled a knife and defendant hit him with the hammer. No knife was found by the officers upon complainant's person or about the premises, and he asserts that he had none. About two weeks before the trial complainant met defendant upon the street and defendant told him that, "he was sorry for the way it turned out, * * * his temper just got the best of him * * * ." A depression above complainant's right eye where he was struck with the hammer was plainly visible in court at the trial more than six months after the injury was inflicted.

These facts and circumstances appearing in the evidence should have required submission of the question of defendant's intent to the jury for their determination under appropriate instructions given by the trial court.

At the outset contention is made by the state, without citing authorities, that defendant's motion to dismiss is not specifically directed to nor inclusive of the question of intent. Of course, "Intent is an essential element in the crime of assault with intent to inflict great bodily injury and proof of such intent is indispensable to sustain a conviction." *Garofola v. State,* 121 Neb. 850, 238 N. W. 755. We must therefore find that the motion to dismiss is inclusive of the question of intent.

This court has consistently defined "great bodily injury" in the following language: "The term 'great bodily injury,' as employed in the Criminal Code is not susceptible

of a precise definition, but implies an injury of a graver and more serious character than an ordinary battery; and whether a particular case is within the meaning of the statute is generally a question of fact for the jury." *Hallett v. State,* 109 Neb. 311, 190 N. W. 862. As early as *Murphey v. State,* 43 Neb. 34, 61 N. W. 491, the court said: "It is not essential to a conviction for the offense charged that the accused should have intended the precise injury which followed as the result of the assault. It is sufficient if serious bodily harm of any kind was contemplated. (*People v. Miller,* 52 N. W. Rep. (Mich.) 65.) True, the injury, however serious, would not of itself authorize a conviction under the statute, and may for the purpose of this prosecution be regarded as immaterial, except so far as it tends to explain the motive of the accused. But where the injury proved is the natural and necessary consequence of the deliberate and inexcusable act of the accused, the inference is that it was the result contemplated by him when the assault was committed, and may be sufficient evidence of the specific intent which is essential to a conviction. Such inference or presumption is, however, one of fact merely; and while the jury may convict without other proof of the intention alleged there is no obligation resting upon them to do so unless satisfied thereof beyond a reasonable doubt." As was also held in *Lambert v. State,* 80 Neb. 562, 114 N. W. 775, "It is not essential to a conviction for such offense that the accused should have intended the precise injury which followed. It is sufficient if it be shown, beyond a reasonable doubt, by the circumstances under which it was inflicted, together with its nature and extent, that great bodily injury was contemplated by the defendant when he made the assault." It was held in *Clary v. State,* 61 Neb. 688, 85 N. W. 897, that, "The intent with which an act is done is inferable from the act itself, and from the facts and circumstances surrounding it." In that case this court also approved the general rule that the intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it is conceived, and is

rarely, if ever, susceptible of proof by direct evidence, but may be inferred or gathered from the outward manifestations, by the words or acts of the party entertaining them, and the facts or circumstances surrounding or attendant upon the assault with which it is charged to be connected. Likewise, in *Hallett v. State, supra,* "The intent with which an assault is made may be inferred from the facts and circumstances surrounding the performance of the act." Also, in *Garofola v. State, supra,* "Where such specific intent is an essential element of the crime, such intent is inferable from the facts and circumstances, inclusive of the assault." This case refers to and relies upon *Swartz v. State,* 121 Neb. 696, 238 N. W. 312, wherein it was said, in quoting from *Ward v. State,* 58 Neb. 719, 79 N. W. 725, "It (the intent) may be gathered or drawn from all the evidence, facts, and circumstances of the case, inclusive of the act, and is a matter of fact for the consideration and decision of the jury." Applicable rules are also stated in 22 C. J. S., sec. 35, p. 93, by use of the following language:

"It is a general rule, applicable in all criminal cases, including those where a specific intent is an element of the crime, that accused, if sane, is presumed to intend the necessary or the natural and probable consequences of his unlawful voluntary acts, knowingly performed. * * *

"The presumption is rebuttable, at least in cases where a specific intent is an element of the crime. The presumption is sufficient to establish a prima facie case as to intent and will prevail unless from a consideration of all the evidence the jury entertain a reasonable doubt whether such intention existed."

Therefore, without reversing or in any manner affecting the judgment of the trial court dismissing the defendant in the instant case, we are required to find, after a consideration of applicable law, that the action of the trial court in sustaining the motion to dismiss, for the reason that there was no evidence of specific intent to commit the crime charged, was erroneous. The exceptions of the state should have been and they are hereby sustained.

EXCEPTIONS SUSTAINED.

IN RE APPLICATION OF IRVING TAIL FOR WRIT OF HABEAS CORPUS.

IRVING TAIL, RELATOR, APPELLANT, V. NEIL OLSON, WARDEN OF THE STATE PENITENTIARY AT LINCOLN, NEBRASKA, RESPONDENT, APPELLEE.

16 N. W. 2d 161

FILED OCTOBER 20, 1944 No. 31795.

1. **Criminal Law.** The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him.
2. **Habeas Corpus.** Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error.
3. ———. The right of a person to the writ of habeas corpus depends on the legality or illegality of his detention, and this in turn depends on whether the fundamental requirements of law have been complied with, and not at all on the guilt or innocence of the prisoner.
4. ———. The petition must set forth the facts constituting the illegal detention. It is not sufficient to state the reason the detention is illegal in the form of conclusions. It should show in what the illegality consists and this should be done by stating facts as contradistinguished from mere conclusions of law.
5. ———. In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. But, if he shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ should be denied.

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

Lee Card, for appellant.

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

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

WENKE, J.

This habeas corpus proceeding was instituted in the district court for Lancaster county by the relator, Irving Tail, against Neil Olson, Warden of the Nebraska penitentiary, as respondent, to obtain the relator's release. From an order denying the writ, the relator has appealed to this court.

The relator's application discloses that a complaint for second degree murder was filed against him in the county court of Sheridan county on August 5, 1939, and on the same day, after entering a plea of guilty, he was bound over to the district court for Sheridan county. Information was then filed in the district court on August 18, 1939, and on August 21, 1939, after relator had entered his plea of guilty, he was sentenced to the Nebraska state penitentiary for the period of his natural life and is confined and being held in said institution pursuant thereto.

It is not entirely clear from the relator's brief whether he claims the state court was without jurisdiction because he was an Indian ward and therefore under the exclusive jurisdiction of the federal government. However, chapter 15, title 18 U. S. C. A., sec. 548 of the federal penal code, vests such jurisdiction in the state courts. See *In re Application of Rice, Rice v. Olson,* 144 Neb. 547, 14 N. W. 2d 850.

Relator contends that the failure of the court to appoint counsel for him is contrary to the provisions of both the state and federal Constitutions and the federal statutes; that such failure was jurisdictional and because thereof the court was without jurisdiction to impose sentence. The record does not disclose that application was ever made for the appointment of counsel. We have held in *In re Application of Rice, Rice v. Olson, supra; Alexander v. O'Grady,* 137 Neb. 645, 290 N. W. 718; *Davis v. O'Grady,* 137 Neb. 708, 291 N. W. 82: "The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him."

Relator's application sets forth that at the time the in-

formation was filed he was an Oglala Sioux, 16 years of age, residing with his parents on a farm on the Pine Ridge Sioux Indian Reservation in South Dakota and a ward of the United States government; that he had about a fifth grade education; that he was unfamiliar with and inexperienced in court procedure and ignorant of his legal rights; and that he was without means to employ counsel. He has presumably set forth his age, education, nationality, inexperience with court procedure and lack of knowledge of his legal rights, as a basis for questioning the fact that he was capable of waiving his right to counsel. However, the journal of the county judge on preliminary hearing binding the relator over to the district court recites: " * * * and the Defendant appearing in open Court in person, and by Frank F. Aplan, his Attorney." The journal of the judgment of the district court for Sheridan county sentencing the relator to life imprisonment in the state penitentiary after his plea of guilty recites: " * * * and the defendant appearing in open Court in person with his attorney, Frank F. Aplan; * * * ." Frank F. Aplan was at the time admitted to practice of law in Nebraska and in good standing as an active practitioner. Having been represented by counsel, all the statutory and constitutional provisions giving him the right thereto have been met and the question of his waiver thereof is not before the court. In the absence of any statement of facts to the contrary it will be presumed that the relator had the benefit of his counsel.

The relator seriously contends he is innocent, but this is not before the court in this proceeding. "Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error." *In re Application of Maher, North v. Dorrance,* 144 Neb. 484, 13 N. W. 2d 653. "A judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void." *State*

ex rel. Gossett v. O'Grady, 137 Neb. 824, 291 N. W. 497. "The right of a person to the writ of habeas corpus depends on the legality or illegality of his detention, and this in turn depends on whether the fundamental requirements of law have been complied with, and not at all on the guilt or innocence of the prisoner, * * * ." 39 C. J. S., sec. 13, p. 441, and cases cited under note 69. "The guilt or innocence of one accused of crime, or convicted of a crime, is not justiciable in habeas corpus." *Smith v. Amrine,* 156 Kan. 486, 134 Pac. 2d 400.

Many of the relator's grounds for release are pleaded in the form of conclusions such as that he was denied and prevented from having counsel through threats, intimidation and coercion, or that he was required to and did plead guilty because of threats, intimidation and coercion. Under our statute, section 29-2801, Comp. St. 1929, and the decisions of this court the relator must set forth the facts from which it is made to appear he will be entitled to discharge. As stated in *State ex rel. Distin v. Ensign,* 13 Neb. 250, 13 N. W. 216: "The petition must set forth the facts constituting the illegal detention. It is not sufficient to state that the petitioner is illegally restrained of his liberty, as that is a conclusion, but it must be made to appear in what the illegal restraint consists." And in *In re Application of Tail, Tail v. Olson,* 144 Neb. 820, 14 N. W. 2d 840: "It is generally held that the trial court may refuse to allow a writ of habeas corpus where the facts alleged in the application would not warrant discharge of the prisoner, and the grant or refusal of the writ is a judicial act. 1 Bailey, Habeas Corpus, 13, sec. 5; *Goetz v. Black,* 256 Mich. 564, 240 N. W. 94, 84 A. L. R. 802. Habeas corpus is a writ of right, but not a writ of course, and probable cause must first be shown which rightly prevents the writ from being trifled with by those who manifestly have no right to be at liberty. 25 Am. Jur. 153, sec. 16. Judicial discretion is exercised in its allowance, and such facts must be made to appear in the application to the court as in its judgment will, *prima facie,* entitle the applicant to be discharged

from custody. 39 C. J. S. 436, sec. 6; 25 Am. Jur. 238, sec. 131; 29 C. J. 14." As stated in *Mellor v. Hinkley*, 201 App. Div. 619, 194 N. Y. S. 732, 39 N. Y. Cr. 534: "It is, therefore, incumbent upon the petitioner to set forth the particulars in which this imprisonment was illegal." See, also, *State v. Flynn*, 180 Wis. 556, 193 N. W. 651. And as stated in *State ex rel. Sherin v. Goss*, 73 Minn. 126, 75 N. W. 1132: "The petition should be construed somewhat liberally, in favor of the liberty of the citizen, but it should place before the court or judge facts enough to permit an intelligent judgment to be formed of the case. The petition should show in what the illegality consists, and this should be done by stating facts, as contradistinguished from mere conclusions of law."

In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. But, if he shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ will be denied for it would be useless to go through the procedure of granting the writ and having the party brought before the court merely to be remanded back to the custody out of which he seeks to be discharged. Since the allegations of the petition are often inconclusive and mere statements of conclusions of the pleader the court may refuse to issue the writ if, upon the face of the petition, it appears that the party is not entitled thereto.

Omitting the relator's statements of conclusions and as to his innocence, the application recites that on August 1, 1939, while at the home of his father, Daniel Tail, at Porcupine post office on the Pine Ridge Sioux Indian Reservation of the United States located in South Dakota, he was told by various persons of the commission of a crime at the city of Gordon, Nebraska, and that he was guilty thereof. During the forenoon of said day, Frank Twiss, an Indian

policeman, came to his home and put handcuffs on him and then directed him, his father and another Indian, Levi Black Bear, to get into their automobile. They were then taken to Rushville, Nebraska, and there lodged in jail. He was then informed of the death of Nellie Yellow Thunder, another Oglala Sioux, accused of her death and advised that he could plead guilty thereto. It was then stated to him, without stating by whom but apparently by his father, Levi Black Bear and their associates, that if he would plead guilty to the crime of murder in the second degree any others implicated therein would go free; that the court or judge would only give him a sentence of three years, or shorter, because he was a child; that if he did not plead guilty he would probably be hanged or death be inflicted upon him in some way. He further alleges this attitude by affiant's associates and the officers of the law, without naming them but as he understood them to be, caused him to follow their suggestions and plead guilty.

From a consideration of all the facts set forth by the relator, we think the lower court was right in denying the writ.

AFFIRMED.

CHAPPELL, J., participating on briefs.

STATE EX REL. CITY OF SIDNEY, APPELLEE, V. MELVIN BRIDD, APPELLANT.
16 N. W. 2d 171

FILED OCTOBER 20, 1944. No. 31798.

1. **Recognizances.** A recognizance is an obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified.
2. ———. In the absence of statutory provision, the proper manner of taking a recognizance is that the magistrate repeat to the recognizors the obligation into which they are to enter and the conditions of it and then ask them if they are content to en-

ter into such obligation. If they are, he then makes a memorandum thereof, which it is not necessary for them to sign. From this memorandum the magistrate afterward draws up the recognizance in full form and certifies it.

3. ———: POLICE COURTS. Where the legislature expressly provides that no appeal shall be allowed unless the defendant shall enter into a written recognizance with sufficient surety to be approved by the police magistrate, it requires that a written recognizance in the terms and on the conditions as provided by the statute, signed by the proper parties, be presented to the magistrate and in his presence acknowledged by the parties thereto in person and then certified by him.

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

A. J. Kinnersley and *C. M. Pierson,* for appellant.

P. J. Heaton and *R. P. Kepler, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

WENKE, J.

Appellant, Melvin Bridd, appeals from the order of the district court for Cheyenne county dismissing his appeal from the police court of the city of Sidney, Nebraska.

Complaint was filed against the appellant in the police court of the city of Sidney for violation of an ordinance. Upon conviction, the appellant sought to appeal his case to the district court for Cheyenne county pursuant to section 18-203, Comp. St. 1929. The following recognizance was given on said appeal:

"State of Nebraska)
"County of Cheyenne) ss.
"City of Sidney)

"Be it remembered that on this 14th day of June, 1943, before me, William Perry, police judge of the said city of Sidney, personally appeared George W. Puckett, and Solomon Snyder, and acknowledged themselves jointly and severally indebted to the said city of Sidney, in the penal sum of One Hundred and twenty five Dollars ($125.00) to be

levied on their land and tenements, goods and chattels if default be made in the conditions following:

"The condition of this recognizance is such that if the said Melvin Bridd shall personally appear before the district court of said Cheyenne County forthwith, (if the court be in vacation on the first day of the next term thereof), to answer the complaint filed against him by Dr. C. B. Dorwart, Health Officer, and abide the judgment of the court and not depart the court without leave, then this recognizance to be null and void, otherwise to be and remain in full force and effect.

"Taken and acknowledged before me the day and year above written,

"/S/ W. J. Perry

"Police Judge of City of Sidney, Nebraska."

The appellee, the State of Nebraska ex rel. City of Sidney, by R. P. Kepler, the county attorney, moved that the appeal be dismissed because the appellant failed and neglected to comply with the statutes of Nebraska in furnishing a recognizance. This motion was sustained by the district court for Cheyenne county for the reason that no written recognizance, as required by statute, was given and the appellant's appeal was dismissed.

The only question presented by the appeal is the sufficiency of the recognizance.

Appellee's contention that section 29-611, Comp. St. 1929, is applicable is not tenable. See *State v. Brandt*, 83 Neb. 656, 120 N. W. 196.

The appeal taken from the police court of the city of Sidney for a violation of an ordinance of said city is under section 18-203, Comp. St. 1929. This statute, as amended in 1921 (Laws 1921, ch. 219, sec. 1), provides in part as follows: " * * * but no appeal shall be allowed unless the defendant shall within ten days, thereafter, enter into a written recognizance with sufficient surety to be approved by the police magistrate in such sum as shall be fixed by him; * * * ."

A recognizance is defined by Bouvier, 3 Bouvier's Law

Dictionary (Rawle's 3d rev.) 2841, as follows: "An obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified." See, also, 36 Words and Phrases (Perm. ed.) 513. Its object is to secure the presence of defendant to perform or suffer the judgment of the court.

We stated in *Shupe v. State,* 40 Neb. 524, 59 N. W. 100: "A recognizance for an appeal in a criminal case is not required to be signed by either the defendant or his sureties; but if so signed, it is not for that reason alone invalid. If properly taken and certified, the signature of the recognizors may be treated as surplusage." See, also, *Irwin v. State,* 10 Neb. 325, 6 N. W. 370.

However, in *Thomsen v. State,* 82 Neb. 634, 118 N. W. 330, wherein the recognizance was signed by the defendant and his surety but not acknowledged in person before the magistrate, we said: "It is essential that the defendant and his sureties should in some manner acknowledge the obligation in the presence of the court; but this may be done in writing, as well as orally, and there is no longer any doubt that an obligation like the one given in this case, executed in the presence of the court, is a recognizance within the meaning of the statute. * * * We think it essential that the recognizance, whether oral or in writing, should be entered into or acknowledged in the presence of the magistrate, and that this essential requirement cannot be dispensed with."

In the absence of statutory provision, the proper manner of taking a recognizance is that the magistrate repeat to the recognizors the obligation into which they are to enter and the conditions of it and then ask them if they are content to enter into such obligation. If they are, he then makes a memorandum thereof, which it is not necessary for them to sign. From this memorandum the magistrate afterward draws up the recognizance in full form and certifies it.

However, where the legislature expressly provides, as it

did by the 1921 amendment, that " * * * no appeal shall be allowed unless the defendant shall * * * , enter into *a written* recognizance with sufficient surety to be approved by the police magistrate * * * ," section 18-203, Comp. St. 1929, it requires that a written recognizance in the terms and on the conditions as provided by the statute, signed by the proper parties, be presented to the magistrate and in his presence acknowledged by the parties thereto in person and then certified by the magistrate. (Italics ours.)

The record disclosing that these requirements have not been met, the ruling of the lower court is affirmed.

AFFIRMED.

HAROLD W. CHAMBERS, APPELLANT, V. BILHORN, BOWER & PETERS, INC., ET AL., APPELLEES.

16 N. W. 2d 173

FILED NOVEMBER 3, 1944. No. 31784.

1. **Workmen's Compensation.** The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment.
2. ———. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment.
3. ———. The rule of liberal construction of the workmen's compensation act applies to the law, not to the evidence offered to support a claim. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules above set out, nor does it permit a court to award compensation where the requisite proof is lacking.

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

Lloyd E. Peterson and *Betty Jean Peterson,* for appellant.

G. H. Seig, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

SIMMONS, C. J.

This appeal involves a claim for workmen's compensation based upon the contention that a hydrocele on the left side was caused by an infected injury to the lower right leg. The matter was heard before a judge of the compensation court, the compensation court, and the district court, resulting in a dismissal in each instance. We affirm the judgment of the trial court.

On September 8, 1939, the plaintiff in the course of his employment by the defendant, Bilhorn, Bower & Peters, Inc., was struck on the right leg below the knee by a heavy iron beam. He was given first aid and continued working. Some days later his leg became infected and on September 18 he was sent to the doctor. He at that time had an infected area an inch to an inch and a half wide and three inches long. He went to bed for a week, was off work for two weeks, when he returned to work, and so far as the infected leg was concerned was thereafter able to work.

The infected leg did not heal and treatment continued. It did not respond to treatment until sulphanilamide was given internally, when the infection cleared about four months after the injury occurred. The last charge of the doctor for treatment to the leg was made on January 13, 1940. The insurance carrier paid compensation for two weeks and paid the doctor bill on February 2, 1940.

On January 7, 1941, plaintiff filed his petition in the compensation court claiming that as a result of the accident he had developed a hydrocele on the left side, permanent in character, and requiring additional medical and surgical treatment, and praying that he recover compensation.

Defendants answered admitting the employment, alleging payment of compensation for the leg injury, denying generally, pleading the bar of the statute of limitations, and alleging that if plaintiff had any further disability, it was

due to disease and not the result of accidental injury while employed by the defendant.

A hearing was had before one judge of the compensation court who, on July 9, 1941, dismissed the plaintiff's petition. Plaintiff refused to accept the award and, on his petition, a hearing was had before the compensation court. On June 9, 1942, the order of dismissal was affirmed by that tribunal. From that order, the plaintiff appealed to the district court, where the matter was submitted and determined on the record and the bill of exceptions from the compensation court. The district court dismissed the plaintiff's petition on September 26, 1942. A motion for a new trial was filed promptly. It was overruled on December 4, 1943. From that determination, an appeal has been taken to this court.

Plaintiff here contends that the compensation court considered "medical textbooks," which were not and are not in evidence; that the district court merely found that the record and evidence supported the findings of fact made by the compensation court, and hence did not consider the case *de novo;* and that the matter should be here considered *de novo* without regard to the findings of the compensation and district courts. Defendants contend that the findings are supported by the record; that no other findings could properly be made; and that the action is barred by the statute of limitations applicable to compensation cases, in that notice of the hydrocele was not given and claim for compensation made within the time fixed by law.

Without determining these questions, we go direct to the question of whether or not the evidence shows that the hydrocele on the left side resulted from the injury to the right leg and is compensable.

The rules of law applicable here are: "The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by the employee by an accident arising out of and in the course of his employment" and "A compensation award cannot be based on possibilities or

probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment." *Zanski v. Yellow Cab & Baggage Co.*, 143 Neb. 340, 9 N. W. 2d 302.

Plaintiff testified that the hydrocele first appeared three days after he went to bed, which would be about two weeks after the accident; that he then called it to the doctor's attention; that the doctor first treated it from four to six weeks after it appeared; and that since that time, it has been drained once every six weeks to two months. He further testified that he had never had a venereal disease and no infection in his system, other than that of the leg injury.

Plaintiff's physician, a general practitioner, testified that plaintiff had a severe traumatic ulceration at the point of the bruise; that his leg was swollen to the groin; that there was a glandular involvement on both sides. He did not fix the date when the hydrocele appeared, but states that it "was probably developing" on September 21, 1939, but he was not sure it was a hydrocele for two or three weeks. Plaintiff's witness developed the theory that the accident caused the injury which was followed by the infection; that the infection spread to the groin, finally reaching the left testicle and settled there causing the hydrocele; and that he believed there was a direct causal connection between the wound and the hydrocele, although admitting that he had never read of, nor had he experienced, a similar result from such an infection.

The defendants offered as their expert witness a specialist engaged in both teaching and practice. He examined the plaintiff and testified as to his findings. He testified that an infection or trauma of the scrotum or contents or circulatory disturbances might cause an acute hydrocele, but that the cause of a chronic hydrocele is not known; that he had never heard of nor read of a chronic hydrocele being caused by a leg infection, such as the plaintiff had; that an infection from the right leg might "by a wild stretch of the imagination" involve the right testicle, but

he had never seen nor heard of such a case; and that had such a case occurred it would have been reported in the literature on the subject. He gave it as his opinion that the hydrocele was purely "coincidental," and that there was no connection between the accident and the hydrocele. In this connection, a letter from plaintiff's physician to defendant's attorney, dated May 2, 1941, contains this statement: "I remember telling you I had never read of nor experienced a similar *coincedence,* (sic) but I did tell you that I felt there was a connection between the two." (Emphasis supplied.)

The following facts must be considered in this connection. Plaintiff's physician, while having definite knowledge of the hydrocele a few weeks after the infection, made no mention of that fact in his reports to the insurance carrier submitted during the period of treatment for the leg. While he testified that he was treating the hydrocele, he made no charge for that treatment, as such, during the period from September 18, 1939, to January 13, 1940. His bill for services submitted to the carrier and paid by it on February 2, 1940, was for services to the infected leg. While he testified that he prescribed the use of a suspensory, the bill for drugs submitted to and paid by the carrier made no mention of that device. The doctor prepared a second statement for services from March 11, 1940, to May 31, 1941. The testimony shows that there was an aspiration performed on March 11, 1940, for which charge was made and described on the second statement as an "office call." The first entry on the charge account, which we find has reference to a hydrocele, was made on October 1, 1940. The defendants were not then notified of the disability, and so far as we can discover from this record, the defendants were not advised of the claim that the hydrocele resulted from the infection until this action was brought.

It further appears from the testimony of both doctors that the etiology of a chronic hydrocele, such as plaintiff has, is not known to the medical profession, and that there

are no cases in the medical books showing that a hydrocele has been caused by an infection such as plaintiff had. Injuries of this kind with resulting infections occur quite commonly to male members of the human family. If there was a cause and effect relationship between such an infection and the hydrocele, it seems to us that the medical profession would ere now have discovered that fact. The most that can be said for plaintiff's evidence is that it indicates that there might possibly be a connection between the two. That is not sufficient to sustain a recovery.

But plaintiff argues that it has long been the rule of this court that a liberal construction will be given to the workmen's compensation act, and that, liberally construed, this evidence is sufficient to sustain an award. The rule of liberal construction applies to the law, not to the evidence offered to support a claim. The rule does not dispense with the necessity that claimant prove his right to compensation within the rules heretofore set out, nor does it permit a court to award compensation where the requisite proof is lacking.

We are of the opinion that claimant has failed to prove a right to compensation. This makes it unnecessary to determine the other questions presented.

The judgment of the district court is affirmed.

AFFIRMED.

LESLIE WILLIAMS ET AL., APPELLANTS, V. NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLEE.
16 N. W. 2d 178

FILED NOVEMBER 3, 1944. No. 31823.

1. **Habeas Corpus.** The denial of an application for and refusal to allow a writ of habeas corpus by the district court is a final order, affecting a substantial right made in a special proceeding which, in effect, terminates the action. Such final order is reviewable on appeal to this court.
2. ———. The principle of *res judicata* applies in cases of habeas

corpus where there has been a hearing upon the merits in a former action of the same kind, and where, in a second petition filed for a writ of habeas corpus, it affirmatively appears that such petition is based upon the same reasons and facts and does not contain a new state of facts different from that which existed at the time the first judgment was rendered.

3. ———. The final adjudication in a habeas corpus proceeding is conclusive in the matters there determined, as against a subsequent application.

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

Leslie Williams and *Joe Bennett, pro se.*

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

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

MESSMORE, J.

On February 17, 1944, Leslie Williams and Joe Bennett, petitioners, filed a petition in the district court for Lancaster county, praying that a writ of habeas corpus be granted. The district court dismissed the petition. From the order of dismissal petitioners appeal.

The petition is voluminous and details with particularity a complete factual situation upon which the petitioners base their claim for the writ. The petition likewise contains a part of the testimony taken at a hearing in the district court for Lancaster county, where the petitioners had a hearing on the merits in a previous habeas corpus action. In addition thereto, the petition sets out the information wherein petitioners were charged with an offense against the laws of this state in which they waived service of a copy of the information and time to plead and request arraignment instanter. Pursuant to their respective pleas of guilty and sentence pronounced, they are now incarcerated in the penitentiary of this state.

On or about May 26, 1941, the petitioners filed a petition for a writ of habeas corpus in the district court for Lancas-

ter county. A hearing on the petition was had on or about June 23, 1941, which lasted two days and a half; testimony was taken, a part of which appears in the petition in the instant case. On July 25, 1941, the court dismissed the application. On August 4, 1941, the petitioners filed in the district court what they term a "Motion for Reconsideration." On October 10, 1941, such motion was overruled and exceptions allowed. An attempt was made to appeal to this court. The appeal was dismissed on motion of the state, petitioners having failed to properly perfect their appeal. Other procedure was had to obtain a writ of habeas corpus, but this part of the history of this litigation we deem unnecessary to relate.

The order of dismissal of the petition and application for a writ of habeas corpus in the case now before us recites that the "petition sets out the same grounds for a writ as were set out in case docketed W-103 by the same parties and in which, under order of this court, answer was filed by respondent and the issues thus drawn and heard in June, 1941" and the order states:

"The petition herein sets out substantially the same grounds as were enumerated in the case heretofore referred to. It also contains transcript of part of the testimony but falls far short of including all the testimony. The petition herein also quotes part of the findings of this court in the previous hearing * * * .

"The relators in their present petition state nothing new that is material other than was stated in the first case, that is W-103, on which petition there was a full and complete hearing and a rather lengthy written findings and a brief summary of the evidence upon which this court based its findings."

The petitioners allege in their petition that on or about May 26, 1941, they filed in the district court for Lancaster county a petition for a writ of habeas corpus and they alleged the same matters and in substantially the same manner as are related in the petition before the court in this case.

The appellants (petitioners) reiterate in their brief that on or about May 26, 1941, they filed in the district court for Lancaster county a petition for a writ of habeas corpus; that the statement of the case "was the same as that hereinbefore presented to this court. In said petition the contentions and allegations were identical with those presented in this cause of action, * * * ."

"The constitutional and statutory right of appeal in habeas corpus proceedings is now given in most states, and it operates as a substitute for successive applications from court to court, or judge to judge, which the prisoner had a right to make at common law, in case his application was refused. Church, Habeas Corpus (2d ed.) 590, sec. 389b." *In re Application of Tail, Tail v. Olson,* 144 Neb. 820, 14 N. W. 2d 840.

Section 24, art. I of the Constitution of Nebraska, provides: "The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied." Responding thereto, section 29-2823, Comp. St. 1929, provides:

"The proceedings upon any writ of habeas corpus shall be recorded by the clerk and judges, respectively and may be reviewed as provided by law for appeal in civil cases."

Section 20-1911, Comp. St. 1929, reads: "A judgment rendered or final order made by the district court may be reversed, vacated or modified by the supreme court, for errors appearing on the record." And section 20-1902, Comp. St. 1929, provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding * * * is a 'final order' which may be vacated, modified or reversed, as provided in this chapter and chapter 19."

This court held in *In re Application of Tail, Tail v. Olson, supra*: "The denial of an application for, and refusal to allow, a writ of habeas corpus by the district court is a final order affecting a substantial right made in a special proceeding which in effect terminates the action.

"Such a final order is reviewable upon appeal to this court, * * * ."

The appeal in the instant case having been lodged in this court, pursuant to the foregoing constitutional and statutory provisions, presents the legal question, whether the doctrine of *res judicata* may be applied in habeas corpus proceedings, where it is claimed that the contention of the petitioners is the same in the instant case as in a former case, and the present case is that the judgment of conviction is void, where no new facts are alleged.

"In a number of jurisdictions by reason of express statutory provisions, and in a few jurisdictions even in the absence of express statute, the doctrine of res judicata applies to habeas corpus proceedings wherein release of the relator is refused, and the decision is conclusive as to all points presented or which might have been presented on the first application, at least where the imprisonment is in a civil case, or where the decision is subject to review on appeal, writ of error, or certiorari." 39 C. J. S., sec. 105, p. 698. See, also, 29 C. J., sec. 203, p. 179; *Perry v. McLendon*, 62 Ga. 598; *McMahon v. Mead*, 30 S. D. 515, 139 N. W. 122; *Rex v. Miller*, 19 Ont. Law, 288. In this state there is no express statute covering the subject matter with reference to *res judicata* in habeas corpus actions.

In *McMahon v. Mead, supra*, the court said: "Under the rulings of our courts, an order made in habeas corpus proceedings is a final order. Being a final order, it is appealable. Being appealable, it is res judicata of all matters that were or could have been raised upon such proceeding." The court decided the matter without the aid of a specific statute. The opinion cited *Ex parte James Scott*, 1 Dak. 140, 46 N. W. 512, wherein it was said: "After careful consideration, we have arrived at the conclusion that this writ should be abated. Under our laws, the principle of *res adjudicata* is applicable to a proceeding upon habeas corpus." The opinion in the *McMahon* case also quoted from *Perry v. McLendon, supra*, as follows: "But when it appears, on the return or at the hearing, that the legality

of the imprisonment has already been adjudicated upon a previous writ between the same parties, by a competent tribunal, the production of that judgment is the end of controversy" and added: "We therefore conclude that, where, as in this state, an order made on habeas corpus is a final order, and, as such, appealable, such order, until reversed upon appeal, is res judicata upon all questions which were, or could properly have been, determined thereby."

In *Smith v. Olson*, 44 Fed. Supp. 456, it was said: "In its ruling upon the petition presently before it, the court, fully mindful of the limitation upon the principle of res adjudicata that is implicit in *Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406; *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461; *Walker v. Johnston*, 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830; and *Smith v. O'Grady, supra*, might nevertheless confidently rely upon that principle. In *Smith v. O'Grady, supra*, every issue here presented was raised, and along with sundry additional issues of fact, was resolved adversely to the petitioner. The petitioner has had his constitutional 'day in court' upon every question he now suggests. And this court will not relitigate his claim."

In *State ex rel. Flippin v. Sievers*, 102 Neb. 611, 168 N. W. 99, this court held: "The principle of *res judicata* does not apply in cases of habeas corpus to a judgment discharging the prisoner, when such previous discharge was not upon the merits, * * * or where a new state of facts, warranting his restraint, is shown to exist, different from that which existed at the time the first judgment was rendered." This indicates that, had the record disclosed in the foregoing case that the petitioner had had a hearing on the merits and subsequently filed a new petition for a writ of habeas corpus, which did not contain a new state of facts, different from that which existed at the time the first judgment was rendered, then the court would have applied the doctrine of *res judicata*.

In our opinion, the final adjudication in a habeas corpus proceeding on its merits is conclusive in the matters there

determined as against a subsequent application. A party should not be permitted to proceed *ad infinitum* before the same court, or before another court having concurrent jurisdiction to review a former decision, where the facts and conditions remain the same.

An examination of the petition in the instant case discloses it affirmatively appears that the contention in the former proceeding was that the judgment of the sentencing court was void, setting forth the reasons. The same conditions, based upon the same reasons and facts, are made in the petition before the court in the instant case. Due to the conclusiveness of the former judgment and the application of the doctrine of *res judicata,* the merits of this controversy, having been once determined in a former action, as hereinbefore explained, are not for review in this court.

For the reasons given in this opinion, the order of the district court, dismissing appellants' petition for a writ of habeas corpus, is affirmed.

AFFIRMED.

FRANK REDFERN, BY B. F. MOORE, GRANDFATHER AND HIS NEXT FRIEND, APPELLANT, V. SAFEWAY STORES, INC., ET AL., APPELLEES.

16 N. W. 2d 196

FILED NOVEMBER 3, 1944. No. 31876.

1. **Workmen's Compensation.** Wages under the workmen's compensation act shall be computed, ordinarily, according to the terms of the contract of hiring in force at the time of the accident. Comp. St. 1929, sec. 48-126.
2. ———. Where reasonable controversy exists between an employer and an employee as to the former's liability under the workmen's compensation act, the employer is not liable for the penalty for waiting time during the time the cause is pending in the courts for final determination.
3. ———. Where the record affirmatively discloses that the employer did not refuse or neglect to pay compensation in conform-

ity with the statute (Comp. St. Supp. 1941, sec. 48-125), but stood ready and willing to pay compensation in accordance with the judgment of the workmen's compensation court, and there was a reasonable controversy existing between employer and employee as to the former's liability, then the provision of the statute for allowance of attorney's fees is not applicable.

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

Albert S. Johnston, for appellant.

Cline, Williams & Wright, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

MESSMORE, J.

This is an action brought under the Nebraska workmen's compensation law (Comp. St. 1929, ch. 48) by Frank Redfern, a minor, by B. F. Moore, grandfather and his next friend, plaintiff and appellant, against Safeway Stores, Inc., and Hartford Accident and Indemnity Company, defendants and appellees. It is undisputed that the plaintiff sustained an injury in the course of his employment compensable under the workmen's compensation law.

On April 4, 1942, while employed in the capacity of a clerk in the meat department of a Safeway Store at Holdrege, Nebraska, the fingers and thumb of plaintiff's right hand were caught in an electric powered meat grinder, requiring the amputation of all four fingers, and also resulting in injuries to the first phalange of the thumb to the extent of 30 per cent loss of the use thereof. The case was first tried before a judge of the compensation court, resulting in an award being granted on April 17, 1943, finding the plaintiff suffered temporary total disability from and after April 4, 1942, to and including June 7, 1942, a period of nine weeks, at which time the temporary total disability was terminated and was immediately followed by 80 per cent permanent partial disability for the loss of use of the plaintiff's right hand from and after June 7, 1942, for a pe-

riod of 140 weeks. As provided in subdivision 3, sec. 48-121, Comp. St. 1929, he was allotted compensation in the sum of $6 per week for the entire period of time. Subsequently, a rehearing was had before the entire compensation court and the award granted October 7, 1943, extended the time of temporary total disability to 14 weeks. The compensation court adjudged plaintiff entitled to 80 per cent permanent partial disability for a period of 140 weeks, fixing the compensation rate at $6 per week. By agreement, the case was tried in the district court upon the pleadings filed in the workmen's compensation court and the record of testimony taken therein. The district court affirmed the decree of the Nebraska workmen's compensation court. Plaintiff appeals.

Plaintiff's first contention is that his employment was not continuous but intermittent, and that both the contract of employment and the actual facts disclosed only part-time or intermittent employment; that his compensation therefor should be calculated according to the first part of section 48-126, Comp. St. Supp. 1941, reading: "Wherever in this article the term 'wages' is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, * * * ."

The record discloses that the unit manager for the Safeway Stores at Holdrege made arrangements with the plaintiff whereby the plaintiff was to work in the meat department of the store each weekday evening from 4 o'clock or a little thereafter until 6 p. m., and on Saturdays ordinarily from 8 a. m. until 12 midnight, and at different times work extra hours in emergencies. At other times during the day plaintiff was attending high school and had no other source of employment. Plaintiff testified that he devoted about 24 hours a week to his employment in the store and 30 hours a week at high school, and also devoted from four to six hours a week in study preparation for high school. At the time of his injury he was paid the sum of 40 cents per hour and received his wage each week. The

amount of pay varied according to the working hours. For overtime work he was paid at the same rate per hour. Upon coming to work he obtained his apron, started his work, and was not required to report to the manager. There were times when he was called in emergencies when the butcher would not be there. He was employed on September 5, 1941, and was told at that time to come to work at 4 o'clock weekdays and 8 o'clock on Saturdays; was informed of his regular hours of employment except for emergencies. He stated that he had regular employment. Certain exhibits, pay roll vouchers of the employees of the store, are in evidence, covering the period of employment of plaintiff from the week ending October 4, 1941, the first week he worked, to the week ending April 4, 1942, the day of the accident and the last week he worked. These vouchers show the actual rate of pay, and net amount paid to the employee. All the vouchers are signed for each week by the plaintiff except the one ending April 4, 1942, the week of the accident, which is signed by a brother. The vouchers show a continuous course of employment and the average number of hours worked each week, the total showing 584 hours worked and the weekly earnings totaling $183.42, or an average of $7.05 a week, and the average hours worked per week of 22½. There is also shown that on some work days, few in number, during the course of the 26 weeks, the plaintiff did not work, due to a decline in that particular line of business.

From this evidence we conclude that the contract of hire was for 30 cents per hour, then raised to 40 cents per hour, for the number of hours actually worked. From the continuous course of this employment for 26 weeks, we conclude that the plaintiff was a regular part-time employee.

Section 48-117, Comp. St. 1929, is pertinent. It provides that "the compensation shall be calculated with reference to the wage the workman was receiving from the person by whom he was immediately employed at the time of the injury." Section 48-126, Comp. St. Supp. 1941, governs. It provides in part: "In continuous employments, if im-

mediately prior to the accident the rate of wages was fixed by the day or hour * * * his weekly wages shall be taken to be his average weekly income for the period of time ordinarily constituting his week's work, and using as the basis of calculation his earnings during as much of the preceding six months as he worked for the same employer; the calculation, furthermore, to be made with reference to average earnings for a working day of ordinary length and exclusive of earnings from overtime." Considering section 48-117, Comp. St. 1929, the plaintiff knew the amount of his wage per hour and the contract for hire was for the hours he actually worked. He received the payments therefor and receipted for them. Referring to section 48-126, Comp. St. Supp. 1941, the money rate was 40 cents an hour at the time of the accident, limited, which the plaintiff knew and understood, to the number of hours he actually worked. The amount averaged $7.05 per week for the entire period,—six months, as specified in section 48-126, *supra*. The action is properly under subdivision 3, sec. 48-121, Comp. St. 1929. The minimum compensation rate provided therein is $6 per week.

The foregoing analysis is sustained by *Drum v. Omaha Steel Works*, 129 Neb. 273, 261 N. W. 351; *Gorham v. Kiewit Sons Co.*, 129 Neb. 277, 261 N. W. 353; *Johnsen v. Benson Food Center*, 143 Neb. 421, 9 N. W. 2d 749; and to hold with the plaintiff in this case would require a modification or overruling of the foregoing cases.

The plaintiff relies on *Carlson v. Condon-Kiewit Co.*, 135 Neb. 587, 283 N. W. 220. The factual situation there is entirely different from that in the instant case. The record in the *Carlson* case shows that the most Carlson worked in each week was two days, totaling 11 days in nine and one-half weeks. Obviously, this is not continuous employment. Carlson worked when needed by the defendant, even though it is true that a maximum week of five days and 40 hours was stipulated. The case was governed by the first sentence of section 48-126, Comp. St. 1929, while in the instant case the plaintiff worked continuously under his hourly

employment and every Saturday he worked for 13 hours.

In the case of *Davis v. Lincoln County*, 117 Neb. 148, 219 N. W. 899, the plaintiff was employed at 35 cents an hour, subject to call seven days a week. No agreement was made as to the number of hours he should or could work. As to the number of hours actually worked by the plaintiff the decision is silent. The factual situation, while apparently analogous, is at least not in keeping with *Drum v. Omaha Steel Works, supra*; *Gorham v. Kiewit Sons Co., supra*; and *Johnsen v. Benson Food Center, supra.*

The situation presented in *Cole v. M. L. Rawlings Ice Co.*, 139 Neb. 439, 297 N. W. 652, is not analogous. Cole was definitely discharged from his previous employment and rehired later on a daily basis; the interim of time from December 10, date of his discharge, and December 28, when re-employed under a new agreement. Under the last agreement the daily wage was certain; the employment was not continuous and certain. In the instant case, the wage was certain; the employment continuous under the contract of hiring. *Weitz v. Johnson*, 143 Neb. 452, 9 N. W. 2d 788, does not support the plaintiff's contention in the instant case. There the employee was subject to call; each job separate and distinct, though based on the sum of 55 cents per hour for an eight-hour day, if, as and when the employee obtained employment. He had to be at a certain place, called by the company when certain jobs were open, not continuous on any one job, as in the instant case. We deem it unnecessary to detail the distinctions in the other cases cited by plaintiff on the factual situation. The change in contract, or the change in working agreement discloses their inapplicability to the state of facts present in the instant case.

We conclude that the plaintiff's employment in the instant case was continuous, the contract of hiring was definite, the amount of pay was known to the plaintiff, he worked in full conformity with his contract of hire, and, under the factual situation, this case is governed by *Drum v. Omaha Steel Co., supra; Gorham v. Kiewit Sons Co., su-*

pra; Johnsen v. Benson Food Center, supra; and *Fredrickson Milling Co. v. Fraser*, 124 Neb. 531, 247 N. W. 36.

The plaintiff contends that he is entitled to an added amount of 50 per cent to his compensation payment under that part of section 48-125, Comp. St. Supp. 1941, which reads: "Provided, fifty per centum shall be added for waiting time for all delinquent payments after thirty days notice has been given of disability. Whenever the employer refuses payment, or when the employer neglects to pay compensation for thirty days after injury, and proceedings are held before the Compensation Court, a reasonable attorney's fee shall be allowed the employee by the court." The reason given by plaintiff is that defendants' pleadings admit that plaintiff was entitled to compensation at the rate of $6 per week and concede that he was entitled to compensation for 14 weeks for temporary total disability, and for 140 weeks for permanent partial disability, making a total of 154 weeks; that defendants did not pay compensation to plaintiff up to the time of decree in the district court.

The evidence discloses that the insurance carrier was willing to pay compensation in conformity with the judgment of the workmen's compensation court and in settlement of the claim. The agent of the insurance carrier testified that he contacted plaintiff's attorney, but they were unable to agree upon the compensation rate. On June 17, 1944, the plaintiff filed an offer in the district court to accept payment on account of the amount of $6 per week. Compensation then due pursuant to the award on rehearing was paid into the district court on June 22, 1944. Later an explanation was filed, the effect of which is that the amounts paid were without prejudice to plaintiff's right to maintain claim for any additional amounts.

In dispute at all times was the question as to whether plaintiff's employment was intermittent or continuous; also in dispute were the proper rate of compensation and the percentage of disability. A reasonable controversy existed between the employer and the employee as to the former's liability. Under such circumstances, this court has held:

"Where a reasonable controversy exists between an employer and employee, as to the former's liability under the workmen's compensation act, the employer is not liable for the penalty for waiting time during the time the cause is pending in the courts for final determination." *Claus v. Devere*, 120 Neb. 812, 235 N. W. 450. See, also, *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254.

Plaintiff further contends that an attorney's fee should have been allowed in his behalf in the compensation court, as provided by section 48-125, Comp. St. Supp. 1941. There is nothing in the record to show that defendants neglected or refused to pay compensation, or violated this provision of the statute. Under these circumstances, payment of an attorney's fee is not allowable.

Other contentions of plaintiff have been examined and found to be without merit.

AFFIRMED.

IN RE ESTATE OF LIZZIE WITTE. WILLIAM WITTE, JR., APPELLANT, V. AUGUST WITTE ET AL., APPELLEES.

16 N. W. 2d 203

FILED NOVEMBER 3, 1944. No. 31731.

1. **Wills.** In order to sustain objection to a will on the ground of undue influence the evidence of the objector must establish that the testator was subject to undue influence, that the opportunity to exercise it existed, that there was a disposition to exercise it, and that the result appears to be the effect of undue influence.
2. **Trial.** A party, having requested the withdrawal of an issue and having had an adverse ruling thereon, does not, by tendering thereafter instructions thereon, waive the right to assert that the issue was without support in the evidence.
3. ———. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury.
4. ———. The submission of issues upon which the evidence is in-

sufficient to sustain an affirmative finding is generally prejudicial and invariably results in a reversal.

5. Wills. A legatee or devisee who seeks probate of a will carries the burden of proving that the testator possessed the requisite mental capacity to make a will.
6. ———. The proponent of a will, in the first instance, is required to make a *prima facie* case as to the testamentary capacity of the testator.
7. ———. After a *prima facie* case is made by the proponent of a will the burden devolves upon the objector to overcome the presumption arising out of the *prima facie* case made by the proponent.
8. ———. After the presumption growing out of the *prima facie* case of the proponent has been overcome the burden of going ahead and of proving mental capacity of the testator by a preponderance of the evidence devolves upon the proponent.
9. ———. A person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will.
10. Evidence. A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based.
11. ———. It must appear that a witness, lay or expert, in giving his opinion as to mental capacity of a testator to make a will had in mind the quality of mental capacity essential to the making of a valid will.
12. ———. An expert witness will be permitted to give his opinion as to mental capacity if it is predicated on a proper and sufficient foundation.
13. ———. The opinion of a medical expert must be predicated on one or more of the following: Examination and observation of the person who is the subject of the inquiry, examination and history, or supposed facts of which there is evidence.
14. Wills. In order that a will may be rejected on the ground of incompetency of the testator the evidence of the objector must be sufficient to sustain a reasonable inference that the testator was incompetent to make a will.

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

Moran & James, for appellant.

Lloyd E. Peterson and *Betty Jean Peterson, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

YEAGER, J.

This proceeding originated in the county court of Otoe county, Nebraska, and was for the probate of the last will and testament of Lizzie Witte, deceased. In the county court the will was objected to but was admitted to probate over the objections. From this admission to probate an appeal was taken to the district court where on a trial to a jury a verdict was returned finding that the instrument in question was not the last will and testament of the said Lizzie Witte, deceased. Judgment was entered on the verdict. From this verdict and judgment the proponent has appealed. William Witte, Jr., is the proponent and appellant here. August Witte, Edward Witte, Paul Witte, Harry Witte, Frieda Witte, Minnie Witte and Martha Witte Harpster are the objectors and appellees.

Lizzie Witte died on or about the 31st day of January, 1942, leaving as her children and heirs at law the appellant and appellees. On October 16, 1941, she made and executed a will whereby she disposed of her estate. The appellant was appointed executor by the will.

On February 4, 1942, appellant, by petition filed in the county court, offered the said will for probate.

On March 14, 1942, all of the appellees joined in objections to the will. The objections were substantially the following: That the instrument offered for probate was not executed as provided by law; the instrument was not properly attested; that at the time the instrument was signed Lizzie Witte was under the undue influence of appellant and his wife, Clara Witte, and thus the contestants were deprived of their fair share of the property and estate; and that at the time of the making of the will Lizzie Witte did not have sufficient physical and mental strength and busi-

ness ability to understand the purport of said instrument and that by reason thereof she made an inequitable distribution of her estate.

In the district court only two grounds of objection were submitted for decision and determination. The two were undue influence and the mental capacity of the deceased.

The appellant sets forth numerous assignments of error which he contends are grounds for reversal. The first to which attention will be directed is in substance an assertion that the court erred in submitting the question of undue influence for determination by the jury, it being the contention that there was no evidence supporting this objection.

The applicable rule in case a will is objected to on the ground that it was executed under undue influence is that the will may not be rejected on this ground unless the evidence of the objector establishes that the testator was subject to undue influence, that the opportunity to exercise it existed, that there was a disposition to exercise it, and that the result appears to be the effect of such influence. *Gidley v. Gidley*, 130 Neb. 419, 265 N. W. 245; *Smith v. Black*, 143 Neb. 244, 9 N. W. 2d 193.

The evidence in this case measured by this rule without question sustains the contention of appellant. There is no word of testimony in the bill of exceptions in proof of any one of the essential elements of proof necessary to sustain a charge of undue influence except that of opportunity and that is very remote.

It is urged by appellees that appellant, having requested instructions on undue influence, has waived the right to object to its submission.

On the record this contention is without merit. At the conclusion of all of the evidence appellant made the following motion which appears in the bill of exceptions: "Proponent moves that there be no reference to undue influence used in the argument of this case to the jury for the reason there has been no evidence offered by the contestants on the allegation of undue influence exerted on the deceased, Lizzie Witte." This motion was overruled.

It is true that this motion does not in terms request that the issue of undue influence be withdrawn from consideration but it is a sufficient challenge to require the court to act judicially upon, and determine as a matter of law, whether or not the issue was one requiring submission. The ruling on the motion was sufficient as a declaration that this issue would be submitted.

Having been thus informed by the ruling on this motion that the issue of undue influence would be submitted, the request thereafter for instructions thereon cannot properly be considered as a waiver of the right to assert that the issue was without support in the evidence. *Sorensen v. Sorensen,* 68 Neb. 509, 103 N. W. 455; *Haslam v. Barge,* 69 Neb. 644, 96 N. W. 245; *Laf Ferry v. Chicago, B. & Q. R. Co.,* 114 Neb. 219, 206 N. W. 737.

Under the authorities there can be no question that the submission of the issue of undue influence was, under the facts as disclosed by the record, error. *In re Estate of Kajewski,* 134 Neb. 485, 279 N. W. 185.

It is further the holding of the authorities that the submission of issues upon which there is insufficient evidence to sustain them, along with issues which are sustained by sufficient evidence is generally prejudicial and invariably ground for reversal. A late expression of the court on this question is found in *Johnson v. Anoka-Butte Lumber Co.,* 141 Neb. 851, 5 N. W. 2d 114, as follows: "It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them, and them only, to the jury. The submission of issues upon which the evidence is insufficient to sustain an affirmative finding is generally very prejudicial and invariably results in a second trial."

The next assignment of error to which attention is given is the one containing the contention that the court should have sustained the motion of appellant to set aside the verdict of the jury and render judgment ordering the admission of the will to probate.

The effect of the motion is to say that there was not sufficient evidence to sustain the contention, hereinbefore con-

sidered, that the will was the result of undue influence and neither was the evidence sufficient to sustain the contention that Lizzie Witte was incompetent to make a will at the time the instrument in question was made and executed.

In the determination of the question of whether or not a will shall be admitted to probate which is objected to on the ground that the testator lacked sufficient mental capacity to make the will, certain rules of evidence and certain other rules relating to the meaning and definition of mental capacity sufficient for making of a valid will must be borne in mind. It appears appropriate to set them forth here as a preliminary to a discussion of the assignment of error under consideration.

"A legatee or devisee who seeks probate of a claimed will carries the burden of alleging and proving, not only that the testator was possessed of authority and capacity to make the will, but also that the instrument is in legal form, * * * ." *In re Estate of Strelow,* 117 Neb. 168, 220 N. W. 251. See, also, *In re Estate of Slattery,* 125 Neb. 194, 249 N. W. 597; *In re Estate of Wotke,* 133 Neb. 739, 277 N. W. 45; *In re Estate of Bose,* 136 Neb. 156, 285 N. W. 319; *In re Estate of Hagan,* 143 Neb. 459, 9 N. W. 2d 794.

In the first instance the proponent is required to make a *prima facie* case as to the testamentary capacity. Thereafter in order to defeat the will it is necessary for contestants to introduce sufficient evidence to overcome the presumption arising out of the *prima facie* case made by the proponents. Once the presumption is overcome the burden of going ahead and proving by a preponderance of the evidence that the testator did have sufficient mental capacity to make a will devolves upon the proponent. In the case of *In re Estate of Bayer,* 119 Neb. 191, 227 N. W. 928, it is said: "The proponents having established a *prima facie* case as to testamentary capacity of the deceased, it is necessary, in order to defeat the will, that the contestants introduce sufficient evidence to overcome the presumption arising out of the *prima facie* case made by proponents. The burden of proof does not shift, but the burden of go-

ing ahead, as some authorities put it, does." See, also, *Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *In re Estate of Kubat*, 109 Neb. 671, 192 N. W. 202.

A person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will. *Spier v. Spier*, 99 Neb. 853, 157 N. W. 1014; *In re Estate of Kubat, supra; In re Estate of Kajewski, supra; In re Estate of Bose, supra; In re Estate of Hagan, supra.*

From the record it is clear that the evidence of the proponent of the will was sufficient to bring into existence the presumption that Lizzie Witte had sufficient mental capacity to make the will in question. Passing this then the assignment under consideration calls for a determination of the question of whether or not the evidence of contestants was sufficient to overcome the presumption flowing from the *prima facie* showing of proponent that the said Lizzie Witte had the requisite mental capacity when she made the will. The weight of the evidence, if the presumption was overcome, was not for determination by the court nor is it for this court but was one for a jury. *In re Estate of Kerr*, 117 Neb. 630, 222 N. W. 63; *In re Estate of Bayer, supra.* As stated in the opinion in the last case cited: "The question directly before us in this case is whether, upon the proponents having established a *prima facie* case, the contestants offered any evidence tending to prove mental incapacity sufficient to sustain the verdict of the jury."

It is clearly apparent from an analysis of the rules stated that in order to have a submission to a jury of the question of the competency of Lizzie Witte to make the will in question, the burden of going ahead was upon the objectors to, by competent evidence, negative one or more of the following propositions: (1) That she understood the nature of her acts, (2) that she knew the extent of her property, (3) that she understood the proposed disposition of her estate, or (4) that she knew the natural objects of her bounty.

It may be said positively here that on the trial there was no direct attempt made by the contestants to negative

these propositions. Fairly analyzed the direct evidence of contestants supports a conclusion that she was in possession of all four of these mental qualities and qualifications. Conclusively, on the evidence, she knew her children and the extent of her property. There is nothing from which a legitimate inference could be drawn that she did not understand the disposition proposed or the nature of the disposition.

In support of the claim of the contestants that Lizzie Witte did not have the requisite mental capacity to make a will the record discloses that two witnesses gave it as their opinion that she did not. One was a laywoman and the other a physician and surgeon who had attended her professionally for a considerable period of time.

Analyzed in the light of the rule announced by the decisions of this court which permits a lay witness under certain circumstances to give opinion testimony as to the mental capacity of a deceased testator the opinion of this laywoman must be considered as having no weight as evidence.

The rule is stated as follows in *Bankers Life Ins. Co. v. Aron,* 133 Neb. 187, 273 N. W. 280, as follows: "It is a settled rule of law in this state that a nonexpert witness who is shown to have had a more or less extended intimate acquaintance with a person may be permitted to state his opinion as to the mental condition of that person, if said condition becomes a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based." See, also, *In re Estate of Wilson,* 78 Neb. 758, 111 N. W. 788; *Torske v. State,* 123 Neb. 161, 242 N. W. 408; *Kehl v. Omaha Nat. Bank,* 126 Neb. 695, 254 N. W. 397. Of course it must follow that the facts and circumstances testified to by the witness shall be sufficient upon which to base an opinion.

A further rule which we think ought to be announced in relation to the mental capacity involved in the making of a will, since mental capacity in this situation involves different considerations than are found in other situations wherein mental capacity is involved, is hereby announced.

It is, that it must appear that the witness in giving his or her opinion as to mental capacity must have in mind the quality of mental capacity essential to the making of a valid will, that is whether or not the testator understood the nature of the acts, knew the extent of the property, understood the proposed disposition, and knew the objects of the bounty.

The witness here related no fact or set of facts from which an opinion or inference could be drawn that Lizzie Witte lacked mental capacity to make a will. She testified to no fact which would indicate that she was in anywise mentally afflicted or infirm. She was allowed to give her opinion, over appropriate objection, without anything to indicate that she was informed as to the qualities of mind constituting mental capacity to make a will or lack thereof which renders one incompetent to make a will.

The only other witness for the contestants who testified with regard to the mental capacity of the testatrix to make a will was a physician and surgeon of Nebraska City, Nebraska, who had cared for her in a professional capacity for a considerable period of time and who had negotiated with her with regard to a proposed disposition of some of her real estate. It may reasonably be said that by reason of his training and experience, as shown by the record, he had expert knowledge on the mental effects of the infirmities attendant upon advancing years.

As an expert witness in this field this witness would be permitted to give his opinion of the mental competency to make a will provided, of course, it was predicated on a proper and sufficient foundation. He gave it as his opinion that she was incompetent to make a will. *Sioux City & P. R. Co. v. Finlayson,* 16 Neb. 578, 20 N. W. 860; *Davis v. School District,* 84 Neb. 858, 122 N. W. 38.

The opinion of a medical expert witness must be based upon one or more of the following: Examination and observation of the person who is the subject of the inquiry, examination and history, or supposed facts of the existence of which there is evidence. *Goken v. Dallugge,* 72

Neb. 16, 99 N. W. 818; *Rathjen v. Woodmen Accident Assn.*, 93 Neb. 629, 141 N. W. 815; *Travelers' Ins. Co. v. Person*, 58 Fed. 2d 210; *Watkins v. Brunswick Restaurant Co.*, 123 Neb. 212, 242 N. W. 439.

With the latter two propositions we are not concerned in this case. The testimony of this witness for its factual background is dependent upon examination and observation.

Like in the case of the nonexpert witness, from a careful examination of the record, we have concluded that the testimony of this doctor does not disclose facts supporting a reasonable inference that the testatrix was incompetent to make her will. There is nothing in it from which an inference could be drawn that she did not understand the nature of her acts, that she did not comprehend the extent of her property, that she did not understand the proposed disposition, or that she did not know the objects of her bounty.

Again, as in the case of the nonexpert witness, there is nothing in the record to indicate that this witness, in giving his opinion that Lizzie Witte was incompetent, gave it with reference to the essential mental requisites necessary to the making of a valid will.

In substance the evidence on which the witness based his opinion was the following: That Lizzie Witte was about the age of 74 years in 1941; that she had hardening of the arteries, called senile arteriosclerosis of a type known as senile cortical devastation, defined as malignant and progressive deterioration of the gray matter of the cortex or brain; that malignant means "that it will do its evil eventually"; that she was not demented; that she had attacks in the nature of epilepsy; that these were only temporarily disabling; that she was nervous, had headaches and at times became dizzy; that her ability to hear had diminished; that her ability to remember had lessened; that she was irritable; that she carried on normal household activities such as cooking, cleaning, marketing and caring for herself in her normal and customary manner, he said, by instinct rather than by the processes of an ordered and normal

mind; he mentioned no abnormal mental reaction; he said that she was "in that barn but not in the stall" of senile dementia. Just what was meant is not quite clear unless it be that she was approaching but had not arrived at a state called senile dementia.

Clearly the facts to which this witness testified oppose rather than support his expressed opinion.

From an examination of the other evidence alone, or coupled with that of these two witnesses, there is nothing which would support a reasonable inference that Lizzie Witte did not have sufficient mental capacity to make a will. The presumption of competency flowing from the *prima facie* showing of the proponent has not been overcome. The verdict of the jury is not sustained.

The conclusions arrived at with regard to the two assignments discussed render a consideration of the other assignments of error unnecessary.

The cause is reversed and remanded to the district court with directions to the district court to render judgment overruling the objections to the will and remanding the cause to the county court with directions to admit it to probate.

REVERSED, WITH DIRECTIONS.

17 N. W. 2d 477

The following supplemental opinion was filed February 2, 1945. *Motion for rehearing denied and cause reversed.*

YEAGER, J.

On consideration of the motion for rehearing of this case it has been concluded that the original opinion should be adhered to in every respect except the last and final paragraph thereof. In that paragraph the direction to the district court was erroneous in directing action in the district court and the county court. We conclude that in the light of our finding that the only power of this court was to reverse and remand for further proceedings. See *In re Estate of Marsh*, p. 559, *post*, 17 N. W. 2d 471. The paragraph is hereby withdrawn and the following substituted therefor:

The cause is reversed and remanded to the district court for further proceedings.

MOTION FOR REHEARING DENIED, AND CAUSE REVERSED.

HENRY HAWK, APPELLANT, V. NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLEE.
16 N. W. 2d 181

FILED NOVEMBER 3, 1944. No. 31841.

1. **Criminal Law.** The fact that a defendant in an information is in prison, serving a sentence for another crime, gives him no immunity from prosecution.
2. **Habeas Corpus.** In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. But, if he shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ should be denied.
3. ———. The guilt or innocence of one accused of crime, or convicted of a crime, is not justiciable in habeas corpus.
4. ———. A writ of habeas corpus is not a writ for the correction of errors and will not be allowed to be used for that purpose.
5. ———. Habeas corpus is not recognized as a remedy to review a judgment. It cannot take the place of a writ of error.
6. **Criminal Law.** Every person accused of crime should be afforded reasonable opportunity to marshal his witnesses and prepare for trial, but mere procrastination—delay for delay's sake—should not be tolerated.

APPEAL from the district court for Lancaster county: RALPH P. WILSON, JUDGE. *Affirmed.*

Henry Hawk, pro se.

Walter R. Johnson, Attorney General, H. Emerson Kokjer, John H. Comstock and *Rush C. Clarke, contra.*

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

WENKE, J.

This habeas corpus proceeding was instituted in the district court for Lancaster county by the petitioner, Henry Hawk, against Neil Olson, warden of the Nebraska state penitentiary, as respondent, to obtain the petitioner's release. From an order denying the writ the petitioner has appealed to this court.

The petitioner's petition discloses that a complaint was filed against him in the municipal court of the city of Omaha containing two counts charging him with first degree murder. Preliminary hearing thereon was had on February 11, 1936, and on the same day he was bound over to the district court. Information to the same effect was then filed in the district court on February 17, 1936. On March 16, 1936, after being arraigned and pleading not guilty, the defendant was tried to a jury. By the verdict of the jury, rendered on March 18, 1936, he was found guilty of murder in the first degree, which verdict fixed the penalty at imprisonment in the penitentiary during life. On March 19, 1936, after motion for new trial had been overruled, the court, as provided in the verdict, sentenced the petitioner to the Nebraska state penitentiary for the period of his natural life. He is confined and is being held in said institution pursuant thereto.

This court, in *Hawk v. O'Grady*, 137 Neb. 639, 290 N. W. 911, has determined the validity of the form of the judgment entered by the trial court.

Petitioner complains that at the time he was tried he was a federal prisoner incarcerated in the federal penitentiary at Leavenworth, Kansas, and therefore outside of the jurisdiction of the state. Further, that when he had completed his term in the federal prison he was turned over to the Nebraska authorities and confined in the state penitentiary without further order. These contentions are without merit.

The petition states that he was brought to Omaha for

trial by the federal authorities and then returned by them to the federal prison; and that when his term in the federal penitentiary expired the federal authorities turned him over to the state authorities. As stated in *Ponzi v. Fessenden,* 258 U. S. 254, 42 S. Ct. 309, 22 A. L. R. 879: " * * * the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. * * * 'The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt.' " As stated in *Rigor v. State,* 61 Atl. 631 (101 Md. 465): "That accused is serving a sentence under a prior conviction of a distinct crime is no ground for postponing his trial until the expiration of such sentence." See, also, *Cato v. Smith,* 104 Fed. 2d 885; *Kelley v. Oregon,* 273 U. S. 589, 47 S. Ct. 504. And in *Ponzi v. Fessenden, supra*: "Nor, * * * is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. *Kite v. Commonwealth,* 11 Metc. 581, 585, an opinion by Chief Justice Shaw; *Ex parte Ryan,* 10 Nev. 261, 264; *Thomas v. People,* 67 N. Y. 218, 226."

Many of the petitioner's grounds for release are pleaded in the form of conclusions. The petitioner must set forth the facts from which it is made to appear he will be entitled to discharge. See *In re Application of Tail, Tail v. Olson, ante,* p. 268, 16 N. W. 2d 161.

"In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. But, if he shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ will be denied for it would be useless to go through the procedure of granting the writ and having the party brought before the court merely to be remanded back to the custody out of which he

seeks to be discharged. Since the allegations of the petition are often inconclusive and mere statements of conclusions of the pleader the court may refuse to issue the writ if, upon the face of the petition, it appears that the party is not entitled thereto." *In re Application of Tail, Tail v. Olson, supra.*

The petitioner questions the sufficiency of the evidence to sustain his conviction and says he is innocent. " 'The guilt or innocence of one accused of crime, or convicted of a crime, is not justiciable in habeas corpus.' *Smith v. Amrine,* 156 Kan. 486, 134 Pac. 2d 400." *In re Application of Tail, Tail v. Olson, supra.* See, also, *Carlsen v. State,* 129 Neb. 84, 261 N. W. 339.

The petitioner sets forth parts of the evidence taken at the time of trial and attempts to show that the same are contradictory, conflicting, impeached, incompetent, and uncorroborated; that the state was permitted to impeach its own witnesses; that the court overruled his motion for continuance made after he had been arraigned and pleaded not guilty but before trial; and that there was error in the instructions given by the court. "Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error." *In re Application of Maher, North v. Dorrance,* 144 Neb. 484, 13 N. W. 2d 653. "A judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void." *State ex rel. Gossett v. O'Grady,* 137 Neb. 824, 291 N. W. 497. "A writ of habeas corpus is not a writ for the correction of errors and will not be allowed to be used for that purpose. *Michaelson v. Beemer,* 72 Neb. 761." *In re Application of Cole, Cole v. Fenton,* 103 Neb. 802, 174 N. W. 509.

The petitioner refers to the testimony of certain witnesses as being perjured and other witnesses as having been intimidated or bribed. These statements are mere conclu-

sions. They do not set forth facts which, if true, would entitle him to relief. However, if sufficient facts were set forth to entitle him to relief on this basis his remedy would not be by habeas corpus. The writ of error *coram nobis* has been recognized in this state. *Carlsen v. State, supra.* The object of the writ is to bring into the record, before the court that rendered the judgment, facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment. As stated in *Carlsen v. State, supra*: " * * * the writ of habeas corpus does not afford a corrective judicial process to remedy an error of fact, at the trial, without which a conviction would not have resulted. * * * Habeas corpus is not a proper remedy to release one from prison who has been wrongfully convicted."

Petitioner complains of his inability to perfect his appeal. On April 10, 1936, he filed notice of appeal and affidavit of poverty with the trial court. On the same day the court ordered a transcript and bill of exceptions to be made at the county's expense. Petitioner says these were impounded and concealed and never delivered to him, but he fails to state in what manner they were impounded and concealed. The bill of exceptions was subsequently found in the office files of the county attorney of Douglas county. No petition in error was ever filed in the supreme court. He alleges he was deserted by his counsel. However, the petitioner fails to show that he ever requested the public defender or his assistant to appeal. He alleges that in order to perfect his appeal he petitioned the supreme court for additional time, mandamused the trial court and brought mandamus in the district court of the United States, Lincoln Division, but all were denied. The facts alleged do not show that the petitioner was prevented from perfecting his appeal within the time provided by our statute. "Habeas corpus is not recognized as a remedy to review a judgment. It cannot take the place of a writ of error." *Carlsen v. State, supra.*

The petition sets forth that on the evening before his arraignment the public defender and his assistant consulted with the petitioner and advised him to enter a plea of guilty to having murdered Isadore Perelman during an attempted robbery on the evening of February 28, 1934, because the county attorney and captain of detectives had arranged to use the testimony of two convicts who were going to testify against him and that if he was convicted by a jury he would no doubt receive a death sentence. He informed the public defender and his assistant that he would not plead guilty. They then informed him they would have nothing to do with the trial scheduled the next morning. When arraigned on the following morning the petitioner pleaded not guilty and in the trial, held on March 16, 17 and 18, he was represented by the public defender and John N. Baldwin. We can see nothing in these facts, if true, that in any way prevented the petitioner from having a fair trial.

Petitioner complains of the court's overruling his motion for continuance and thereby denying him time to consult counsel, examine the charge, subpoena witnesses, prepare a defense and thus giving him only a mere semblance of a trial. The record discloses that preliminary hearing was had on February 11, 1936. That over a month later, on March 16, 1936, he was arraigned on the same charge. He was brought to Omaha the day before and consulted with and was represented by the public defender and his assistant. The trial lasted for three days, March 16, 17 and 18. He was found guilty by the verdict of the jury. Motion for new trial was filed and overruled on March 19 and judgment on the verdict sentencing the defendant was had the same day. "Every person accused of crime should be afforded reasonable opportunity to marshal his witnesses and prepare for trial, but mere procrastination—delay for delay's sake—should not be tolerated." *Hubbard v. State*, 65 Neb. 805, 91 N. W. 869. The petitioner does not set forth any facts to establish his innocence that he was prevented from establishing which, if continuance had been

granted, he could have presented. He merely says he is innocent and criticizes the evidence upon which he was convicted. We find there is no merit to petitioner's contention.

For the reasons herein discussed the order of the lower court in denying the writ was correct and is therefore affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. CHARLES HUTTER, DEFENDANT IN ERROR.
16 N. W. 2d 176

FILED NOVEMBER 3, 1944. No. 31878.

Criminal Law. In proceedings under sections 29-2314, 29-2315 and 29-2316, Comp. St. 1929, this court will not decide questions therein presented until a final order has been entered in the court below completely disposing of the action, unless it is clearly shown by the record that the decision can in no manner reverse or affect the case in which the exceptions are taken.

ERROR to the district court for Douglas county: CHARLES E. ELDRED, JUDGE. *Motion to dismiss sustained.*

Walter R. Johnson, Attorney General, H. Emerson Kokjer, Rush C. Clarke, Kelso Morgan and *C. E. Walsh,* for plaintiff in error.

Eugene D. O'Sullivan, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

WENKE, J.

By permission of this court, pursuant to sections 29-2314, 29-2315 and 29-2316, Comp. St. 1929, the state of Nebraska, by its attorney general and the county attorney

of Douglas county, filed a bill of exceptions in the above entitled cause in this court to obtain a decision upon questions therein presented.

The proceedings, out of which these exceptions arise, were originally instituted in the county court of Douglas county.

On December 6, 1943, a complaint was filed in the county court charging the defendant, Charles Hutter, with murder in the second degree arising out of the death of Grant Fallon on December 5, 1943. Preliminary hearing was had and on December 17, 1943, defendant was bound over to the district court. Information was then filed in the district court on December 20, 1943, charging the same offense.

On March 3, 1944, complaint was filed in the county court charging the defendant with murder in the first degree for the death of Grant Fallon on December 5, 1943. Preliminary hearing was had and he was bound over to the district court on March 18, 1944. Information was then filed in the district court on March 24, 1944, charging the same offense.

At the time the defendant was tried in the district court on the information charging murder in the first degree, and after a jury had been impaneled and the state had offered its evidence, the defendant made a motion "to either dismiss this action or reduce the charge stated in the Information," for the reasons set forth in the motion. Ruling thereon was reserved until all of the testimony had been submitted. At the conclusion of all the testimony the motion was renewed and the court sustained the motion to dismiss as to murder in the first and second degree but submitted manslaughter. At the same time an order was entered dismissing the information of murder in the second degree. See Comp. St. 1929, sec. 29-1801.

After the jury had been out 21½ hours and were unable to agree on a verdict, with the consent of both the state and defendant, the jury were discharged and cause continued for further proceeding.

On July 11, 1944, the defendant filed a plea in bar as to murder in the first and second degree and manslaughter based on the proposition that in the previous trial he had been lawfully acquitted thereof and setting forth his reasons therefor. The state filed its answer thereto and hearing was had thereon. On July 12, 1944, the defendant's plea in bar as to first and second degree murder was sustained but the same plea as to manslaughter was overruled and the defendant was ordered to be tried on the charge of manslaughter.

The state then made a motion for continuance which was sustained and the matter of defendant's trial continued to October 16, 1944. In its motion for continuance the state sets forth the reasons therefor. They are in part as follows:

"2. That the State is very seriously and earnestly of the opinion and respectfully suggests to the Court the possibility that the Court erred in sustaining the Plea in Bar heretofore mentioned, and desires, if possible, to bring proceedings in the Supreme Court of Nebraska either by exceptions in the manner provided by law or by error proceedings or by appeal if it be determined that the order of this Court entered upon the Plea in Bar is a final order subject to review, and to secure the judgment and opinion of the Supreme Court upon the questions presented by said Plea in Bar and the Answer thereto, prior to the trial of this cause.

"3. * * * and that this Court could then, if it were so advised, set aside the judgment it has entered upon the Plea in Bar in this case."

Likewise, on page 70 of its brief the state says, " * * * we do have here an opportunity to have the law settled before the case comes on for retrial in the lower court."

Section 29-2316, Comp. St. 1929, provides as follows: "The judgment of the court in the case in which the bill was taken shall not be reversed nor in any manner affected; but the decision of the supreme court shall determine the law to govern in any similar case which may be pend-

ing at the time the decision is rendered, or which may hereafter arise in the state."

The attorney appointed by the trial judge has by motion to dismiss raised the question of whether or not a final order must be entered in the proceedings below before the matter can be brought here by exceptions under our statutes.

Whether or not the rendition of a final judgment was, in the contemplation of the legislature, to precede the filing of the bill of exceptions is not entirely clear from the act. No reason is suggested or presents itself why the bill of exceptions should be permitted to be filed before the prosecution is ended. Since the decision is not to reverse or in any manner affect the judgment in the case in which the exceptions are taken, the court may require a final order if it can in no other way make sure that its decision will in no manner violate the legislative mandate. That would appear to be the better practice.

We adopted our statutory criminal procedure from Ohio. At the time of its adoption Ohio had the same statutes in force. In subsequently interpreting this act in *State v. Dickerson,* 73 Ohio St. 193, 76 N. E. 864, it was given a construction in accordance with our interpretation. Subsequently, after the act had been amended but for other reasons, Ohio declared the act unconstitutional. See *Eastman v. State,* 131 Ohio St. 1, 1 N. E. 2d 140.

To hear the matters herein presented would, in effect, determine the rights of the defendant in this action when he is neither a necessary nor proper party in the proceeding. That is not the purpose nor within the contemplation of the legislative act. Under the special proceedings provided by these statutes (sections 29-2314, 29-2315 and 29-2316, Comp. St. 1929) it would appear to be the better rule that generally this court require that a final order or judgment completely disposing of the case shall have been entered below before we will decide any questions therein presented, unless it is clearly shown by the record that the decision can in no manner reverse or affect the case in which the bill was taken.

The state and the attorney appointed by the trial judge have filed printed briefs. That is a proper procedure under this special proceeding. These briefs discuss interesting questions of law. However, they will not be discussed here because their answer might reverse or affect the action which is now pending in the district court for Douglas county awaiting final determination. Further, they may be presented here when a final disposition of the case has been made.

For the reasons stated the motion to dismiss is sustained.

DISMISSED.

CHARLES M. THOMSON, TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTHWESTERN RAILWAY COMPANY, APPELLEE, V. CITY OF CHADRON, NEBRASKA, APPELLANT.
16 N. W. 2d 447

FILED NOVEMBER 16, 1944. No. 31836.

1. **Municipal Corporations.** The maintenance and repair of streets by a city of the second class is a governmental function and the cost thereof must be paid from the general fund of the city.
2. ———. A city of the second class cannot lawfully levy taxes in excess of five mills for general fund purposes (Comp. St. Supp. 1939, sec. 17-567) on the actual property valuation (Comp. St. Supp. 1939, sec. 77-201) and any amount levied in excess of that limitation is void.
3. ———. Where the annual tax ordinance of a city contains an item for "Streets, alleys and sidewalks 2.83 mills" and the demand for a refund described it as "Repair of streets 2.83 mills," there being no similar item contained in the ordinance, substantial compliance with the statute has been had and the variance is not fatal.

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

Charles A. Fisher, for appellant.

Wymer Dressler and *Robert D. Neely, contra.*

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

CARTER, J.

This is an action to recover excessive taxes paid under protest for the reason that the 1941 tax levy made by the city of Chadron exceeded statutory limits. The trial court held that the city of Chadron illegally levied taxes for items properly belonging within the general fund of said city against the property of the plaintiff in the amount of $604.97. Due to the fact that plaintiff did not demand a refund within 30 days after payment, as required by statute, the recovery of the first installment of $302.48 was held to be barred and a judgment was entered for plaintiff for $302.49 with interest and costs. From the judgment the city appeals.

The record shows that the city by ordinance levied taxes in the amount of 25.55 mills for the benefit of the city for all purposes on all taxable property within the corporate limits of the city for the fiscal year commencing on or about May 1, 1941. Among the specific levies included in this amount were the following: General fund, 3.25 mills; Incidentals, .32 mills; Paving maintenance and improvement, .95 mills; Police, 1.70 mills; and Streets, alleys and sidewalks, 2.83 mills. These items, totaling 9.05 mills, are clearly items falling within the general fund of the city. The city contends that the repair and maintenance of streets, alleys and sidewalks are not a part of the governmental expenses of a city and consequently not an item of expense properly chargeable to the general fund. We think the city is clearly in error in so contending. In *Harms v. City of Beatrice,* 142 Neb. 219, 5 N. W. 2d 287, we said: "It is the duty of the city in the exercise of its governmental functions to keep its streets in a reasonably safe condition for public use." In *State ex rel. Metropolitan Utilities District v. City of Omaha,* 112 Neb. 694, 200 N. W. 871, we held that the maintenance of water hydrants in the public streets was in pursuance of the police power to prevent

fires and that a hydrant tax could be imposed by the legislature because it tended to carry out the sovereign duty to protect the public against conflagrations and was a governmental function in the strict sense. We think the case of *Goodrich v. University Place,* 80 Neb. 774, 115 N. W. 538, cited by the city in support of its contentions, is not at variance with the foregoing decisions. This position is further fortified by the provisions of the statute providing that the cost of repairs to streets, avenues and alleys shall be paid out of the general fund. Comp. St. 1929, sec. 17-431.

It is not disputed that the city of Chadron is a city of the second class governed by the statutes applicable to that class of cities. A city of the second class cannot lawfully levy more than five mills for general fund purposes. Comp. St. Supp. 1939, sec. 17-567. The city attempts to justify the excessive levy by virtue of the language of section 17-431, Comp. St. 1929, which authorizes a tax for street repair to be paid out of the general fund of the city not exceeding eight and one-half mills of the levy for tax purposes. Section 17-431 was enacted prior to 1921 at a time when the valuation for taxing purposes was only 20 per cent of the actual value. In 1921 the legislature changed the valuation for tax purposes to the actual value and limited the maximum levies to be subsequently made to 20 per cent of the maximum levies authorized theretofore. See Laws 1921, ch. 133, art. II, sec. 1, art. XII, sec. 1.

The contention is advanced that the foregoing limitation on the taxing power could not lawfully be enacted without a repeal of the former statutes dealing with the subject, which was not done. This court has held, however, that the revenue act of 1921 covered the whole subject of revenue, was complete in itself and, consequently, a specific repeal or amendment was not required. *Drew v. Mumford,* 114 Neb. 100, 206 N. W. 159; *State ex rel. Liberty High School District v. Johnson,* 116 Neb. 249, 216 N. W. 828. We are of the opinion that the position assumed by the city of Chadron is untenable and that the 1941 tax levy was excessive as claimed.

The city contends that the statutory notice required to be given demanding a refund of the excess tax was fatally at variance with the city ordinance under which it was levied. The ordinance listed the item as follows: "Streets, alleys and sidewalks 2.83 mills." The statutory demand for a refund listed the item as "Repair of streets 2.83 mills." No other item of 2.83 mills appears in the ordinance. No possibility of confusion existed. Clearly, there was a substantial compliance with the statute and the variance is not sufficient to defeat the claim for a refund. See *Bankers Life Assn. v. Commissioners of Douglas County*, 61 Neb. 202, 85 N. W. 54.

We think the trial court came to the correct conclusion. The judgment is therefore affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

IN RE GUARDIANSHIP OF MABEL E. MORRIS, INCOMPETENT. HERBERT W. BAIRD, HER NEXT FRIEND, APPELLANT, V. ROY J. CUSACK, GUARDIAN, APPELLEE.

16 N. W. 2d 442

FILED NOVEMBER 16, 1944. No. 31759.

1. **Guardian and Ward.** Before a guardian invests a ward's funds, he is required by law to file an application with the county court. Notice is then given to all persons interested therein as the court shall direct. Thereafter, on hearing on the application, the court, by order, may authorize the guardian to invest the ward's funds, naming the specific security or securities to constitute the investment.
2. ———. Where a guardian has breached his trust by failing to comply with the law for the investment of his ward's funds, and has made an unauthorized loan, it is not necessary that such guardian shall have embezzled and converted to his own use and for his benefit the funds of his ward's estate, in order to charge the guardian with the legal rate of interest, when he is required to make an accounting of the unauthorized loan to the county court for purposes of settlement.
3. ———. Where a guardian fails to abide by the law for invest-

ment of the funds of his ward's estate and loss ensues, he is chargeable with the full amount of the principal of the unauthorized loan and interest thereon at the legal rate from the date of making the loan until settlement is had thereon and approved by the county court.

4. ———. Where a guardian is required to account for an unauthorized loan and interest thereon, the ward's estate is not liable for attorneys' fees to be paid his attorneys. The guardian's attorneys in such case represent the personal interests of the guardian, as distinguished from representing the interests of the ward's estate.

5. **Case Overruled.** The case of *Seward v. Danaher*, 105 Neb. 787, 181 N. W. 941, in so far as it conflicts with this opinion, is overruled.

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

John E. Lowe and *Herbert Baird,* for appellant.

Sidner, Lee & Gunderson, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

MESSMORE, J.

This is an action by the next friend of an incompetent against the guardian of her estate, to require him to account for an unauthorized loan by taking a promissory note, dated April 16, 1928, renewed April 16, 1929, in the amount of $10,000 and interest thereon at the rate of 5 per cent per annum. The unauthorized loan will hereinafter be referred to as the Black note. The guardian admits that the loan was unauthorized. The county court permitted the guardian to resign and account for the principal and interest of the loan, fixing the rate of interest at 3 per cent. This judgment was affirmed by the district court on appeal. The next friend appeals to this court, contending that the promissory note provided for interest at 5 per cent, and therefore the ward's estate is entitled to the additional interest over and above that upon which settlement was had and approved.

During the pendency of a decision had on a petition to

show cause why the guardian should not be removed and required to account for the unauthorized loan and interest thereon, filed by the next friend of the incompetent ward, the guardian instituted an action in the district court against the maker of the note for the full amount thereof and interest at 5 per cent. Settlement of the case in the amount of $6,000 was approved. In addition, one of the notes, constituting collateral for the loan, was settled for $3,982.85. The amount of the collections on the collateral and the settlement of the case against the maker of the note equaled the settlement made by the guardian at the time of his resignation, and as approved by the county court.

Certain exhibits, guardian's reports, show interest credited on the Black note at the rate of 5 per cent at different times. One of such exhibits shows settlement of a note given as collateral for the Black note, and that the $1,200 obtained therefrom was applied on the principal when interest was in default in an amount exceeding $3,000. There was no authorization by the county court for this credit; it was arbitrarily made and should have been applied as interest.

At the time of making the loan, the guardian, before investing the ward's funds, was required to comply with the provisions of section 38-506, Comp. St. 1929, which reads in part: "The county courts in their respective counties, on the application of a guardian, * * * after such notice to all persons interested therein as the court shall direct, may authorize or require the guardian * * * to invest * * * moneys in his hands in real estate, or in any other manner that shall be most for the interest of all concerned therein; and the court may make such further orders and give such directions as the case may require for managing, investing and disposing of the estate and effects in the hands of the guardians." See *In re Guardianship of Phillips*, 144 Neb. 183, 13 N. W. 2d 99, and cases cited therein.

In the case of *In re Estate of O'Brien*, 80 Neb. 125, 113 N. W. 1001, it was held that a guardian must "apply to and

receive from the county court an order authorizing him to loan the funds of his ward. If he loans his ward's funds without such authority, and a loss ensues, he is liable therefor." See, also, *In re Guardianship of Phillips, supra,* wherein it was said: "The accountability of a guardian for the safekeeping and investment of his ward's funds is not measured by his own conceptions of his duty, but he is required at his peril to strictly follow all the requirements of the law enacted by the legislature for the protection and security of a ward's estate."

" 'A guardian is a trustee and is governed by the same rules that govern other trustees.' 25 Am. Jur. 113, sec. 185." *In re Estate of Davenport,* 140 Neb. 769, 2 N. W. 2d 17.

"The duties of a guardian are similar to those of a trustee in the handling of trust funds, and every violation of a duty required of him by law, whether wilful and fraudulent, or done through negligence, or even a violation of those duties which arise by mere mistake, oversight, or forgetfulness, is a breach of trust." *In re Guardianship of Phillips, supra.*

The guardian relies on *Seward v. Danaher,* 105 Neb. 787, 181 N. W. 941, wherein this court held: "After a guardian has fully accounted for the principal of the funds of his ward invested by him, he is chargeable only with such a reasonable rate of interest thereon as he could have secured by the exercise of reasonable diligence and with due regard to the safety of the investment and with scrupulous fidelity to his trust; but he is always chargeable with the interest actually received by him."

It is clear from a reading of the opinion in *In re Guardianship of Phillips, supra,* that, where a guardian has breached his trust by failing to comply with the law for investment of his ward's funds and has made an unauthorized loan, it is not necessary that such guardian shall have embezzled and converted to his own use and for his benefit the funds of his ward's estate in order to charge the guardian with the legal rate of interest. It is likewise clear

that, where a guardian fails to abide by the law for investing the funds of his ward's estate and a loss ensues, he is chargeable with the legal rate of interest. This court in the *Phillips* case required the guardian to pay interest at the rate of 6 per cent from a certain date on the net proceeds of the ward's estate. While the opinion did not so state, the legal rate of interest in this state at the time of the decision, affecting matters of this kind, was and is 6 per cent. Comp. St. Supp. 1941, sec. 45-102. Further authority for the holding that the guardian should be surcharged with the legal rate of interest where an unauthorized loan is made, as announced in *In re Guardianship of Phillips, supra,* is the case of *In re Estate of O'Brien, supra.*

In the instant case, at the time the loan was made C. M. Black, the maker, an uncle of the guardian and vice-president and director of the bank in which the guardian was also an officer, had ample security to give, but the guardian did not require it. He took instead certain bad banking paper, as collateral security for the Black note, which the examiners of the department of banking required to be removed from the bank. The purpose of the loan is obvious. It was to stabilize the bank. The bank was later closed. During the period of the loan, Black had become burdened with double liability on his bank stock; his land had become heavily encumbered. Although knowing this, the guardian made no effort to protect his ward until the next friend of the ward persistently filed petitions to show cause why the guardian should not render an accounting and be removed. The loan benefited the guardian and his business at the time. He breached his trust.

"Where the trustee commits a breach of trust (or, as in this case, where the guardian breaches the trust) and thereby incurs a liability for a certain amount of money with interest thereon, he is chargeable with interest at the legal rate or such other rate as the court in its sound discretion may determine, but in any event he is chargeable with interest actually received by him or which he should have received." Restatement, Trusts, sec. 207.

Under the facts and circumstances of the instant case, the guardian is required to account to his ward's estate for the principal amount of the unauthorized loan and interest thereon at the legal rate from April 16, 1928, the date the unauthorized loan was made, until the guardian's final accounting was approved by order of the county court, and the successor-guardian has qualified and receipted for the remaining assets of the ward's estate, which, according to the record in the instant case, was July 23, 1942.

The disallowance of attorney's fees by the district court is correct. Where a guardian is required to account for an unauthorized loan and interest thereon, the ward's estate is not liable for attorneys' fees to be paid his attorneys. The guardian's attorneys in such case represent the personal interests of the guardian, as distinguished from representing the interests of the ward's estate.

The case of *Seward v. Danaher, supra,* in so far as it conflicts with this opinion, is overruled.

The judgment of the district court is reversed, and the cause remanded, with directions to enter judgment to conform with this opinion.

REVERSED, WITH DIRECTIONS.

STATE EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ELMER GUDMUNDSEN, RESPONDENT.

16 N. W. 2d 474

FILED NOVEMBER 16, 1944. No. 31636.

1. **Disbarment**: ATTORNEY AND CLIENT. In an action for disbarment of an attorney at law the presumption of innocence applies and his culpability must be established by a clear preponderance of the evidence.
2. ———: ———. The degree of proof in a disbarment proceeding being higher than that required to sustain a judgment in a civil action, the finding and judgment of culpability of an attorney at law in a civil action is not conclusive in a disbarment proceeding.

3. ———: ———. The failure to file exceptions to the report of a referee in disbarment proceedings within the time provided by the rules of this court is not jurisdictional.
4. ———: ———. Where exceptions have not been filed, or have not been filed within the time prescribed by the rules, this court may either consider the findings of the referee final and conclusive or may enter such order as the evidence and the law require.

Original proceeding by the state, on the relation of the attorney general, to disbar the defendant. *Judgment of disbarment.*

Walter R. Johnson, Attorney General, H. Emerson Kokjer and *John H. Comstock,* for relator.

Good & Simons, for respondent.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

YEAGER, J.

This is a disciplinary action and an original proceeding initiated in conformity with the rules of this court against Elmer Gudmundsen, respondent, who is a duly licensed attorney at law, bringing into question, by appropriate complaint, the right of said Elmer Gudmundsen to retain his license and to continue in the practice of law.

On filing of complaint the matter was duly referred to Bern R. Coulter, referee, for hearing, report and recommendation. A hearing was had, report made and the referee recommended some kind of disciplinary action short of disbarment.

The relator, by the attorney general, and the respondent each filed exceptions to the report. The hearing here is on the issues joined on the complaint, the evidence taken and the exceptions.

The complaint is of great length and the misconduct therein charged pertains to the conduct of respondent in his capacity as attorney for the estate of Festus Corrothers, deceased, and in his representation as attorney of the heirs, legatees and devisees of the said Festus Corrothers.

A brief summary of the charge is that he violated the canons of ethics of the Bar Association of the state of Nebraska and his duties as attorney, and was guilty of fraudulent conduct in the following respects and particulars: That he misrepresented the quantity and value of the personal property; that he misrepresented the value of the real estate, all to the detriment of the estate and the parties represented; that he falsely represented that one Lauda Zimmer and one Effie L. Smith were taking steps to establish themselves as children of Festus Corrothers, the purpose of which was to induce heirs of the estate to sell their respective interests to one George Manning for less than the true value; that while thus representing the estate and heirs, legatees and devisees he became attorney for George Manning and illegally conspired with him to cause the said heirs, legatees and devisees to convey their interest in the estate to Manning for less than the true value; that he failed to disclose to his clients his representation of Manning; and that by and through his conduct and in fraud of his clients he obtained for Manning by purchase at a price much below actual value the interest of certain, in fact nearly all, of the parties having an interest in the distribution of the estate.

The respondent joined issue on this complaint by a denial of the allegations thereof charging him with misconduct.

The charges against the respondent in the complaint in this disciplinary action are the same as were made against him in eleven actions in the district court for Grant county, Nebraska, as grounds for vacation and setting aside transfers of interest in the estate of Festus Corrothers, deceased, which actions were tried in that court. Decrees were therein entered setting aside and vacating the transfers as fraudulent. Appeal was taken to this court where the decrees, except as to certain particulars having no bearing here, were affirmed. Respondent was a party to those actions. He made defense thereto and appeared as a witness therein. The cases are reported as *Zimmer v. Gudmund-*

sen, 142 Neb. 260, 5 N. W. 2d 707. The records made and the bills of exception in those cases were introduced in evidence and thus are before the court in this proceeding.

In the decrees in those cases the trial court found that all of the charges which were made against the respondent in the complaint which is now before the court had been sustained. On a review *de novo* of said actions this court in *Zimmer v. Gudmundsen, supra,* specifically, and in positive and unequivocal terms, sustained the findings and decrees of the district court. We shall not repeat the findings but refer only to the opinion in that case.

The relator contends that the findings and judgment of this court in the previous cases on the conduct of the respondent, which is the basis of this action, are conclusive here.

The pronouncements of this court appear to support the contention although not positively so where the finding is in a civil action. *State ex rel. Wright v. Sowards,* 134 Neb. 159, 278 N. W. 148. In *State ex rel. Spillman v. Priest,* 118 Neb. 47, 223 N. W. 635, which was a disciplinary action, this court said: "In a disbarment proceeding, where the specification alleges that an attorney was guilty of unprofessional conduct, violated his oath as an attorney and betrayed the trust imposed on him, to the detriment of his client, in failing to account for money collected by him for his client and entrusted to him by his client for the purpose of investment, the final judgment of the court in a suit for an accounting brought by the client against the said attorney is a final determination as to the rights of the attorney and client to the fund in question." See, also, *State ex rel. Sorensen v. Scoville,* 123 Neb. 457, 243 N. W. 269; *State ex rel. Sorensen v. Kennedy,* 124 Neb. 789, 248 N. W. 314; *State ex rel. Wright v. Sowards, supra.*

Conviction of a criminal offense involving moral turpitude is conclusive in a later disciplinary action. *State ex rel. Wright v. Sowards, supra.* The decisions cast doubt upon this as a rule with regard to civil actions since findings in a civil action need only be supported by a prepon-

derance of the evidence, whereas in a criminal action they must be sustained by evidence beyond a reasonable doubt. It would appear that the findings to sustain disbarment must be sustained by a higher degree of proof than that required in civil actions, yet falling short of the proof required to sustain a conviction in a criminal action. The most recent pronouncement on this question is found in *State ex rel. Nebraska State Bar Assn. v. Price,* 144 Neb. 542, 13 N. W. 2d 714, as follows:

"While a disbarment proceeding is essentially a civil proceeding and the recognized rules governing that practice are controlling, *State ex rel. Nebraska State Bar Assn. v. Bachelor,* 139 Neb. 253, 297 N. W. 138, however, the nature of the proof required is stated in *In re Newby,* 82 Neb. 235, 117 N. W. 691, and approved in *State ex rel. Nebraska State Bar Assn. v. Bachelor, supra*: ' "While the proceedings in this matter are not criminal in their nature, in view of the momentous consequences to the person charged, involving his means of obtaining a livelihood from his profession and his reputation as an honest and honorable man, the presumption of innocence applies, and his culpability must be established by at least a clear preponderance of the evidence. The court should be satisfied to a reasonable certainty that the charges are true." ' "

The doubt arising from this situation does not require resolution here since the record before us does not only establish the culpability of the respondent by a clear preponderance of the evidence but beyond a reasonable doubt. In fact a sufficient number of the charges of culpability contained in the complaint are admitted to justify a judgment of disbarment.

It is thought, however, that this question should no longer remain in doubt. It is therefore the holding of this court that the finding in a civil action that an attorney at law has been guilty of conduct justifying disbarment is not conclusive on the same question when presented for determination in an action for disbarment; that notwithstanding the finding in the civil action the culpability of the at-

torney must be established in the disbarment action by a clear preponderance of the evidence. For this purpose the evidence taken at the trial of the civil action and all other competent evidence is admissible.

On the hearing before the referee a considerable amount of evidence was adduced testifying to the good repute of respondent in his home community and in the area where he carries on his professional activities but we find in this nothing which would take away from the enormity of the misdeeds pleaded and proved and nothing which should mitigate the consequences thereof to him.

It may well be said that the reputation of a man in his community is usually a good indication of character but this is not always so. Evildoers, unless they be callous indeed, do not parade their misdeeds.

Finally, it is contended by the respondent that this court is without jurisdiction to consider the exceptions of the relator to the report of the referee since they were not filed within the time provided by rule VIII of the Rules for Disciplinary Proceedings of this court.

An examination of the rule, which is the following, discloses that it in no wise affects the jurisdiction of this court to review the report of the referee or to otherwise examine the record and the proceedings: "Within 10 days after the filing of such report, either party may file written exceptions to such report. If no such exceptions are filed, the court in its discretion may consider the findings final and conclusive, and on motion shall enter such order as the evidence and law require."

The rule empowers the court, in its discretion, to consider the findings conclusive but does not require that this shall be done.

On the record, it is the finding of this court that the charges in the complaint against the respondent have been sustained. It is a further finding of the court that the conduct proved against the respondent disqualifies him for continuance as a member of the bar of the state of Nebraska. Accordingly his order of admission to the bar of the

state is annulled, and his name is ordered stricken from the roll of attorneys and counselors at law.

JUDGMENT OF DISBARMENT.

CORDELIA E. INGRAHAM, APPELLANT, V. STELLA INGRAHAM ET AL., APPELLEES.

16 N. W. 2d 445

FILED NOVEMBER 16, 1944. No. 31801.

1. Wills. In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law.
2. ———. The creation by will of a vested interest in real estate defeasible upon the occurrence of an expressed contingency is not legally objectionable and is valid and enforceable.

APPEAL from the district court for Custer county: ELDRIDGE G. REED, JUDGE. *Reversed, with directions.*

Ross G. Moore, for appellant.

Evans & Lee and *Miles N. Lee*, guardian *ad litem*, *contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

YEAGER, J.

This is an action instituted in the district court for Custer county, Nebraska, by Cordelia E. Ingraham, plaintiff, appellant here, against Stella Ingraham and others, defendants, appellees here, to have the last will and testament of Alonzo F. Ingraham, deceased, construed and to quiet title in plaintiff to certain real estate.

At the conclusion of the trial the district court construed the will contrary to the contention of plaintiff and decreed that the defendants had a fee simple title by inheritance to an undivided one-half interest in the real estate involved. It is from this decree that the plaintiff has appealed.

The facts necessary to be set forth for a determination

of the issues presented are the following: Alonzo F. Ingraham on the 11th day of August, 1932, in due form, executed his last will and testament. The following are the parts of the will pertinent here:

"Fifth: I give devise and bequeath a life use in the remainder of my real estate to my beloved wife, Susan M. Ingraham. I own real estate in Custer County, Nebr. and in Virginia and my beloved wife, Susan M. Ingraham is to collect and receive all rents and royalties from same. From these receipts she is to pay all taxes and insurance on all properties.

"At her death all the real estate included in Item Five is to be divided share and share alike between my beloved daughter, Cordelia E. Ingraham and my beloved son, Fred A. Ingraham. Should either of my children pass away before my beloved wife, Susan M. Ingraham then all of the real estate included in Item Five would go to the remaining heir."

At the time of the making of the will he had only three heirs at law, namely, Susan M. Ingraham, wife, Cordelia E. Ingraham, daughter, and Fred A. Ingraham, son. This testator died March 19, 1933. At that time all three of the named heirs were living. On January 19, 1938, Fred A. Ingraham died leaving Stella Ingraham, widow, and seven children, as his heirs at law, all of whom are defendants and appellees herein. Thereafter on July 1, 1939, Susan M. Ingraham, widow of Alonzo F. Ingraham, died. Cordelia E. Ingraham was still living.

Cordelia E. Ingraham claimed in her petition and contends here that by the terms of the quoted portion of the will she is entitled to all of the real estate therein referred to and should have title thereto quieted by decree of court. Appellees contend, and the trial court decreed, that the following from the quoted portion of the will was of no force and had no legal effect whatsoever: "Should either of my children pass away before my beloved wife, Susan M. Ingraham then all of the real estate included in Item Five would go to the remaining heir." The court further decreed

that Cordelia E. Ingraham and Fred A. Ingraham each acquired a fee simple title to one-half of the real estate involved.

There is but one issue for determination in this case and that is, what did the testator intend by the second paragraph of the quoted portion. Specifically, we are required to ascertain the meaning of the words "would" and "remaining heir" in the last sentence thereof.

In the ascertainment of the intent of a testator in the making of a will, courts are to be guided by the following rule: "In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law." *Martens v. Sachs*, 138 Neb. 678, 294 N. W. 426; *In re Estate of Pfost*, 139 Neb. 784, 298 N. W. 739. See, also, *Salmons v. Salmons*, 142 Neb. 66, 74, 5 N. W. 2d 123, 8 N. W. 2d 517; *Hulse v. Tanner*, 142 Neb. 406, 6 N. W. 2d 618.

With this rule in mind we find no difficulty in arriving at the evident meaning of the words "remaining heir." Obviously at the time of making his will the testator knew his heirs and made it with a conscious knowledge that he had but three. He contemplated a situation wherein one child, an heir, might die before the widow. If such a situation arose then with the widow's passing there would be but one heir remaining.

For at least one other reason it seems clear that he did not lack intent of specific disposition. He used the term "heir" in its singular sense, meaning of course that the real estate should pass to one person.

With regard to the word "would" we are of the opinion, and accordingly hold, that in its use the testator intended that it should carry the force of the word "shall" if used at the same point in the context. The use of the word in any other sense would require us to say that the sentence involved no intent or purpose on the part of the testator; that all that it amounted to was a mistaken notion of the manner and method of descent and distribution in case of intestacy.

Clearly it was the intention of the testator that these portions of his will should be effective and should be given effect as directions in the disposition of his estate and that in case one child should die before the death of the widow the real estate in question should descend to the other.

To permit the real estate to thus pass is not violative of any rule of law. In fact the decisions sustain this character of disposition. Assuming that the will created a vested interest in Fred A. Ingraham, objection is not available that the will makes it defeasible. The creation by will of a vested interest in real estate defeasible upon the occurrence of an expressed contingency is not legally objectionable and is valid and enforceable. *Case v. Haggarty*, 91 Neb. 746, 137 N. W. 979; *Wilkins v. Rowan*, 107 Neb. 180, 185 N. W. 437; *Seybert v. Seybert*, 118 Neb. 246, 224 N. W. 1.

The decree of the district court is reversed and remanded with directions to enter a decree in the light of the opinion and in conformity with the prayer of plaintiff's petition. This contemplates, however, that the direction to decree quieting title shall extend only to real estate subject to the jurisdiction of the court.

REVERSED, WITH DIRECTIONS.

IN RE ESTATE OF CZAR C. JOHNSON. MARY ERMA DOUGLAS, APPELLEE, V. LENA JOHNSON, ADMINISTRATRIX, APPELLANT.

16 N. W. 2d 504

FILED NOVEMBER 24, 1944. No. 31686.

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.

2. **Physicians and Surgeons.** Where a patient's physician informs a surgeon of the diagnosis which the physician has made, and with the authority of the patient employs the surgeon to perform an operation which the physician deems advisable or necessary, the surgeon may rely upon the diagnosis of the physician and is not required to make an independent diagnosis before operating, in the absence of information or conditions which would put the surgeon upon inquiry as to the correctness of the physician's diagnosis and the advisability or necessity for the operation.
3. ———. Where, under the above conditions of employment, the surgeon, relying wholly upon the physician's diagnosis, operates, and during the course thereof discovers facts or conditions which suggest a reasonable basis for a different conclusion from that arrived at by the physician which, if true, would make the proposed operation inadvisable or unnecessary, and there exists no emergency requiring him to proceed, the surgeon is not negligent if he refrains from completing the operation until a further proper diagnosis based upon the newly discovered facts or conditions is made, and a proper course of action based thereon is determined.
4. ———. Likewise, where, under the above conditions of employment and before performing the operation, the surgeon discovers facts or conditions which appear to contradict the physician's diagnosis, or which cause the surgeon to question the correctness of the physician's diagnosis or to reach a different diagnosis, with the result that a different or no operative treatment is indicated, and there is no emergency, and the surgeon operates without making an additional and proper diagnosis to determine the questions presented and the action to be taken, the surgeon is negligent and liable to respond in damages for such injury and detriment to the patient as proximately follows.
5. **Trial.** Where instructions are not inconsistent or contradictory but, considered together, correctly state the law, the judgment will not be reversed because one does not state the entire law on the subject, unless it appear that the jury were misled.
6. ———. Where a party requests an instruction to the jury which contains several propositions of law, and one or more of the propositions fail to correctly state the law, it is not error for the court to refuse to give the instruction.

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

Peterson & Devoe, Kennedy, Holland, DeLacy & Svoboda and *Lester L. Dunn,* for appellant.

Max Kier, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

SIMMONS, C. J.

This is an action for malpractice. It was tried to a jury in the district court and resulted in a verdict for the plaintiff. Defendant appeals. We reverse the judgment of the district court and remand the case.

The matter was originally filed as a claim, in the form of a petition, against the estate of Dr. Czar C. Johnson, deceased. Objections were filed. The claim was allowed in the sum of $1,800. The administratrix appealed.

A petition was filed in the district court, wherein plaintiff alleged that Dr. Johnson, therein called the defendant, was a physician and surgeon engaged in the practice of his profession in Lincoln; that on and prior to March 2, 1938, plaintiff was under the care of her family physician, who diagnosed her ailment as "tumor or abscess of the uterus"; that plaintiff was in St. Elizabeth's Hospital in Lincoln, and there on or about March 1, or 2, defendant was called into consultation; that he spent ten or fifteen minutes in examination and said: "Oh yes, I know an abscess"; that the relation of physician and surgeon upon the part of the defendant to plaintiff "came about" and it was agreed that defendant should operate upon the plaintiff to remove said tumor or abscess; that he did so in said hospital on March 2, and without her knowledge or consent removed her appendix and "disregarding the tumor or abscess then present in plaintiff's body, failed and neglected to remove said tumor abscess"; that thereby plaintiff was caused to have a second operation with its resulting risk, pain, suffering and loss of time from work, "and in connection with said operation performed by defendant, to suffer humiliation affecting her health," all as a result of his negligence.

Plaintiff further alleged that in connection with the diagnosis and the operation performed, the defendant negligently failed and neglected to use and exercise the reasonable and ordinary care, skill and diligence that physicians and surgeons in the same line of practice in Lincoln and vicinity ordinarily exercise in that "(a) Defendant stated prior to the operation that he knew there was an abscess and during the operation failed and neglected to remove the abscess. (b) During the operation, and without the previous consent and without the knowledge of the plaintiff, the defendant removed her appendix. (c) During said operation defendant examined and handled the uterus and saw, or by the exercise of ordinary care and skill would have ascertained the condition of the uterus as it was, affected with said tumor or abscess. (d) During said operation and examination of the plaintiff, defendant, by the exercise of ordinary care and skill aforesaid, knew or would have ascertained the presence of said tumor or abscess as it was then in plaintiff's body, and would have removed same. (e) Immediately prior to said operation, and as a part of the diagnosis of plaintiff's case and physical condition, defendant knew, or by the exercise of ordinary care and skill aforesaid would have ascertained that plaintiff was then an unmarried woman, that her menses were regular, and that she was not pregnant, but defendant carelessly, negligently, wrongfully and improperly disregarded, or failed to ascertain such facts, and during and after said operation diagnosed plaintiff's condition as being pregnancy, four months or more advanced, which diagnosis was false. (f) Notwithstanding said false diagnosis and finding of pregnancy, and disregarding the fact that plaintiff was unmarried and was the patient of defendant, the defendant falsely, negligently, wrongfully and improperly stated to other persons than the plaintiff that plaintiff was pregnant as aforesaid, and also suggested that plaintiff's brother-in-law so advise plaintiff's sister and her parents, which was done, and because of the said false statement that plaintiff was pregnant, so made to her relatives and

others, plaintiff was greatly disturbed and distressed, and her physical and mental suffering thereby greatly enhanced and prolonged and her recovery retarded and her general health affected."

This last or sixth charge of negligence, on defendant's motion, was stricken from the petition by the trial court.

Plaintiff further alleged that because of the failure to remove said tumor or abscess and the carelessness and negligence of the defendant, as aforesaid, plaintiff suffered pain of body and mind, injury and damage, and was compelled to have a subsequent operation with the attendant risk, pain and expense, all to plaintiff's material damage as detailed in the petition.

Defendant by answer admitted that Dr. Johnson was a physician and surgeon as alleged; that he performed an operation on the plaintiff and denied generally.

At the close of all the evidence, defendant moved for a directed verdict on the ground that the evidence was insufficient to sustain a verdict for plaintiff. The motion was overruled. This is the first assignment of error.

We review the evidence in the light of the rule that "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.

The plaintiff in this action formerly was married and the mother of one child. She was divorced in 1936, and for some time prior to the events here recited was living with her parents in Lincoln. She became ill and in December, 1937, consulted Dr. Deppen, who specialized in internal medicine and diagnosis, for hemorrhage from the uterus. Thereafter plaintiff remained under the care of Dr. Deppen. He finally diagnosed her trouble as a pelvic tumor

and decided that an operation was necessary. Plaintiff entered the hospital on February 28, 1938, understanding that she was to be operated upon for the tumor. Dr. Deppen did not do surgery. With plaintiff's approval, Dr. Deppen selected Dr. Johnson, a surgeon, to perform the operation, believing him to be well qualified to do so. Dr. Deppen thought the tumor should be removed. He told Dr. Johnson of his diagnosis and referred the case to him for operation for the pelvic tumor. Dr. Deppen did not expect Dr. Johnson to make a "real preliminary examination."

Plaintiff testified that Dr. Johnson called upon her in the hospital on March 1, 1938. Plaintiff had never seen him and did not know him when he entered the room. He removed the sheet covering her body, placed his hand upon her abdomen, put back the sheet and said: "We will operate for a tumor." The entire examination covered some two or three minutes. Plaintiff testified that he made no further examination or tests and took no history. However, the "summary" record, signed by Dr. Johnson and offered by plaintiff, under title of "Chief Complaint" showed the following: "Severe pain pelvis. Vaginal discharge. Occasionally blood in discharge. Unable to work. Constipated has had no regular normal flow for several months"; under "Onset and Course" the following: "Has had discharge for several months. Bartholin gland abscess opened and drained. Last two weeks increased pelvic pain with increased flow at periods and considerable discharge"; and under "Physical Examination" the following: "Abdomen: Upper tympanitic. Lower—rigid and painful in rt. lower quadrant. Rounded mass, mid line, reaching nearly the umbilicus. Considerable vaginal discharge. No Blood." The summary further shows an entry that plaintiff was married, divorced and the mother of *three* children. Where or how this information was gathered, or when Dr. Johnson made the entries, is not disclosed. The language quoted appears above Dr. Johnson's signature.

Dr. Johnson operated on the plaintiff the following morning. The "Record of the Operation" signed by Dr. Johnson

and offered by plaintiff, showed a "Preoperative" diagnosis of "Appendicitis sub-acute. Pregnancy? Pelvic adnexal disease". His "Postoperative Diagnosis" entry was "Ditto" written under "Pelvic adnexal disease", followed by "Pregnancy—4 mo. Appendicitis s.a." His "Gross Pathology" entry was "Pregnant uterus 4 mo. appendix—deeply injected adherent to rt. ovary region." It further shows "Operation" followed in writing by "Appendectomy." The "Summary" record, referred to above, showed under "Preliminary Diagnosis" the same entries above recited and under "Final Diagnosis" was recited "Appendix sub acute. Pregnancy 4 to 4½ mos. Pelvic adnexal dis." and following the printed words "Indications for Operation" was the entry "Appendix acute. Pelvic adnexal disease. Pregnancy (?) suspected."

Dr. Deppen was not present at the operation. Dr. Johnson removed the appendix. He did not remove the uterus. Shortly after the operation he advised plaintiff's sister that plaintiff was pregnant. Two weeks later he, in the presence of Dr. Deppen, advised the plaintiff that he thought her pregnant. This seems to be the last connection that Dr. Johnson had with the case.

Dr. Deppen on March 15 had a Friedman test made by the hospital staff. This test is the one ordinarily used to aid in determining pregnancy. There was a positive reaction, i. e., it indicated pregnancy. Plaintiff left the hospital at the end of three weeks.

Plaintiff had some irregularity in her menses, and excessive flow and pain when they occurred. She was flowing at the time of the operation on March 2. Following the operation by Dr. Johnson, she continued to have pain and hemorrhages. On March 28 Dr. Deppen referred plaintiff to Dr. Harvey, a specialist in obstetrics and gynecology. He examined her over a period of about three weeks. He knew of the controversy that had arisen as to the cause of plaintiff's illness. He applied many tests. The Friedman test was made and the reaction was negative, i. e., a pregnancy was not indicated. Dr. Harvey, after a series of ex-

aminations, was not certain as to whether or not there was a tumor in the uterus or a fœtus. He thought it a pregnancy. He decided to wait and to apply other tests, i. e., a second Friedman, and also time, on the theory that if there were a pregnancy and a live fœtus, growth would show that fact. The uterus did not increase in size. The second Friedman test was also negative. The hemorrhages increased. Dr. Harvey decided an operation was necessary. When the abdomen was opened, the uterus on visual examination did not contract on stimulation, and was "paler" than usual for a pregnant uterus. This indicated a tumor. He was confident that if a pregnancy, it was not a live fœtus. He determined that in any event the removal of the uterus was necessary to save plaintiff's life and he completed the operation.

The pathologist who examined the uterus in the laboratory found that it had "the appearance and consistency of a pregnant uterus." The visible outside did not disclose the cause of the enlargement. It was an "inside" tumor. That was only revealed when the uterus was opened and the tumor on the inside definitely appeared. Dr. Harvey then knew positively for the first time that a pregnancy did not exist, and he was "relieved" to have his diagnosis confirmed. Thereafter plaintiff made a normal and complete recovery.

Due to Dr. Johnson's death, this case, of necessity, has been submitted without the benefit of his evidence, save the written record he made. It is clear that he was employed to perform an operation upon the plaintiff for a pelvic tumor. It was understood between the plaintiff and Dr. Johnson, on the evening before the operation, that such an operation was to be performed. Sometime before the operation, he reached the diagnosis of a subacute appendix, pelvic adnexal disease and a suspected pregnancy. The record does not show upon what he based that diagnosis, other than the entries hereinbefore set out. Neither does the record show where he received that information, except what he observed during the physical examination he gave the plain-

tiff on the evening before the operation. Dr. Deppen does not testify that he made any such diagnosis. It does not appear that Dr. Johnson advised Dr. Deppen of his diagnosis. He did not advise the plaintiff of it. Although defendant strenuously argues that Dr. Johnson operated for a pelvic tumor, it is noted that he did not make reference to "pelvic tumor" in either the pre- or postoperative diagnosis. He did not secure the consent of Dr. Deppen or the plaintiff to operate for a diseased appendix. There was no emergency requiring an immediate operation. He operated. He found and removed the diseased appendix. He found what he believed to be a pregnant uterus. He did not remove it. A second operation was necessary to remove the pelvic tumor.

The expert testimony is that where a diagnosis of pelvic tumor is made and there is a suspected pregnancy, as there was here, several tests should be made, and that question determined before an operation is undertaken, and a failure to do that would be carelessness and negligence on the part of the surgeon. The expert evidence further is that ordinarily preoperative tests can determine whether or not a pregnancy exists; that there being no emergency and where the surgeon disagrees with the referring physician, and does not know what tests the referring physician has made, nor what they showed, he should make the tests and examination, or have them made and know the results before operating. It further appears that neither the Friedman test, nor menstruation, or the lack of it, or other tests mentioned are infallible. They are tests, however, which the surgeon should have made and taken into consideration in arriving at his ultimate conclusion.

Under these circmustances, was defendant liable to the plaintiff for the resulting damage?

The defendant here contends that Dr. Johnson was employed to operate on plaintiff for a pelvic tumor; that he did so; that he had a right to rely upon Dr. Deppen's diagnosis, did so, and accordingly is not liable, citing and relying upon the following: "But a physician is justified in

accepting as correct, and in acting upon, the diagnosis or preliminary examination of another physician of good repute who has sent the patient to him for a specified treatment, and is not negligent in failing to make an independent examination or diagnosis before administering such treatment." 41 Am. Jur. 209, sec. 92. The difficulty, however, is that the evidence does not support that contention. The evidence is sufficient to sustain a finding that Dr. Johnson did not accept Dr. Deppen's diagnosis. He made one of his own and acted upon it. The testimony of the experts is sufficient to sustain a finding that that diagnosis was not based upon commonly recognized and applied tests and examinations, and that he was negligent in operating before those tests and examinations had been made.

The rule is: "A patient is entitled to an ordinarily careful and thorough examination, such as the circumstances, the condition of the patient, and the physician's opportunities for examination will permit, and, while he does not insure the correctness of his diagnosis, a physician or surgeon is required to use reasonable skill and care in determining through diagnosis the condition of the patient and the nature of his ailment, and is liable for a failure, due to a want of the requisite skill or care, to diagnose correctly the nature of the ailment, with resulting injury or detriment to the patient." 48 C. J. 1125. See *Kimble v. Roeder*, 115 Neb. 589, 214 N. W. 1.

We have held that the "belief" which would excuse a surgeon from the consequences of an operation "must have been a well founded belief acquired in the exercise of due professional care and skill." *Johnson v. Winston*, 68 Neb. 425, 94 N. W. 607.

It has repeatedly been held that "there is a fundamental difference in malpractice cases between mere errors of judgment and negligence in previously collecting data essential to a proper conclusion, * * * thus, if he omits to inform himself, by proper examination, as to the facts and circumstances, and injury results, he is not relieved of liability for errors of judgment." 48 C. J. 1128. If injury

results therefrom, he is liable. Supplementing the cases cited in the text, see *Brewer v. Ring,* 177 N. C. 476, 99 S. E. 358; *Reed v. Church,* 175 Va. 284, 8 S. E. 2d 285; *Moulton v. Huckleberry,* 150 Or. 538, 46 Pac. 2d 589.

We have said: "Malpractice may consist in a lack of skill or care in making the diagnosis as well as in the treatment of the ailment." *Cook v. Moats,* 121 Neb. 769, 238 N. W. 529, 78 A. L. R. 694.

The language of the court in *Fortner v. Koch,* 272 Mich. 273, 261 N. W. 762, is as follows: "It is the duty of a physician or surgeon in diagnosing a case to use due diligence in ascertaining all available facts and collecting data essential to a proper diagnosis. The instant case, not being an emergency and the defendant not having used such diligence in availing himself of various methods of diagnosis for discovering the nature of the ailment as are practiced by physicians and surgeons of skill and learning in the community in which he practiced, he must be held liable for the damages due to his negligence."

The case of *Pilgrim v. Landham,* 63 Ga. App. 451, 11 S. E. 2d 420, principally relied on by the defendant here, is not *contra* to the above rules. There it was held that the expert surgeon had "the right to rely on the diagnosis of the family physician, and, *in the absence of anything warranting a contrary conclusion,* to perform the operation" and "Where the expert tells the patient in effect that he was relying on the family doctor's diagnosis that she had a tumor, and that he was going to give her treatment accordingly, the mere fact that the expert might have given the patient a slight examination from the outside, by feeling the stomach or abdomen and noticing the enlargement of the same, *and where there was nothing appearing to contradict the family physician's diagnosis,* and the slight examination of the expert rather confirmed the family physician's opinion than otherwise, the expert was justified in relying on the judgment of the family doctor." (Emphasis supplied.) Here it is obvious that Dr. Johnson did discover symptoms that contradicted Dr. Deppen's diagnosis.

Without further discussing the authorities, we think the following rules are amply sustained by reason and the adjudicated cases.

Where a patient's physician informs a surgeon of the diagnosis which the physician has made, and with the authority of the patient employs the surgeon to perform an operation which the physician deems advisable or necessary, the surgeon may rely upon the diagnosis of the physician and is not required to make an independent diagnosis before operating, in the absence of information or conditions which would put the surgeon upon inquiry as to the correctness of the physician's diagnosis and the advisability or necessity for the operation.

Where, under the above conditions of employment, the surgeon, relying wholly upon the physician's diagnosis, operates, and during the course thereof discovers facts or conditions which suggest a reasonable basis for a different conclusion from that arrived at by the physician which, if true, would make the proposed operation inadvisable or unnecessary, and there exists no emergency requiring him to proceed, the surgeon is not negligent if he refrains from completing the operation until a further proper diagnosis based upon the newly dicovered facts or conditions is made, and a proper course of action based thereon is determined.

Likewise, where, under the above conditions of employment, and before performing the operation, the surgeon discovers facts or conditions which appear to contradict the physician's diagnosis, or which cause the surgeon to question the correctness of the physician's diagnosis or to reach a different diagnosis, with the result that a different or no operative treatment is indicated, and there is no emergency, and the surgeon operates without making an additional and proper diagnosis to determine the questions presented and the action to be taken, the surgeon is negligent and liable to respond in damages for such injury and detriment to the patient as proximately follows.

The trial court did not err in refusing to direct a verdict for the defendant.

Defendant's assignment No. 2 goes to the following situation. It will be remembered that paragraph (f) of plaintiff's allegations was striken from the petition. In her general allegations, plaintiff had alleged that "in connection with said operation" plaintiff had been caused "to suffer humiliation affecting her health." The trial court in his instruction No. 1 told the jury of that allegation. The plaintiff testified, over the objection of the defendant, that two weeks after the operation she learned that Dr. Johnson claimed she was pregnant and that it embarrassed her and made her ill. The assignment does not go to the admission of the evidence, but to the instruction. The trial court at the request of the defendant specifically instructed the jury that they should allow the plaintiff nothing for any embarrassment or mental suffering, or any effect on her health resulting from any statements Dr. Johnson may have made about his diagnosis of pregnancy. We do not find that prejudicial error occurred in the matter about which complaint is made.

Assignment No. 3. The trial court in instruction No. 3 instructed the jury in part that before the plaintiff could recover, she must establish by a preponderance of the evidence that Dr. Johnson was negligent "in some particular as alleged in the petition." In instruction No. 1, the court repeated the allegation that "Defendant stated prior to the operation that he knew there was an abscess and during the operation failed and neglected to remove the abscess." It is the contention that there was no abscess and that the trial court submitted an issue to the jury on which there was no evidence. In instruction No. 1 the court referred to the plaintiff's allegation that her family physician had diagnosed her ailment "as a tumor or abscess of the uterus." In the same instruction the court refers to the allegation of the failure of Dr. Johnson to remove "said tumor." At several other points in the instructions he refers to "tumor or abscess." Defendant does not assign the other references to abscess as error. Plaintiff at eight points in her petition refers to "tumor or abscess," twice to "tumor ab-

scess," and three times to "abscess." Defendant did not move to clarify the allegations. True, she had a tumor—but throughout the words are used interchangeably. The evidence relates to a tumor. We are unable to see how the jury were misled and accordingly, if error, it is held to be without prejudice.

Assignment No. 4. The trial court in his instruction No. 1 set out plaintiff's allegation of negligence that "During the operation, and without the previous consent and without the knowledge of the plaintiff, the defendant (Dr. Johnson) removed her appendix." In his instruction No. 3 he advised the jury of plaintiff's burden of proving that Dr. Johnson was "negligent in his treatment of the plaintiff in *some particular* as alleged in the petition," and that "If plaintiff has proved the above propositions by a preponderance of the evidence and that the *one or more* of them was the proximate cause of said damage to the plaintiff, then and in that case you will find for the plaintiff." (Emphasis supplied.) There is no evidence that plaintiff consented to the removal of her appendix or that it was done with her knowledge. The evidence is all to the contrary. The evidence of Dr. Deppen, however, is that Dr. Johnson, finding the condition of the appendix as he did, should have removed it, and it was right that he did. There is no evidence to the contrary. Moreover, there is no evidence that the removal of the appendix in any wise caused any of the damage for which plaintiff sought to recover. That issue should not have been submitted to the jury. There is no way by which it can be determined here what, if any, part of the verdict was given based upon the appendix removal issue. We deem the error to be prejudicial.

Assignment No. 5. In like manner the trial court submitted the allegation of negligence to the jury that "During said operation defendant (Dr. Johnson) examined and handled the uterus and saw, or by the exercise of ordinary care and skill would have ascertained the condition of the uterus as it was, affected with said tumor or abscess." We find no evidence that Dr. Johnson "handled the uterus."

Neither is there evidence that *after* he had exposed the uterus, he could "by the exercise of ordinary care and skill" have ascertained that the uterus was affected with a tumor. The test of stimulation that could then have been made with the uterus in place was admittedly inconclusive. The evidence of plaintiff's experts, however, was that to make a definite diagnosis after the uterus was exposed would have required that it be opened, as was done in the laboratory, and that that could not be done in place without grave danger to the plaintiff. When he had proceeded that far, Dr. Johnson was confronted with either removing a uterus which he believed contained a fœtus, with the resulting death of the fœtus if alive, and the sterility of the plaintiff, or leaving the uterus in place. He elected not to proceed. The expert witnesses of plaintiff do not indicate other than that he proceeded in the exercise of a proper professional judgment at that time. The case of *Kimble v. Roeder, supra,* relied upon by plaintiff here was one where an exploratory operation was properly made, and evidence of a failure to use ordinary care and skill in making a diagnosis *after* exposing a kidney, and in removing it before that diagnosis was made. The distinction is obvious. We are of the opinion that the trial court erred in submitting this instruction to the jury, and that it was prejudicial.

Assignment No. 6. In like manner the trial court submitted the allegation of negligence to the jury that "During said operation and examination of the plaintiff, defendant, by the exercise of ordinary care and skill aforesaid, knew or would have ascertained the presence of said tumor or abscess as it was then in plaintiff's body, and would have removed same." Defendant submits that this instruction is erroneous for the same reason as that discussed in assignment No. 5. We agree only in so far as it relates to "during said operation."

Assignment No. 7. This assignment is that the trial court erred in submitting ground (e) of plaintiff's allegations of negligence to the jury "on the theory that Dr. Johnson negligently failed before the operation to find out

that plaintiff was not pregnant." This matter has been discussed at length in considering the motion for a directed verdict, and need not be discussed here. It was not error.

Assignment No. 8. The trial court in instruction No. 2 "summarized" the plaintiff's claim as follows: "Plaintiff claims that the physician and surgeon was careless and negligent in advising an operation without sufficient examination and in performing said operation improperly, and that said negligence and carelessness was the direct and proximate cause of plaintiff's damages." Dr. Johnson did not advise an operation. He performed one and, according to the evidence, without sufficient examination and diagnosis. The instruction refers to the "physician and surgeon" who it is claimed "was careless and negligent in advising an operation." Dr. Deppen advised the operation. He was not a party to the action, nor is it claimed that he was negligent or careless. The effect of the instruction was to wipe out the specific recital of plaintiff's claims and to submit to the jury "to consider" an inaccurate and misleading summary. The instruction should not have been given and was in our opinion prejudicial to the defendant.

Assignments Nos. 9, 10 and 11. The defendant complains by assignment No. 9 that in instruction No. 3 the court undertook to set out the degree of care which Dr. Johnson was required to exercise and in doing so left out the element of care that physicians "in the same general line of practice" have and practice. However, in instruction No. 3½ the court said: "You are instructed that physicians and surgeons are required only to use that degree of skill and diligence which other physicians in the same general neighborhood and in the same school or same general line of practice ordinarily use, and if you find that plaintiff has failed to prove by a preponderance of the evidence that Dr. Johnson did not use that degree of skill and diligence, then your verdict must be for the defendant." This instruction is almost verbatim in accord with one requested by the defendant and contains the element which defendant asserts was missing in instruction No. 3. By

assignment No. 10 complaint is made that in instruction No. 3 Dr. Johnson was held to that degree of care that "reasonably" competent physicians and surgeons use and that the rule does not go that far. However, in instruction No. 3½, quoted above, he was held to that degree of care which "other" physicians use. By assignment No. 11, defendant complains that in instruction No. 4 the court again left out the element of "same general line of practice." The court did use the expression "and his school," which is used in instruction No. 3½ in the alternative for "same general line of practice," which instruction No. 3½, the defendant advises us, "is probably a correct statement of the law." Further complaint is made that in the last sentence of the instruction, the court said it would be negligence to fail "to exercise such ordinary knowledge, skill, care and judgment as reasonably might be expected from members of the same profession practicing in this locality." This overlooks the previous sentence that it was the physician's obligation to exercise that knowledge, etc., "ordinarily possessed and exercised by doctors of his profession and his school in the same locality in like cases and under like circumstances." There was no dispute in the evidence involving these niceties of distinction and expression. The rule, recently restated, is: "Where instructions are not inconsistent or contradictory but, considered together, correctly state the law, the judgment will not be reversed because one does not state the entire law on the subject, unless it appear that the jury were misled." *Schram v. Lowden,* 144 Neb. 851, 15 N. W. 2d 42. We find no prejudicial error in the instructions here discussed.

Assignment No. 12. The trial court gave instruction No. 5 as follows: "You are instructed that even if a physician or surgeon has used his best judgment in treating a patient, he is not relieved of a charge of negligence and carelessness against him when it appears that *such judgment as he possessed and used was not such judgment as is possessed and used by physicians and surgeons of ordinary learning, skill and ability practicing in the same commu-*

nity where it is alleged that the negligence and carelessness occurred, or in similar communities." The defendant objects to that part of the instruction which is emphasized. The argument is that Dr. Johnson should be relieved if his error was the result of an honest mistake where he used his best judgment, and it is asserted that "there is no expert testimony that the judgment of the ordinary physician or surgeon would have been contrary to that exercised by Dr. Johnson." On the contrary, as has been pointed out in our discussions of assignment No. 1, the testimony of the experts is that when a physician or surgeon suspects pregnancy in connection with a diagnosis of pelvic tumor, he should not operate until the established tests and examinations have been made to determine whether or not a pregnancy exists, and that he would be careless and negligent if he did not do so. This question has been fully discussed heretofore in this opinion. We see no merit in the assignment.

Assignment No. 13. In instruction No. 6 the court instructed the jury that the terms "careless and negligent" or "carelessness and negligence" do not imply a lack of skill or capacity "but simply a disregard of the ordinary prudence and care which one has a right to expect from persons holding themselves out as physicians and surgeons." It is argued that the "one has a right to expect" phrase leaves each juror to apply his own yardstick. The expert witnesses advised the jury as to what that yardstick was and as to the specific acts and failure to act that constituted carelessness and negligence on the part of Dr. Johnson. Taken in connection with the evidence and the other instructions, we find no prejudicial error in the instruction.

Assignment No. 14. By instruction No. 7 the court set out the elements of damage that they should allow if they found for the plaintiff. He said: "If the injuries impaired plaintiff's power to earn money, such a sum as will compensate her for such a period of time as she suffered loss of her earning power." Defendant contends that the court should have limited the time of her recovery for loss of earning

power to the period between the first and second operation. The evidence is that she was operated by Dr. Johnson on March 2; that she was continuously ill until operated by Dr. Harvey on April 16. Thereafter her recovery was normal and she returned to work in November. There is no evidence that her recovery was in any way retarded by the first operation. Under these circumstances the period of her convalescence is not chargeable to Dr. Johnson. His operation may have delayed the beginning of the period for not to exceed the weeks between the two operations, but it did not extend the running of the period. The jury may well have considered under this instruction that they had the right to allow damages for loss of earning power until her recovery was complete. Under the circumstances, we consider the trial court erred in not limiting the period as herein indicated.

Assignment No. 15. The defendant requested an instruction, the effect of which was to require the jury to find for the defendant, unless they found, among other things, that Dr. Johnson's decision not to remove the uterus after it was exposed was not "a proper one under the circumstances." From what has been said heretofore, it is obvious that the court did not err in refusing so to limit plaintiff's right of recovery.

Assignment No. 16. The defendant requested an instruction, which, among other things, would have advised the jury that "If you believe that the error was so gross as to be inconsistent with ordinary care and skill, still the plaintiff cannot recover, unless you further find that a surgeon using that degree of skill and diligence which other physicians in this community and in the same general line of practice ordinarily use would have determined that immediate removal of the tumor was necessary." Here the defendant again attempted to restrict plaintiff's basis of recovery. For the reasons heretofore given, the trial court did not err in refusing to give the requested instruction.

Assignment No. 17. Defendant requested an instruction that, among other things, would have denied plaintiff a re-

covery unless the jury found that, at the time of the operation, there was no "reasonable doubt" but that the uterus should be immediately removed. Obviously, such an instruction should not have been given.

Assignment No. 18. Defendant requested an instruction leading off with the proposition that "it conclusively appears that the mere failure of Dr. Johnson to diagnose a tumor and remove it in and of itself caused no damage" (we do not so read the evidence); that the alleged negligence "consisted of physical non-feasance," that is, the defendant "did no physical act which affected plaintiff's condition" (he performed a major abdominal operation); that "the negligence, if any, was the failure to diagnose and advise" (the negligence proved was the failure properly to diagnose before operating); and that it was not sufficient to show that another operation was made necessary, but that the plaintiff must go further and show such medical certainty as to the existence of the tumor at the time of the first operation that a surgeon possessed with the proper qualifications would have immediately removed the uterus. This instruction, as would the others requested, would have relieved Dr. Johnson of the liability that attached by reason of an operation based upon insufficient preoperative diagnosis. The court did not err in refusing to give the proposed instruction.

Assignment No. 19. Defendant offered an instruction which was "an effort on our part to cover the whole case in one instruction." It contained several propositions which we have heretofore discussed and held should not have been submitted to the jury. In addition, it contained an instruction that "the most that plaintiff can recover in this case in any event is reasonable compensation for such pain, suffering and expense as was occasioned by the second operation." In Assignment No. 14, the defendant says: "The only thing that plaintiff could recover for in this action (outside of pain and suffering, etc.), was delay. Her return to work was delayed to the extent of the period between her first operation and her second operation. Her

recovery for lost time should have been limited to a period of that length, * * * ." It is obvious that the instruction conflicts with defendant's own view as to the elements that enter into plaintiff's damages once a right of recovery is established. By combining several propositions of law in one instruction, defendant comes fairly within the rule that "Where one of several instructions asked by a party fails to correctly state the law, error can not be predicated upon an exception taken to the refusal of the court to give the instructions as a whole." *Strong v. Combs*, 68 Neb. 315, 94 N. W. 149.

For the reasons herein given, the judgment of the trial court is reversed, and the cause remanded for further proceedings.

REVERSED.

WILLARD ANDERSON, APPELLEE, V. CLAY COUNTY MUTUAL INSURANCE COMPANY, APPELLANT.
16 N. W. 2d 481

FILED NOVEMBER 24, 1944. No. 31825.

Insurance. A person having title to real estate not shared by any one else and to which no condition is attached, even if the title is voidable, is the sole and unconditional owner within the meaning of a fire insurance policy which provides that the insurance policy shall be void and unenforceable unless the insured is the sole and unconditional owner of the real estate on which the insured property is situated.

APPEAL from the district court for Clay county: EDMUND P. NUSS, JUDGE. *Affirmed.*

D. B. Massie and *Robert B. Waring*, for appellant.

John E. Ray and *August C. Krebs, contra.*

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

YEAGER, J.

This is a suit at law in two causes of action by Willard Anderson, plaintiff and appellee, against Clay County Mutual Insurance Company, defendant and appellant. The first cause of action is for the value of personal property destroyed and damaged by fire, which personal property was insured by a policy of insurance issued to plaintiff by the defendant company. The second is for destruction and damage to buildings situated on real estate, the title to which was in plaintiff, occasioned by the same fire that destroyed the personal property. The buildings were also insured by the defendant company.

The action was tried to a jury. At the conclusion of the evidence a verdict was directed in favor of plaintiff on the two causes of action for $1,509.55. Verdict was accordingly returned and judgment was entered thereon. It is from this verdict and judgment that the defendant has appealed.

The appellant makes no contention on appeal that the amount of the verdict and judgment exceeds the value of the property destroyed. Its contention, as disclosed by the assignments of error and the discussion thereof, is that plaintiff is not entitled to recover against the defendant for the loss.

The first contention, which applies to both policies of insurance, is that plaintiff, in making his proofs of loss, in violation of the terms of the policy, failed and refused to disclose the origin or cause of the fire which caused the loss.

Assuming that in a proper case such failure or refusal would operate to avoid a right of recovery on a fire insurance policy, that assumption would avail nothing here. The record discloses that plaintiff did not know the origin of the fire at the time he made his proofs and he so stated. An eight-year-old child of plaintiff at one time said that he had not, and at another time that he had, set the fire. This was the only information in possession of plaintiff as to its cause or origin at the time proofs of loss were made. On this plaintiff cannot be charged with giving false, or withholding correct, information.

The other substantial contention of defendant is that by the terms of the policy plaintiff was entitled to recover for the buildings only if he was the sole and unconditional owner of the real estate, whereas he was not such sole and unconditional owner.

The facts are that the real estate in question was conveyed by Peter Hergenrother to plaintiff by warranty deed on March 21, 1941; that the insurance policy was issued to plaintiff under date of March 25, 1941; that the fire occurred July 28, 1941; that on March 28, 1941, a petition was filed in the county court of Clay county, Nebraska, asking for the appointment of a guardian for Peter Hergenrother, the grantor in the deed to plaintiff, on the ground that he was incompetent; that on April 12, 1941, a guardian was appointed; that on April 22, 1941, the guardian so appointed brought an action in the district court to set aside the deed of Hergenrother to plaintiff on the ground that Hergenrother was incompetent at the time the deed was executed; this action apparently was never tried; that on August 16, 1941, plaintiff and his wife reconveyed the real estate to Peter Hergenrother by warranty deed.

Upon these facts the defendant relies to sustain its contention that at the time of the application for and the issuance of the insurance policy plaintiff was not the owner of the real estate. The contention is without merit.

Under the undisputed evidence he was the sole and fee simple holder of the title to the real estate when the insurance policy was issued and so remained until the reconveyance thereof to Peter Hergenrother on August 16, 1941, and as such and within the meaning of the insurance policy was the sole and unconditional owner. This would be true even if the record disclosed that the title was subject to avoidance on account of defect therein but not rendering the deed absolutely void.

The case of *Miller v. Yorkshire Ins. Co.*, 237 Wis. 551, 297 N. W. 377, 133 A. L. R. 1341, is closely in point here on both facts and law. In that case Fannie Miller, in an application for fire insurance, represented, as plaintiff did

here, that she was the sole and unconditional owner of certain real estate. Prior even to the application for insurance, action had been instituted to invalidate the deed. It was conceded that the title of Fannie Miller was open to successful attack by parties interested in the real estate. The court held under those facts that within the meaning of fire insurance contracts Fannie Miller was the sole and unconditional owner of the real estate. In the opinion it is stated: "Although the title of the insured may be fatally defective, if no condition is annexed to his title and no one shares the title with him, he is a sole and unconditional owner within the meaning of that clause of the standard fire insurance policy. * * * No one shared the ownership with her and her ownership was subject to no condition."

Another case in point is *National Union Fire Ins. Co. v. Short*, 32 Fed. 2d 631, 64 A. L. R. 753. In this case I. W. Short transferred his interest in real estate to his wife. The wife obtained fire insurance on an application wherein she claimed to be the sole and unconditional owner of the real estate. There was a fire loss but before the fire a trustee in bankruptcy brought suit to set aside the deed on the ground that it was in fraud of creditors. Judgment was rendered setting aside the deed at the instance of the trustee. The court said: "There was no other or outstanding *title* except as possessed by her. There was no other *owner* in whole or in part."

To like effect, but lacking the clarity of statement of *Miller v. Yorkshire Ins. Co., supra,* and *National Union Fire Ins. Co. v. Short, supra,* are the following cases from this jurisdiction: *German Ins. Co. v. Hyman,* 34 Neb. 704, 52 N. W. 401; *Rochester Loan & Banking Co. v. Liberty Ins. Co.,* 44 Neb. 537, 62 N. W. 877.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

CHAPPELL, J., participating on briefs.

FLORENCE WESSEL, APPELLANT, V. CITY OF LINCOLN, APPELLEE

16 N. W. 2d 476

FILED NOVEMBER 24, 1944. No. 31834.

1. **Appeal and Error.** In reviewing a directed verdict for the defendant at the close of all the evidence this court will assume the existence of every material fact favorable to the plaintiff, which competent evidence tends to establish, and give the plaintiff the benefit of every logical inference therefrom.
2. **Statutes: CONSTITUTIONAL LAW.** The fundamental principle of statutory construction is to ascertain the intent of the legislature, and to discover that intent from the language of the act itself. It is not the court's duty, nor is it within its province, to read a meaning into a statute that is not warranted by the legislative language.
3. **Constitutional Law: STATUTES.** Where the language of the statute is unambiguous there is no necessity for construction, and courts cannot change the clear language of a statute.
4. **Municipal Corporations.** Under the provisions of section 2439, Comp. St. 1922, the period of 21 years of service, after which a fireman may retire and go upon the retired list and receive pension benefits, means 21 years during which he actually performed the labor and duties of a fireman.
5. **Evidence.** A verdict may not rest on mere conjecture or speculation.
6. ———. Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony.
7. ———. The evidence of an expert is ordinarily sufficient to sustain a verdict, providing the facts upon which it is based have been established.
8. **New Trial.** Newly discovered evidence, if merely cumulative or impeaching or which probably would not change the result, does not require a new trial.

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

Merril R. Reller and *John McArthur*, for appellant.

Max Kier and *A. A. Whitworth*, *contra.*

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

WENKE, J.

This action was commenced in the district court for Lancaster county by Florence Wessel, widow of Edward Wessel, deceased, as plaintiff, against the city of Lincoln, as defendant, to recover a fireman's pension alleged due plaintiff as such widow under the provisions of the statutes applicable thereto. From an order sustaining defendant's motion for a directed verdict and the overruling of plaintiff's motion for a new trial, the plaintiff has appealed.

For the purpose of this opinion the plaintiff will be referred to as the widow, the defendant as the city and Edward Wessel, deceased, as Wessel.

The widow claims she is entitled to a fireman's pension under our statutes for the following reasons: First, because Wessel was a member of the city fire department for more than 21 years. Second, because Wessel suffered an accident and contracted a disease while on duty and performing services as a fireman which resulted in his death.

Sections 2439 to 2442, inclusive, Comp. St. 1922, are applicable. See *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N. W. 2d 613.

The appeal being taken from an order sustaining a motion for a directed verdict we will construe the evidence in accordance with the rule announced in *McNaught v. New York Life Ins. Co.*, 143 Neb. 220, 12 N. W. 2d 108: "This court, in reviewing such decision, will assume the existence of every material fact which the evidence on behalf of the plaintiff tends to establish, including the answers to the hypothetical questions by the doctors, and, in addition, give the plaintiff the benefit of the logical inferences therefrom. See *Zielinski v. Dolan*, 127 Neb. 153, 254 N. W. 695; *In re Estate of Skade*, 135 Neb. 712, 283 N. W. 851." Bearing in mind that circumstantial evidence is competent to prove a fact, see *Fonda v. Northwestern Public Service Co.*, 134 Neb. 430, 278 N. W. 836; *Markussen v. Mengedoht*, 132 Neb. 472, 272 N. W. 241.

Section 2439, Comp. St. 1922, provides in part as follows: "All metropolitan cities, and cities of the first class having a paid fire department, shall pension all firemen of the paid fire department, whenever such firemen shall have first *served* in such fire department for the period of twenty-one years, and shall elect to retire from *active service* and go upon the retired list." (Italics ours.)

The undisputed evidence shows that Wessel became a member of the city fire department on May 6, 1918, and actively performed his duties as such until May 26, 1938. He again reported for active duty on December 9, 1938, and performed his duties on December 9 and 11. On December 13, 1938, he had a stroke and never reported for active duty thereafter. He died on October 9, 1939. Unless the period from May 26, 1938, to December 9, 1938, and after December 13, 1938, until he died, can be added to the period he actively performed his duties, it is clear that Wessel did not perform 21 years of service.

It is the widow's contention that Wessel remained a member of the city fire department until his death and was given a fireman's funeral; that in January of 1937 the city required all of its firemen to be examined and Wessel was discovered to have a disease which required treatment; that the city requested and required him to take treatments therefor if he desired to stay on duty with the fire department; and that his subsequent inability to perform his duties after May 26, 1938, to December 9, 1938, and after December 13, 1938, to the date of his death, was due to the effect of the treatments taken. Therefore, this period of time should be added to that actively served in order to meet the 21-year requirement. Assuming, for the purpose of argument, that the evidence sustains these facts, could a verdict based thereon be sustained? We find that it could not.

The complete act covering pension benefits is sections 2439 to 2442, inclusive, Comp. St. 1922. Section 2440, Comp. St. 1922, is in part: "In case * * * death is caused by or is the result of injuries received while in the line of duty,

* * * ." In *Elliott v. City of Omaha*, 109 Neb. 478, 191 N. W. 653, we held the word "injuries" to include disease. Section 2441, Comp. St. 1922, provides in part: "In case any fireman * * * , shall become permanently and totally disabled from accident or other cause, while in the line of his duty, such fireman shall forthwith be placed upon the roll of pensioned fireman, * * * ."

In construing this act we should apply these principles:

"The fundamental principle of statutory construction is to ascertain the intent of the legislature, and to discover that intent from the language of the act itself. It is not the court's duty, nor is it within its province, to read a meaning into a statute that is not warranted by the legislative language. See *State v. School District*, 99 Neb. 338, 156 N. W. 641; *State v. City of Lincoln*, 101 Neb. 57, 162 N. W. 138." *Knox County v. Perry*, 142 Neb. 678, 7 N. W. 2d 475.

"It is the duty of the court to discover, if possible, the legislative intent from the language of the act. It is not the court's duty, nor is it within its province, to read a meaning into a statute that is not warranted by the legislative language." *State ex rel. Marrow v. City of Lincoln*, 101 Neb. 57, 162 N. W. 138.

" 'Where the language of the statute is unambiguous there is no necessity for construction, and courts cannot change the clear language of a statute.' *Stiles v. Board of Trustees of Police Pension Fund, supra* (281 Ill. 636, 118 N. E. 204)." *State ex rel. Herman v. City of Grand Island, ante*, p. 150, 15 N. W. 2d 341.

" * * * where the words of a statute are plain, direct and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice." *In re Estate of Robinson*, 138 Neb. 101, 292 N. W. 48.

We must accept the statutes as we find them and can permit no recovery which is not authorized by the act.

It is apparent that the purpose of the legislature was to create legislation to protect firemen while engaged in behalf of the public in this hazardous occupation. If a fire-

man becomes totally and permanently disabled from accident or other cause, while in the line of duty, he has recourse to pension benefits under section 2441, Comp. St. 1922. If he dies as the result of injuries, including disease, received while in the line of duty, he has recourse to benefits under section 2440, Comp. St. 1922. To complete the pension benefits the legislature provided in section 2439, Comp. St. 1922, that " * * * whenever such firemen shall have first served in such fire department for the period of twenty-one years, and shall elect to retire from active service and go upon the retired list" he shall be entitled to pension benefits. We think this provision is clear and unambiguous. The word "served" as here used means the act of serving, the labor performed or the duties required of a fireman. It means the active service from which the statute says he may elect to retire. The fireman must have been performing such duties for a period of 21 years before he is entitled to the pension benefits. It does not include any period of time while he is only a member of the fire department but not on active duty. If his inability to serve and subsequent death are from causes arising out of his duties then he has recourse under the other provisions of this act, but there is no provision whereby the period of any disability to serve can be added to the length of service which permits a fireman to retire. If the legislature intended to permit such time to be added they should have expressly so stated in the act. For a similar construction see *Rumetsch v. City of Oakland,* 135 Cal. App. 267, 26 Pac. 2d 677; *State ex rel. King v. Board of Trustees of Firemen's Pension Fund,* 192 Mo. App. 583, 184 S. W. 929.

The second proposition presents the question of whether or not, under section 2440, Comp. St. 1922, the evidence is sufficient to submit to the jury the question of Wessel's death being the result of a disease contracted while in the line of duty. We have often said that verdicts cannot be based solely on possibilities, conjecture or speculation. *Peabody v. Continental Life Ins. Co.,* 128 Neb. 23, 257 N. W. 482; *Securities Investment Corporation v. Krejci,* 132 Neb. 146, 271 N. W. 287.

The widow, in her brief, says that the hypothetical question asked Dr. McCarthy contains a concise statement of all the important facts brought out by her evidence. This question is as follows: "Q. Doctor, I am going to sak (ask) you a hypothetical question and I want you to assume the truth of all the statements in this question but I do not want you to assume any other facts which are not in the question: Edward Wessel was employed by the City of Lincoln on May 6, 1918 as a fireman on the regular City Fire Department and he was given this employment after taking a physical examination prescribed by the city; he worked regularly and was not known to miss any work on account of illness until the 28th day of May, 1938; from 1935 to 1938 he was stationed at the fire house at 10th and R Streets in Lincoln, Nebraska, known as No. 1, and his duties there included cleaning the toilet and urinal; and in doing this cleaning it was necessary for Mr. Wessel to place his hands in the toilet and urninal (urinal) whenever he cleaned them; that about August 15, 1936 Edward Wessel in some way sustained a deep scratch on the inner surface of the index finger of one hand and this scratch failed to heal in the usual way; a sore developed at the point of this scratch and this sore had the outward appearance of a chancre. In the late summer or early fall of 1936 Dr. B. Charles Pease, who is a regularly licensed physician, met Mr. Wessel on the street and looked at this sore and he observed that it had the appearance of a chancre. And about the same time Mr. Wessel developed a sore throat and it was inflamed; in December of 1936 all the firemen stationed in the engine house where Mr. Wessel was employed were required to take a medical examination and at that time it was learned that Mr. Wessel and several other firemen in this house were infected with syphilis. These other men customarily had used the toilet and urinal that it had been Mr. Wessel's duty to clean. After that Mr. Wessel was required to take a course of treatments which are of the type known as Bismuth treatments but from the time these treatments started Mr. Wessel's health got worse and in

May, 1938 he was unable to report for duty because of his health, but in December of 1938 he was able to report for duty for a few days and about December 13th he suffered a paralytic stroke of his left side, and it was on the index finger of his left hand where he had sustained the scratch and the sore appeared. Mr. Wessel never recovered; he eventually was removed to the state institution at Hastings and he died there on October 9, 1939. Up to the time of the sore appearing which appeared to be a chancre, had that appearance; it was not know (known), or at least no one was known to have observed any symptoms of syphilis in connection with Mr. Wessel and except for cleaning this toilet and urinal he was not known to have any other connection with a source of syphilis. Mr. Wessel was a man of regular habits, he had carried on normal marriage relations with his wife until his health gave way as stated in this question; neither his wife nor his two children contracted syphilis at any time and these two children appear normal in all respects; further, Mr. Wessel's genital organs at all times appeared normal. I will ask you to state whether, assuming all those facts are true, you have an opinion at (as) to the source of syphilis infection in Mr. Wessel?"

We have said that " * * * if a hypothetical question, calling for expert skill or knowledge, is so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, it will be sufficient. *Malcolm v. Evangelical Lutheran Hospital Ass'n*, 107 Neb. 101; *Landis & Schick v. Watts*, 82 Neb. 359; *Herpolsheimer v. Funke*, 1 Neb. (Unof.) 471." *Shotwell v. First Nat. Bank*, 127 Neb. 676, 256 N. W. 508. And that " 'Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses in the case, will be sufficient, provided the subject is one proper for expert testimony.' *Landis & Schick v. Watts*, 82 Neb. 359." *Jacobson v. Skinner Packing Co.*, 118 Neb. 711, 226 N. W. 321.

However, the hypothetical question states " * * * that

about August 15, 1936 Edward Wessel in some way sustained a *deep scratch* on the inner surface of the index finger of one hand and this *scratch* failed to heal in the usual way; * * * ." (Italics ours.) The only testimony as to the nature of the injury to Wessel's finger is question No. 73 and the answer thereto: "Q. Now do you remember any circumstance suring (during) the summer of 1936 wherein Mr. Wessel was injured and your attention was called to it? A. Yes, he hurt his finger on his left hand in his line of work down at the engine house." It is the undisputed testimony of the doctors that in order for syphilitic infection to enter the body at the point of injury there must be a break of the mucuous membrane or skin and without such a break there can be no entry.

We have said in *Ward v. Aetna Life Ins. Co.*, 91 Neb. 52, 135 N. W. 220: "The conjectural opinion of an expert, based solely on a hypothetical question not submitting all of the material facts, is insufficient to sustain a verdict." And in *McNaught v. New York Life Ins. Co., supra*: " * * * Such an expert opinion based upon assumed facts not supported by the evidence is of no value. * * * The evidence of experts is ordinarily sufficient to sustain a verdict, providing, of course, * * * the facts upon which it is based have been established.".

To say that a jury might, from the evidence as a whole, say that the injury or hurt to the finger resulted in a break in the skin through which the infection could have entered is leaving a material fact to their conjecture and speculation. If such were the fact it should have been proved.

If the facts are insufficient to submit to a jury then, of course, the answer of an expert to a hypothetical question, based on an erroneous assumption of a material fact not supported by the evidence and without which a recovery could not be sustained, would add no weight thereto.

With reference to the court's overruling of the motion for a new trial, in order to be error, it must appear that the new evidence is of so controlling a nature as to probably change the result of the former trial. If merely cumu-

lative or impeaching, it does not require a new trial. See *Williams v. Miles*, 73 Neb. 193, 102 N. W. 482, and *Miller v. Crosson*, 133 Neb. 892, 277 N. W. 796. From an examination of the showing made in connection with the motion we find the proposed evidence is only cumulative and impeaching. We do not think the court abused its discretion in overruling it. See *Miller v. Crosson, supra.*

AFFIRMED.

CHRIS YAKAL, APPELLEE, V. HENKLE & JOYCE HARDWARE COMPANY ET AL., APPELLANTS.
16 N. W. 2d 531

FILED DECEMBER 8, 1944. No. 31855.

Workmen's Compensation. To sustain an award in a workmen's compensation case, it is sufficient to show that an injury, resulting from an accident arising out of and in the course of the employment, and preexisting disease combined to produce disability.

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

Baylor, Tou Velle & Healey, for appellants.

George I. Craven and *Buschenfield & Leffler, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

SIMMONS, C. J.

This is an appeal from a judgment of the district court granting compensation to the plaintiff under the workmen's compensation act. The appeal presents the question as to whether or not a heart condition resulted from an accident arising out of and in the course of plaintiff's employment. We affirm the judgment of the trial court.

Plaintiff in his petition in the compensation court alleged that he was employed as a truck driver by the Henkle & Joyce Hardware Company; that on April 2, 1942, he re-

ceived personal injuries, arising out of and in the course of his employment, when struck in the chest by a roll of wire; and that the injury aggravated an asthmatic condition, and proximately caused pneumonia and a dilation of the heart.

The defendants (the employer and its insurance carrier) answered, admitting the employment, denying that the plaintiff had sustained injuries entitling him to compensation under the workmen's compensation act, and alleging that plaintiff's disability was due wholly to natural causes and disease.

Trial was had before one judge of the compensation court. Plaintiff offered evidence as to his accident and wages. He offered no evidence that his disability was due to or traceable to his accident. Defendant cross-examined the plaintiff, and offered no other testimony. The hearing resulted in an order of dismissal.

A rehearing was had before the compensation court. The compensation court, among other things, found that plaintiff had received a blow from a roll of wire on the lower part of his chest, which "lighted up and activated dormant physical ailments," for which he was entitled to compensation benefits. An award was entered granting compensation to plaintiff.

From that order, defendants appealed to the district court for Lancaster county. The district court affirmed the award of the compensation court. Defendants appeal here from that judgment.

Plaintiff, a man 46 years of age, had worked for the defendant hardware company 19 years prior to the date of the accident on April 2, 1942. He had been a steady and a good workman. His work consisted of heavy manual labor, and he was not trained nor educated for other than that type of work.

In 1918 he had had a severe attack of influenza. Some years later he had an appendectomy performed. Sometime in the middle thirties, he had pain in his legs. He, at different times, had his tonsils and teeth removed and that

pain cleared. Following those operations he lost little time from work and during the years 1938 and 1939 lost no time from his work. He lost a week in January, 1940. The 1941 work record was not shown.

Plaintiff's fellow employees testified that he was a "heavy breather," and coughed frequently, noticeably in the winter. Plaintiff testified that in the wintertime he had "colds" resulting from alternating periods of work indoors and outdoors, and that during those periods he coughed and was short of breath.

About a year before the accident, plaintiff had a period of severe headaches for three weeks, occurring at night and requiring that he sit up to secure relief. He had no medical attention and these headaches ceased after three weeks. A similar period of headaches began in the latter part of March, 1942, and after a week plaintiff, on March 28, 1942, stopped working, and went to an eye, ear, nose and throat specialist. He was at that time in discomfort with a severe pain in the back of the head and neck. The specialist examined plaintiff with the stethoscope "a little bit," sent him to the hospital for X-ray pictures and instructed him to go home, go to bed and rest. On March 31 he again was treated by this specialist, his left maxillary sinus punctured and irrigated, and practically nothing found. The plaintiff was sent home to bed and told to "take it easy." He did so. The nose again was irrigated on April 1.

Plaintiff returned to work on the morning of April 2. About 11:00 a. m. of that day, a truck loaded with nails and wire, including rolls of "rabbit" wire, was docked for unloading. Plaintiff stood in the truck, at its rear end, and was directing the unloading of the wire. A roll of wire weighing 51 pounds was thrown from the front of the truck and struck plaintiff in the chest. The force of the blow was sufficient to cause plaintiff to throw his arms into the air in an attempt to maintain his balance, which he did not do, and he dropped some four feet to the pavement, landing on his feet. He was jarred out of breath, got onto

the loading platform, sat down for a time, and then resumed his work. He continued to work that day, and the day following, taking it easy. He felt pain in his chest and abdomen from the time of the accident. The pain persisted and became worse. He worked until noon of the third day (Saturday, the 4th), and then went to see the nose specialist. The nose again was irrigated and plaintiff was told to "see his family doctor." Plaintiff was then quite ill. Plaintiff went immediately to the office of a doctor in the same building, whom he had not previously consulted. This doctor, mistakenly it now appears, thought he had a fractured bone in the chest, taped him extensively and sent him home. The pain got worse. On the following day, the family doctor was called to the home, had the tape removed, diagnosed plaintiff's then condition as pneumonia, and treated him for it. Plaintiff was off work for two weeks.

He then returned to work for two weeks and a day. The pain continued. Plaintiff then went to a doctor whose specialty was surgery. This doctor diagnosed plaintiff's sickness as a heart trouble and sent him to a heart specialist, who examined him on May 3, 1942. This doctor found shortness of breath, pain in the chest, the heart "a little bit enlarged" and evidence of the pneumonia in the right chest. On May 8 the heart was found to be enlarged about one-fourth. On June 9, 1942, the heart was found to be considerably reduced in size and the cardiogram showed heart muscle damage.

It appears to be assumed by both sides that plaintiff had some bronchial trouble and asthma for some time prior to the accident, but the evidence is not at all satisfactory that plaintiff knew of such a diagnosis for his condition.

The heart specialist testified that in his opinion, plaintiff's pain after the injury was due to his trauma; that the trauma was a primary causative factor; and that "unquestionably * * * his heart condition was aggravated by his injury" or "lighted up even." This conclusion was sustained by a specialist in internal medicine and diagnosis who ex-

amined the plaintiff on November 6 and 7, 1942. Based on X-rays, cardiograms, etc., he gave it as his opinion that plaintiff had "myocardial damage" resulting from the accident and injury of April 2, 1942.

Defendants offered the testimony of a specialist in internal medicine and diagnosis, who made an examination of the plaintiff in the latter part of June, 1942. He testified as to the extensive examination he had made, the history considered, and expressed the opinion that plaintiff's accident and injury had nothing to do with his heart condition, and that the plaintiff's heart condition was the result of his heart being overworked in pumping blood through the diseased lungs. This witness appears to have based his opinion upon the existence before the accident of a more severe sinus and chest condition than the evidence supports, and, likewise, to have discounted appreciably the severity of the blow which the evidence shows plaintiff received on his chest.

Defendants also offered the testimony of the eye, ear, nose and throat specialist. This specialist testified that he was "not a heart specialist"; that plaintiff's heart was "irregular"; that he was "breathing very heavily" at the time of the examination on March 28, 1942; and that on March 31 the heart was "not what it should be" and the heavy breathing persisted. The conclusion of this specialist at the close of his examination and treatment was that the infection of the sinuses was not causing plaintiff any difficulty and that his heart condition was the result of something else. We have not overlooked the testimony of this specialist that he examined with the stethoscope on March 31 and found an irregular heart action. Plaintiff testified that the stethoscope was not used until the last examination on April 4. The weight to be given to the testimony of the nose specialist is minimized by a number of things. He was not a heart specialist. His examination of plaintiff's heart was incidental to the sinus examination and not exhaustive. It is noted that he did not testify that he at

any time advised plaintiff that he had a heart condition, and he did not advise plaintiff to see his "family doctor" until April 4, two days after the chest injury.

To sustain an award in a workmen's compensation case, it is sufficient to show that an injury, resulting from an accident arising out of and in the course of the employment, and preexisting disease combined to produce disability. *Gilcrest Lumber Co. v. Rengler,* 109 Neb. 246, 190 N. W. 578; *Skelly Oil Co. v. Gaugenbaugh,* 119 Neb. 698, 230 N. W. 688; *Chatt v. Massman Construction Co.,* 138 Neb. 288, 293 N. W. 105; *City of Omaha v. Casaubon,* 138 Neb. 608, 294 N. W. 389; *Palmer v. Sample,* 141 Neb. 36, 2 N. W. 2d 583.

We conclude that the plaintiff has established the facts necessary under the rule, and that his disability is compensable.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF DAN F. DONLEN.
MARY SIMPKINS, APPELLANT, V. ALTA DONLEN, GUARDIAN, ET AL., APPELLEES.

16 N. W. 2d 731

FILED DECEMBER 8, 1944. No. 31808.

1. **Courts.** County courts are by the Constitution given original jurisdiction in all matters of probate. Const., art. V, sec. 16.
2. **Descent and Distribution.** Agreements for a family settlement of an estate are not contrary to public policy, and are enforceable if supported by the weight of the evidence.
3. **Appeal and Error.** When a jury is waived, this court accords to a finding of fact by the trial court, when there is sufficient evidence to support it, the same weight and credence, and the court indulges the same presumptions in favor thereof, as it would in favor of the verdict of a jury rendered on the same evidence.
4. ———. A finding of the trial court, in a law action tried to the court, will not be disturbed except when it is clearly wrong.

APPEAL from the district court for Dixon county: SIDNEY T. FRUM, JUDGE. *Affirmed.*

E. J. McCarthy and *W. V. Steuteville,* for appellant.

Griffin & Griffin and *John E. Newton, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

PAINE, J.

This is an appeal from the disallowance of a claim filed against the estate of Dan F. Donlen, incompetent, deceased, by Mary Simpkins, his sister. The trial court found for the estate, and claimant appeals.

The facts, as disclosed by the record, show that Catherine Frazier died March 11, 1936, leaving a last will and testament, duly executed by her on April 25, 1921. This will left specific legacies to many of her close relatives. The residuary clause in this will gave all of the remainder of her real and personal property to her brother, Daniel Donlen, whom she named as executor of her estate.

On March 17, 1936, Dan Donlen filed petition to probate the estate of said Catherine Frazier, who had died at Ponca in Dixon county, setting forth that she died possessed of real estate of the value of about $2,000 and personal property of the estimated value of $8,000. The hearing on the probate of this will was set for April 4, 1936.

Mary Simpkins, a sister of the deceased, filed objections to the probate of the will. The evidence shows that on said April 4, 1936, the contesting parties undertook to settle the dispute without a contest of the will.

The evidence of F. B. Hurley, the attorney for the estate, was that he went to the office of E. J. McCarthy, the attorney for Mary Simpkins, to attempt an adjustment of the dispute. At that time McCarthy is alleged to have offered to accept one-half of the residuary estate for his client and to permit the will to be probated. McCarthy con-

tends that the agreement was to be reduced to writing, submitted to the parties for signature, and, if signed, to be filed as a stipulation in the estate of Catherine Fraser, deceased. These formalities were never completed.

Several hours therafter objections were filed for Mary Simpkins by her attorney, Mr. McCarthy, to the allowance of said will, on the ground that said instrument was not executed as required by law, nor properly attested, and that said instrument was executed by Catherine Frazier when she was incapable, by reason of physical infirmities and old age, to understand what she was making, or to make a will.

Thereafter on the same day, April 4, 1936, the county court overruled said objections of Mary Simpkins and admitted the last will and testament of Catherine Frazier to probate.

Upon renunciation in open court by Dan Donlen, the executor named in the will, the county court appointed Owen McQuillan of Ponca as administrator with will annexed. On December 5, 1936, the final account of Owen McQuillan, administrator, was approved, showing that seven United States government bonds, in the amount of $4,200, and cash in the sum of $1,859.98 had been duly assigned to Daniel Donlen as provided in the residuary clause of said will.

The record shows that in April, 1938, Dan F. Donlen died, but that shortly before his death Mary Simpkins filed a claim against the estate of Dan F. Donlen, he being at that time under guardianship as an incompetent person, the claim being based on the purported agreement entered into by attorneys Hurley and McCarthy on April 4, 1936. From an adverse ruling, Mary Simpkins appealed to the district court.

Alta Donlen, having been appointed guardian of the estate of Dan F. Donlen, incompetent, filed an answer to the petition of Mary Simpkins, in which she denied each and every allegation contained in said petition. She specifically denied that any such arrangement or agreement with Mary Simpkins as set out was ever made. She further alleged

that, at the time claimant asserted that such agreement was made with Dan F. Donlen, he was mentally incompetent to enter into such an agreement, or to understand the nature thereof.

Claimant filed reply, denying each and every allegation of new matter in the answer, and alleging that the estate of Dan F. Donlen, incompetent, was estopped from urging his incompetency on April 4, 1936, by reason of the fact that, because of agreement entered into between Mary Simpkins and Dan F. Donlen, claimant was prevailed upon to desist from contesting the will of Catherine Frazier.

The case went to trial before District Judge Ryan and a jury, and the verdict of the jury was for the defendant. Judgment was entered thereon that the defendant, Alta Donlen, guardian of Dan F. Donlen, have judgment for costs against claimant Mary Simpkins.

On July 2, 1940, Judge Ryan sustained the motion for a new trial. On May 7, 1941, the counsel waived a jury and tried the cause to District Judge Frum upon the record of the former trial. Judgment was entered, finding that the claim of claimant Mary Simpkins against the estate of Dan F. Donlen, an incompetent person, should be disallowed and her petition dismissed, and that defendant should have judgment for costs, from which judgment claimant appealed to this court.

The claimant assigns as errors that the judgment is not sustained by sufficient evidence, and that it is contrary to the evidence and the law.

County courts under the Constitution (Const., art. V, sec. 16) have original jurisdiction in all matters of probate and settlement of the estates of deceased persons. See *In re Estate of Shierman*, 129 Neb. 230, 261 N. W. 155; *In re Estate of Lee*, 137 Neb. 567, 290 N. W. 437.

The claimant insists that agreements for a family settlement of an estate are not contrary to public policy, are enforceable, and the compromise of a doubtful right may be sufficient consideration for such an agreement. See *Rhodes*

v. Lewis, 136 Neb. 870, 287 N. W. 662; *Darling v. Darling*, 122 Neb. 153, 239 N. W. 727.

The burden of proving such an agreement, however, rests upon the claimant in the case at bar. The evidence indicates that a tentative oral understanding was had between the parties. The evidence also shows that it was the understanding of the parties that such oral tentative agreement was to be reduced to writing, submitted to the parties for signature and, if signed, filed as a stipulation in the pending proceeding. This was not done.

The district court, after hearing the evidence, evidently concluded that these were conditions precedent to a valid agreement, and, not having been complied with, no valid agreement was made. There is ample evidence in the record to sustain this finding.

The rule is that, when a jury is waived, this court accords to a finding of fact by the trial court, when there is sufficient evidence to support it, the same weight and credence, and the court indulges the same presumptions in favor thereof, as it would in favor of the verdict of a jury rendered on the same evidence.

Under this rule of law, we think the finding of the trial court in the case at bar is conclusive upon this court, as such a finding should only be disturbed when it is clearly wrong. See *Fox v. Carman*, 139 Neb. 34, 296 N. W. 343.

This conclusion makes further discussion of the errors assigned for reversal unnecessary, and the judgment of the trial court is hereby affirmed.

AFFIRMED.

J. H. MELVILLE LUMBER COMPANY, APPELLEE, V. JOHN T. MARONEY ET AL., APPELLEES: IMPLEADED WITH M. M. LEONARD, APPELLANT.

16 N. W. 2d 527

FILED DECEMBER 8, 1944. No. 31803.

1. **Descent and Distribution.** Where an ancestor dies intestate his

lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest his title.

2. **Homestead.** A homestead in this state has been defined as the land and buildings occupied by the owner as a home for himself and family, protected by law from his creditors.
3. ———. The statutory exemption of a homestead was intended and enacted in the interest of, and for the benefit of, the debtor, and it is the policy of the law that such enactments be liberally construed, so that the intention of the legislature shall be enforced and carried out to its fullest and greatest extent.
4. ———. An undivided interest in real estate, accompanied by the exclusive occupancy of the premises by the owner of such interest and his family as a home, is sufficient to support a homestead exemption.
5. ———. The claimant of a homestead exemption has a right to claim surplus money in lieu of his homestead exemption at any time before the same is finally distributed.
6. ———. When a homestead is sold to satisfy a mortgage thereon, the owner is entitled to have the amount of his homestead exemption set off to him from the surplus proceeds of sale after satisfying the debt which was a lien on the homestead interest, and before the application of any part of the proceeds to the satisfaction of debts against which the homestead exemption might be claimed.
7. ———. If the title passes to and vests in the heirs, the possessory right goes with it, except to the extent it is placed by law in the administrator, which is not exclusively or absolutely, but optionally with him, and for purposes indicated by statute and for none other.

APPEAL from the district court for Custer county: WILLIAM F. SPIKES, JUDGE. *Affirmed.*

Johnson & Johnson, for appellants.

George W. Wiebusch, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

MESSMORE, J.

In this case a judgment creditor seeks to have the sum of $1,145.45, one-half of the surplus over and above the

amount realized on a mortgage foreclosure, paid to him, to be credited on his judgment. The trial court decreed and adjudged that such amount be paid one of the surviving heirs at law in lieu of the homestead interest of such heir, as contemplated by section 40-101, Comp. St. 1929. The judgment creditor appeals.

The record discloses that Timothy P. Maroney died intestate on February 10, 1935; his wife preceded him in death. He left as his sole and only heirs at law two children, Mary Knoell, a daughter, and John T. Maroney, a son. Among the assets of his estate were 240 acres of farm land, involved in this action, certain town lots and buildings, and an additional 40 acres of land. The 240 acres were encumbered by a real estate mortgage given to the plaintiff, dated March 7, 1933. On March 11, 1935, Mary Knoell was appointed administratrix of the estate, which has not been closed. On March 26, 1935, the judgment creditor obtained a judgment against John T. Maroney for the sum of $5,052 and costs. Pursuant to plaintiff's petition filed for foreclosure of its mortgage lien, sale of the real estate was had on November 27, 1939, and the surplus over and above the amount of the decree of foreclosure amounted to $2,289.45. Of this amount $1,144 was paid to the administratrix, and the balance of $1,145.45 remained in the possession of the clerk of the district court.

The judgment creditor on September 16, 1939, filed an answer and cross-petition, asking that he be paid one-half of the proceeds of the sale of the real estate after payment of the mortgage, interest and costs. The administratrix filed an application for all of the proceeds in excess of the amount required to pay the decree, claiming the same for the purpose of paying debts, claims and expenses. John T. Maroney filed an application for one-half of the proceeds of the sale after payment of the decree, interest and costs, claiming to be the owner of the land, and that it was not subject to the judgment lien of the creditor, being exempt under the homestead laws of this state. The judgment

creditor replied to the application of the administratrix, setting forth that she was derelict in her duty and negligent in several respects, causing loss to the estate, and asked for an accounting.

The judgment creditor did not file a claim against the estate. The administratrix was allowed the sum of $2,300 on a claim for care rendered the deceased during his lifetime. All of the debts and obligations of the estate are paid, with the exception of the claim of the administratrix upon which $700 has been paid. It is apparent that the judgment creditor preferred to rely upon his judgment lien and was not a party to the estate matter.

The judgment creditor filed a reply to the application of John T. Maroney, denying that there existed a homestead interest in the real estate; alleged that John T. Maroney and his wife occupied the same as tenants and not as owners, and it was the duty of the administratrix to collect from them as tenants until all claims and expenses were finally settled, and that they could not occupy the same as owners until the debts and expenses were paid.

John T. Maroney was born on this land in 1889, lived there continuously, and on April 26, 1911, was married. Thereafter he and his wife occupied the 240 acres as a home and raised their three children on this farm. Arrangements were made for the payment of some cash rent for the pasture and crop rent beginning in 1910. This continued until 1928. The record is vague as to just what rent, if any, was paid thereafter by Maroney. There is evidence of certain improvements made on the farm and the building of a house in 1914, which he and his wife occupied; evidence of a granary built in 1916, a barn in 1924, and a basement under the house in 1929. The latter improvements, not including the house, were paid for by the occupants, and the house was modernized by them. There is also in the record a tax redemption certificate in the amount of $290 for the year 1930 and subsequent tax for 1931 paid by John T. Maroney.

Timothy P. Maroney, the father, went to live with Mrs. Knoell in 1929 and visited the farm occasionally thereafter, a few days at a time. After the death of the father, no rent was paid by the son and none was demanded of him. He occupied the farm and carried on the business of farming on the 240 acres until he and his wife were forced to leave the premises by virtue of a writ of assistance issued March 9, 1940. The evidence shows that John T. Maroney and his wife Ora intended at all times to occupy the premises as their home, and, in fact, from February 10, 1935, six weeks before the judgment creditor obtained his judgment, were living on the land and occupying it as a home.

"Where an ancestor dies intestate his lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest the title." *Johnson v. Colby,* 52 Neb. 327, 72 N. W. 313. See, also, *Shellenberger v. Ransom,* 31 Neb. 61, 47 N. W. 700, 41 Neb. 631, 59 N. W. 935. Therefore, on February 10, 1935, John T. Maroney, as one of the two sole surviving heirs of Timothy P. Maroney, was vested with a half-interest in the fee title to the 240 acres of land. At that time, he was occupying the land as a home. A homestead in this state has been defined as the land and buildings occupied by the owner as a home for himself and family, protected by law from his creditors. *Meisner v. Hill,* 92 Neb. 435, 138 N. W. 583.

The appellant contends that the court erred in finding that all right, title and interest which John T. Maroney had in the proceeds from the sale of the real estate was exempt from all judgment liens, under the provisions of section 40-101, Comp. St. 1929, and that the judgment creditor acquired no right or interest in the proceeds of the sale.

In view of the foregoing holding, it is immaterial in what manner the intestate's son occupied the premises prior to the date of the intestate's death. Section 40-101, Comp. St. 1929, provides:

"A homestead not exceeding in value two thousand dollars, consisting of the dwelling house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding one hundred and sixty acres of land, to be selected by the owner thereof, * * * shall be exempt from judgment liens, * * * ."

In *Quigley v. McEvony,* 41 Neb. 73, 59 N. W. 767, it was said (p. 82): "The statutory exemption of a homestead was intended and enacted in the interest of, and for the benefit of, the debtor, and it is the policy of the law that such enactments be liberally construed, so that the intention of the legislature shall be enforced and carried out to its fullest and greatest extent, * * * ." Followed in *Bliss v. White,* 132 Neb. 651, 272 N. W. 769. See, also, *Dougherty v. White,* 112 Neb. 675, 200 N. W. 884.

There is some contention on the part of the judgment creditor that, in determining the homestead selection, an undivided interest in real estate may not be considered. This court, in the following decisions, expressed the rule in Nebraska:

"An undivided interest in real estate, accompanied by the exclusive occupancy of the premises by the owner of such interest and his family as a home, is sufficient to support a homestead exemption." *Giles v. Miller,* 36 Neb. 346, 54 N. W. 551. See, also, *Connor v. McDonald,* 120 Neb. 503, 233 N. W. 894; *Doman v. Fenton,* 96 Neb. 94, 147 N. W. 209.

In *First Nat. Bank of Tekamah v. McClanahan,* 83 Neb. 706, 120 N. W. 185, a discussion of the rule in Nebraska is expressed as follows: "In many states a homestead cannot be acquired in lands that are held in co-tenancy, but such is not the rule in this state. One of the principal objects of the homestead law is to protect the debtor and his family in the possession of a home. The homestead law has always been liberally construed in this state with a view to promoting its beneficent purposes. It is no concern of the creditor that the debtor's interest in the land is an undivided interest or that it may be less than a fee title to all

the premises out of which he claims a homestead." And, also, in *Hoy v. Anderson*, 39 Neb. 386, 58 N. W. 125, this court held:

"The extent of a homestead is not to be determined from the fee-simple value of the land, but from the value of the homestead claimant's interest therein." The extent of a homestead is to be determined by the claimant's interest in the land and not by the fee-simple value of the premises, and in determining his homestead interest valid mortgage and other liens are to be deducted from the value of the land and not from the 2,000-dollar homestead exemption. To like effect are *Prugh v. Portsmouth Savings Bank*, 48 Neb. 414, 67 N. W. 309; *Corey v. Plummer, Perry & Co.*, 48 Neb. 481, 67 N. W. 445; *Connor v. McDonald, supra.*

With specific reference to the right to claim the surplus money in lieu of the homestead exemption, the following authorities are pertinent to the instant case:

The claimant of the homestead exemption has a right to claim surplus money in lieu of his homestead exemption at any time before the same is finally distributed. *Hooper v. Castetter*, 45 Neb. 67, 63 N. W. 135. And in *Morrill v. Skinner*, 57 Neb. 164, 77 N. W. 375, this court held:

"When a homestead is sold to satisfy a mortgage thereon, the owner is entitled to have the amount of his homestead exemption set off to him from the surplus proceeds of sale after satisfying the debt which was a lien on the homestead interest, and before the application of any part of the proceeds to the satisfaction of debts against which the homestead exemption might be claimed." See, also, *Thompson v. Todd*, 106 Neb. 545, 184 N. W. 96.

The judgment creditor's contention, that because John T. Maroney did not claim the homestead interest prior to the sale of the premises by the sheriff such right was waived, is, therefore, not meritorious.

The judgment creditor contends that section 30-406, Comp. St. 1929, is binding upon the administratrix and for her non-compliance therewith he is entitled to one-half of

the proceeds of the surplus over and above an amount to satisfy the mortgage decree. Section 30-406 provides in part: "The * * * administrator shall have a right to the possession of all the real as well as the personal estate of the deceased, and may receive the rents, issues and profits of the real estate, until the estate shall have been settled, or until delivered over, by order of the county court, to the heirs * * * and shall keep in good tenantable repair all houses, buildings, and fences thereon which are under his control."

In re Estate of Dovey, 102 Neb. 147, 166 N. W. 353, is cited in which we held: "An administrator may take possession and control of the lands and tenements belonging to the estate of his intestate during its settlement; but, unless it is necessary to collect the rents or to sell the land to pay debts, * * * or expenses, he is not compelled to take control of the real estate." In this connection the following cases are applicable:

In *Lewon v. Heath,* 53 Neb. 707, 74 N. W. 274, this court said: "If the title passes to and vests in the heirs, as it most certainly does, then the possessory right goes with it, except to the extent it is placed by law in the administrator, which is not exclusively or absolutely, but optionally with him, and for purposes indicated by statute and for none other; * * * ." The court quoted with approval from *Jones v. Billstein,* 28 Wis. 221, as follows: "As we understand the statute, it gives the personal representative the power to reduce the real estate to his actual possession should he think proper, or should the probate court direct him so to do, but it does not imperatively require him to take possession thereof, and until he does so the common right of the heir to the possession remains unimpaired."

In the instant case the administratrix did not take possession of the 240 acres of land. Regardless of the manner in which she handled the estate, which is not an issue here, the fact remains that all of the debts and obligations of the estate are paid except a portion of her own claim.

In *Tunnicliff v. Fox*, 68 Neb. 811, 94 N. W. 1032, this court held: "Under the law of this state, an executor can not be charged with the rent of real estate until it becomes necessary or proper to reduce such real estate to actual possession for the protection of the creditors of such estate, or until the executor is ordered so to do by the proper court."

"Under the homestead law in force in this state a judgment is a lien alone on the debtor's interest in lands, impressed with the character of a homestead, in excess of $2,000. This principle has been so frequently recognized in this jurisdiction as not to require discussion, or the citation of authorities in its support." *Farmers Loan & Trust Co. v. Schwenk*, 54 Neb. 657, 74 N. W. 1063.

Other contentions of the appellant are without merit, and for the reasons given in this opinion the decree and judgment of the district court are affirmed.

AFFIRMED.

AUGUST B. LIENMANN, APPELLANT, V. COUNTY OF SARPY ET AL., APPELLEES.
16 N. W. 2d 725

FILED DECEMBER 15, 1944. No. 31775.

1. States. The boundary between the states of Iowa and Nebraska was fixed as the center of the channel of the Missouri river by the respective acts of Congress admitting said states to the Union.
2. ———. Where the main channel of the river changes by accretion and decretion, the boundary between the two states follows the channel.
3. ———. Where the main channel of the river changes by avulsion to a new course, the boundary does not change but becomes fixed along the line which constituted the center of the old channel.
4. ———. Lands cut off from the mainland of a state by avulsion

do not change their status but remain a part of the state from which they were cut off.

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

Kennedy, Holland, DeLacy & Svoboda and *Edwin Cassem,* for appellant.

Guy E. Tate and *Samuel L. Winters, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

SIMMONS, C. J.

In this action, plaintiff seeks to enjoin the sale of his land for taxes on the proposition that the land is not in Sarpy county, Nebraska, but is in the state of Iowa, and that taxes levied by Sarpy county are void for want of jurisdiction over the land. The trial court dismissed the action. Plaintiff appeals. We make findings of fact which require that the decree be reversed and the cause remanded for further proceedings.

The defendants named in the petition are the county of Sarpy, its sheriff, treasurer and commissioners.

Plaintiff in his petition alleges that he is the owner and has been in exclusive possession for more than ten years last past of certain lands, set out by subdivision and tax lot, in Sections 13 and 24, T. 13 N, R. 13 E of the 6th P. M., as described "in the tax records of Sarpy County, Nebraska." He then alleges the land as "described in the United States Government Survey," setting out by subdivision land in Sections 13, 24 and 19, and finally describes the land by a third description, without source of the designations being alleged, but, by subdivisions, as land in Sections 13, 24 and 19. Plaintiff further alleges the official status of the defendants, and alleges that for many years the defendant county never undertook to assert jurisdiction over said lands by taxing the same; that sometime subsequent to the year 1901 the county assessed taxes against the land, and

in 1938 issued and itself purchased tax certificates; that thereafter the county foreclosed the tax certificates and, pursuant to decree, advertised the property for sale; and that the action of the county is wholly void for the reason that the land is outside the boundaries of the county, and in fact is within the boundaries of the state of Iowa.

Plaintiff further alleges that in the United States district court for the district of Nebraska, in an action to try the title to said land (wherein the plaintiff's father and predecessor in title was defendant), a judgment was rendered finding that said land was in Iowa; and that the county of Sarpy knew or was bound to know of the litigation and the status of the land and was estopped to assert jurisdiction.

Plaintiff prayed for a decree holding that the land be held to be outside the boundaries and jurisdiction of Sarpy county; that the taxes be held void; that title be quieted in him free and clear of the taxes; and that the county be enjoined from enforcing the taxes and from asserting or levying present or future taxes.

Defendants, for answer, admitted the official status of defendants, denied generally, and alleged that plaintiff had commenced an action in the district court for Sarpy county, wherein it was alleged, and the decree found, that the plaintiff was the owner of certain lands, described by government subdivision, in Sarpy county.

Trial was had, resulting in a general finding "in favor of the defendant" and dismissing plaintiff's petition.

The only witnesses called were the plaintiff and a civil engineer. They were used as both plaintiff's and defendants' witnesses. The civil engineer's evidence was largely explanatory of exhibits offered by the parties. Basically, there is no disagreement as to the facts. There are some discrepancies in detail in the exhibits, largely centering around descriptive matter with reference to areas with which we are not here concerned. The dispute comes with reference to the conclusion to be reached from the evidence.

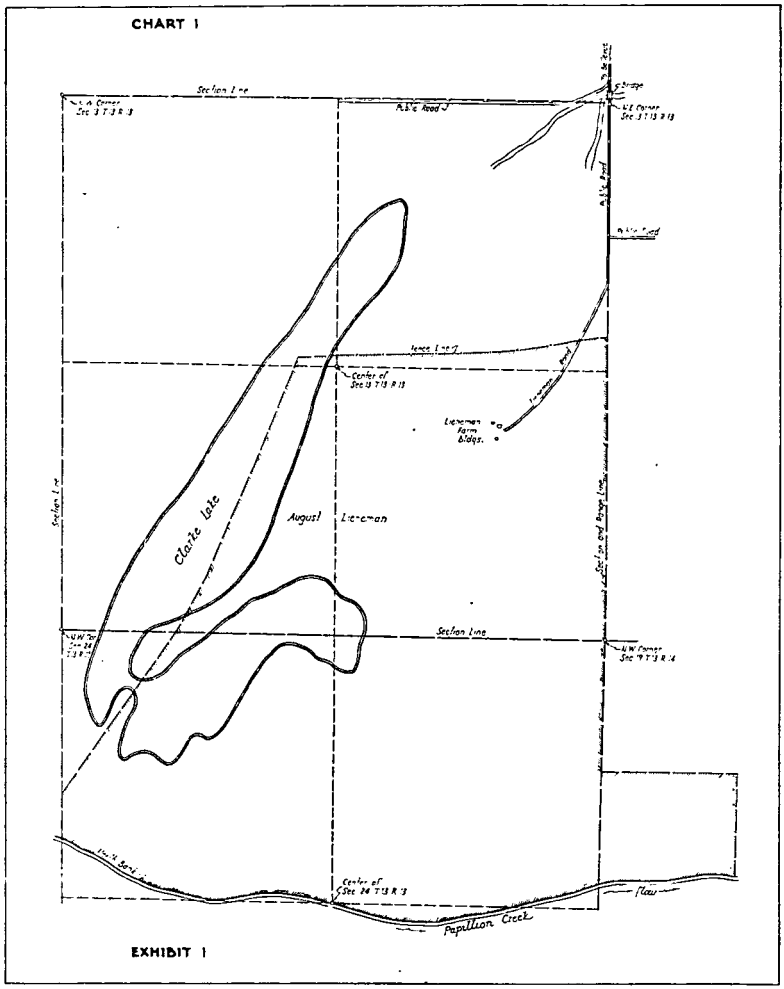
This case, as submitted here, involves the sole question of

whether or not the land involved in this action is located in Sarpy county, Nebraska. That question turns on whether or not it is land that has attached to the state of Iowa by accretion resulting from the action of the Missouri river. The two actions referred to in the petition and the answer are argued here only in so far as they tend to establish the fact questions.

At the outset we were confronted with some preliminary difficulties: First, the allegations of plaintiff's petition in which three different, and irreconcilable, descriptions of the land were alleged. It was stipulated, however, at the beginning of the trial that plaintiff's Exhibit 1 described the land involved. Exhibit 1 is a map prepared by the civil engineer witness. Accordingly, the determination herein made applies to the land as set out in Exhibit 1. Second, the trial court in his decree did not indicate the basis of his decision, and the parties are not in agreement here upon that matter. Accordingly, we are denied the benefit of the reasoning of the trial court. Third, a large number of maps are in evidence. Counsel in some instances in examining witnesses did not refer to the exhibits by number or letter, and the witnesses in answering were not always required to identify exhibits or parts about which they were testifying. Also, some exhibits, reproduced in the bill of exceptions by photostatic copies, do not show markings to which reference is made by the witness. However, the story of this land can be reconstructed almost entirely from the exhibits themselves, and for clarity in discussion, we reproduce here pertinent parts of some of the exhibits, without an attempt being made as to exactness of detail. The exhibits reproduced all find support in other exhibits which are not shown.

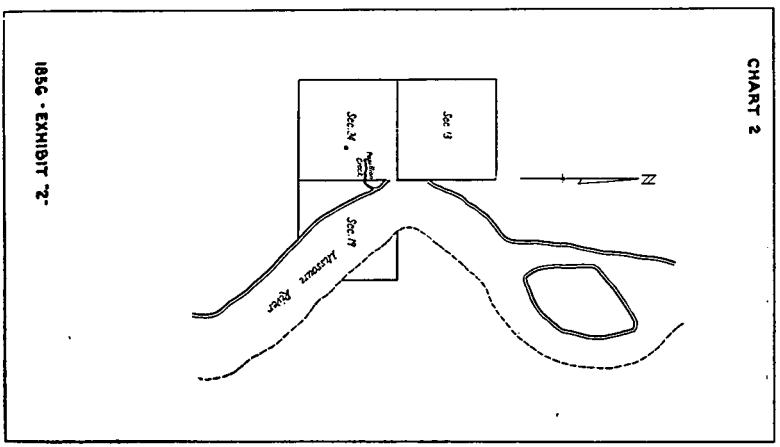
In this opinion we will refer to the Nebraska bank of the Missouri river as the right bank and the Iowa bank as the left bank.

CHART 1



This is the land involved in this action, as shown by Exhibit 1, and is reproduced for the purpose of showing the location of Clarke lake and Papillion creek, and the land claimed with reference to the area of the sections and the land and creek.

CHART 2



This is a reproduction in outline of plaintiff's Exhibit 2, being a map of a United States government survey made in 1856. It has these points of value: (1) The location of the island with a distinct channel to the west; (2) in 1856 the right bank was at one place west of the east line of Sections 13 and 24, with the intersections of the east line about equidistant from the east and west section line; and (3) the location of Papillion creek. The left bank of the river is not shown with exactness on the exhibit. Defendants assert in their brief: "That the main channel of the river was East of said Island."

CHART 3

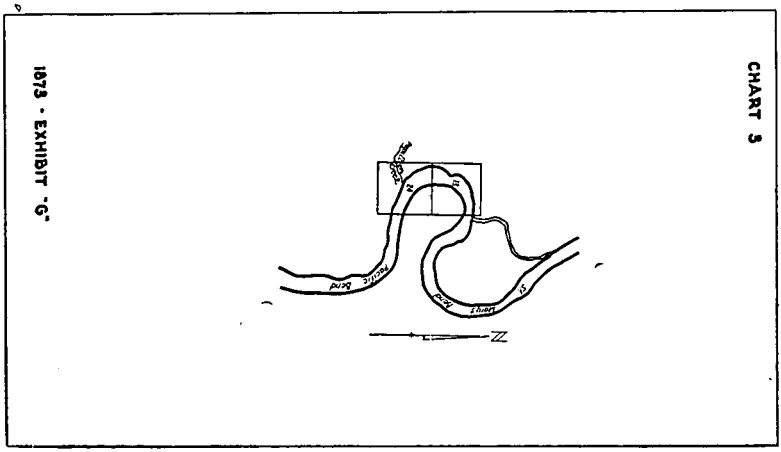


Chart 3 is a reproduction of defendants' Exhibit G, being a United States government survey made apparently in 1873. This is reproduced for the following reasons: (1) It shows the channel west of the island to be a narrow stream in comparison with the channel east of the island; (2) the island is shown to have been enlarged to the south and east, concededly by accretion; (3) on the exhibit, the main channel is shown to be in the part described as "St. Mary's Bend" with sand bars on the inside of the bend; (4) Pacific Bend, to which reference will be made later, is shown; (5) it also appears that since 1856 the right bank of the river has moved approximately three-quarters of a mile west and into Sections 13 and 24, and that it has been followed by the left bank so that that bank is now well toward the center of the sections. On the exhibit sand bars are shown on the inside of the bend here also. (6) Papillion creek also is shown. It should be here stated that the civil engineer on the witness stand undertook to superimpose Sections 13 and 24 on Exhibit G, and in so doing had practically all of Section 24 south of Papillion creek. The location of plaintiff's land, north of Papillion creek as shown on Chart 1, anchors its location to all these maps

and shows the error admittedly made by the engineer. The exhibit here shows the sections with accurate reference to Papillion creek and the other exhibits.

CHART 4

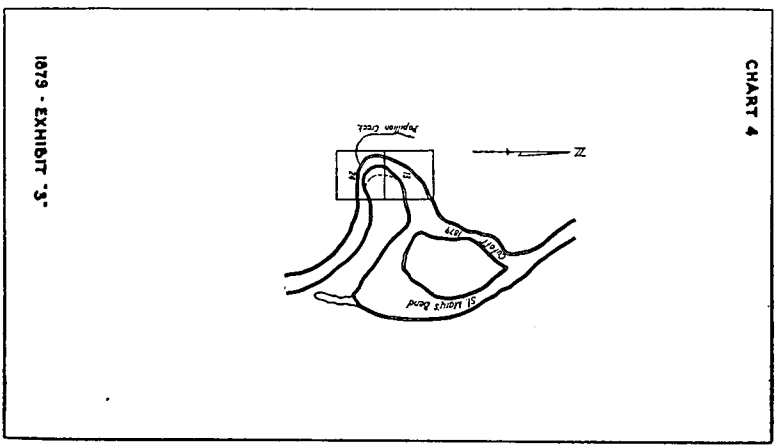


Chart 4 is taken from plaintiff's Exhibit 3, being the Suter survey of July 14 to July 22, 1879. It is reproduced to show (1) the "Cut off 1879" (shown on defendants' Exhibit B as "Cut off April 1879"), which follows generally the course of the smaller channel to the west of the island as shown on the map of 1873 (Chart 3) and the channel to the west of the island as shown on the map of 1856 (Chart 2). Defendants' Exhibit B, being a more detailed map of this survey, shows the main channel of the river to be flowing through the "Cut off 1879" and not through St. Mary's Bend. (2) These two exhibits show a strip of untimbered land (or point of water) at the southeast part of St. Mary's Bend leading from St. Mary's Bend toward, but not reaching, Pacific Bend. In this connection, there is in evidence a copy of a United States engineer's report, dated January 15, 1878, in which it is stated: "The neck of land between Pacific and Saint Mary's Bends is gradually becoming narrower, and a cut-off is imminent if the cutting continue, as

there is no doubt it will." (3) The exhibits show cottonwood and willow trees growing on this land to the east of a line approximating the east line of Sections 13 and 24, willows growing to the west up to the dotted line and sand bars to the west to the left bank of the river. The exhibits also show that the river near the outer side of the bend in Sections 13 and 24 was 35 feet deep. Plaintiff's witness, who prepared Chart 1, testified that Clarke lake on that exhibit corresponded with the river channel as shown on Chart 4, and that Clarke lake "is today" where the river was at its 35-foot depth in 1879. The exhibits also show large trees growing on the right bank of the river at that bend and the evidence is that there were large elms there when the case was tried. The evidence also is that there is elevated ground which the witness and the exhibits show as the old river bank following generally the right bank of the river as it appears on Chart 4. (4) The location of Papillion creek also is shown.

CHART 5

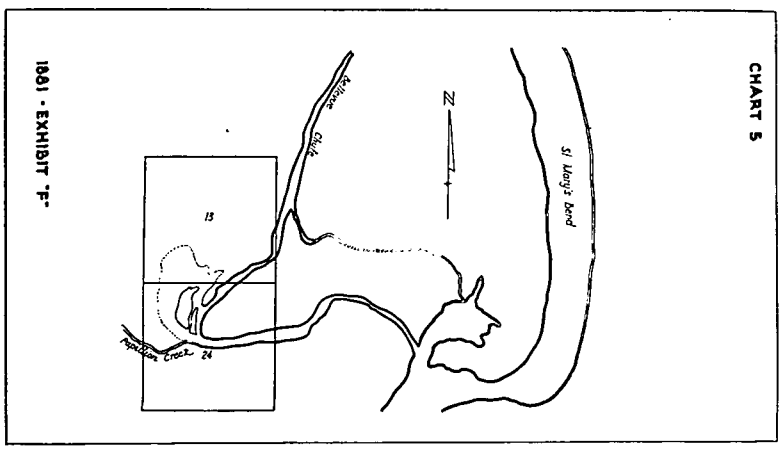


Chart 5 is taken from defendants' Exhibit F, which was based on a government survey of the river made in October and November, 1881. It shows the main channel of the

river to be again down "St. Mary's Bend" and also shows that the river had cut off the "neck of land" between St. Mary's and Pacific Bends and no longer followed through its old course, as shown on Chart 4. Just when the river made this change is not shown, although the parties seem to agree that it occurred in 1881. The defendant offered in evidence copies of reports of the Army engineers. The date of one is not shown, but there is in it a reference to June, 1881 and to "the extreme high-water of April 25, 1881." In that report it is stated: "Owing to cut-off of 1880 and the development of Saint Mary's Bend, erosion of a temporary nature has been the result this season in Pacific Bend." In a similar report, dated July 1, 1882, it is stated: "In my last report I referred to the change of regimen in the Missouri above this point, its sudden yet desirable transition from Bellevue Chute to its former course in old Saint Mary's Bend." It seems reasonable to conclude that the river first returned to its old course down St. Mary's Bend, and then cut a channel across the neck of land and connected with Pacific Bend. In any event, sometime between July 22, 1879, and the time the 1881 survey was made, upon which Exhibit F (Chart 5) is based, the river returned to its former course in St. Mary's Bend, cut off the "neck of land," ran into Pacific Bend and abandoned its old channel (as shown on Exhibit 3, Chart 4). The evidence is that from that time to this it has continued its channel in that general area. The 1881 map also shows that between July, 1879, and October, 1881, the tip of the land in Sections 13 and 24 had eroded on the northwest side and some islands or bars formed to the west. Also, the exhibit shows a part of Section 13, which is shown as channel of the river in 1879 (Chart 4), to be surface land. Plaintiff's Exhibit 3 and defendants' Exhibit B show sand bars forming in that area in 1879.

The parties have simplified our problem by agreeing that in 1856 the land that lay where the plaintiff's land is now was in Nebraska Territory. They agree also that the plaintiff's land is accretion land. The contentions that the cut-

off of 1879 west of the island and that of 1881 between St. Mary's Bend and Pacific Bend resulted from avulsions are not controverted in the briefs. It is established by the decisions hereinafter cited that they constituted avulsions.

The parties also are in accord on the basic rule of law to be applied here, which is concisely stated in *Nebraska v. Iowa,* 143 U. S. 359, 12 S. Ct. 396: " * * * accretion on an ordinary river would leave the boundary between two States the varying centre of the channel, and that avulsion would establish a fixed boundary, to wit: the centre of the abandoned channel." Or as more recently stated by that court: " * * * when changes take place by the slow and gradual process of accretion the boundary moves with the shifting in the main channel's course. * * * a sudden or avulsive change in that course does not move the boundary, but leaves it where the channel formerly had run." *Kansas v. Missouri,* 321 U. S. 213, 64 S. Ct. 975.

This court has repeatedly followed the rules of law as stated in *Nebraska v. Iowa, supra.* Two years after that case was decided, this court had before it the case of *Bouvier v. Stricklett,* 40 Neb. 792, 59 N. W. 550. The factual situation there was similar to the case at bar. We there quoted at length from and applied the principles of *Nebraska v. Iowa.* Again in *Rober v. Michelsen,* 82 Neb. 48, 116 N. W. 949, this court was presented with a case where the summation of facts could be applied with little change to the facts as they appear in the case at bar, even down to a lake which formed the west and south boundaries. We there cited *Nebraska v. Iowa* and said: "The boundary between Iowa and Nebraska was fixed by the respective acts of Congress admitting said states to the Union as the center of the channel of the Missouri river. That boundary may and does fluctuate with the changes of the channel of that stream where the alteration is gradual and imperceptible; but, when by a sudden variation the stream seeks and marks for itself an entirely new course and abandons the old path, the boundary remains along the line which constituted the center of the old channel." Again, in *O'Connor*

v. Petty, 95 Neb. 727, 146 N. W. 947, the factual situation is similar to the case at bar. This case, applying the rules announced in *Nebraska v. Iowa,* held: "The boundary between Iowa and Nebraska follows gradual and imperceptible changes in the main channel of the Missouri river" and "A change by avulsion in the main channel of the Missouri river does not change the boundary line between Iowa and Nebraska." In *First Nat. Bank v. McFerrin,* 142 Neb. 627, 9 N. W. 2d 166, we held: "Lands cut off from the mainland of a state by avulsion do not change their status but remain a part of the state from which they were cut off." Without citing other intervening decisions, *Nebraska v. Iowa* was again followed in the late case of *Conkey v. Knudsen,* 143 Neb. 5, 8 N. W. 2d 538.

We think it appears clearly from this evidence that during the years the water of the river as it moved downward was deflected by the island, so that its force was against the left bank, and decretion took place there with accretion to the island where the slower moving water deposited its burden. By that process, St. Mary's Bend was gradually extended to the south and east. The change in the one bend produced the change in the next and lower bend. The water then moving westward, impinged upon the right bank at Sections 13 and 24, gradually decreting that bank and depositing soil by accretion on the left bank of the river at that bend. By that process the original Nebraska soil was washed away as far west as Clarke's lake, the river occupying the land, and building, by accretion, soil onto the left bank; and by that process, the land here involved became, in part at least, accretion land attached to the left bank of the river. The engineer's reports offered by defendant show that the river in this section has "a heavy slope, averaging 8/10 of a foot to the mile." In the engineer's report of January 28, 1880, it is stated: "When these narrow strips are washed through, cut-offs take place, which shorten the course of the river, change its slope, increase its velocity, and otherwise disturb its regimen for many miles both above and below." When the river cut

across from St. Mary's to Pacific Bend, it shortened its channel, naturally gained additional slope and velocity in so doing, and secured a lower channel. The land formerly under the abandoned channel became surface land, with the exception of the deep area at the bend, which, because of its depth, became and now is Clarke's lake. It is obvious from the maps that the cut-off of 1879 west of the island (later called Bellevue Chute) did not create this land by avulsion. As has been pointed out, the land involved in the east half of Sections 13 and 24 was in July, 1879, well covered with cottonwood and willows. This growth would not have occurred between April, 1879, when the cut-off occurred, and July, 1879, when the survey was made. It necessarily follows that this was accretion land, attached to Iowa before the "cut off of April, 1879" occurred.

But defendants argue that the river did not reach as far west as what is now Clarke lake until sometime in 1881, just before the 1881 cut-off at St. Mary's and Pacific Bends. We do not find supporting evidence of that claim. The evidence of the engineer and the exhibits, we think, clearly establish that the river reached the area now known as Clarke lake in 1879. But, assuming that the cut-off of 1879, being an avulsion, did contribute to the movement of the right bank further west into the Clarke lake area between 1879 and 1881, still it does not deprive the land on the left bank of its status as accretion land. This situation is discussed in *Nebraska v. Iowa, supra,* where the court points out that while the diminution of the bank "may be sudden and obvious" yet the accretion "is always gradual and by the imperceptible deposit of floating particles of earth." So here, we are not concerned with the rapidity of the movement of the right bank westward (although the evidence shows it to have been gradual). We are concerned with the admitted and established accretion to the left bank. Whether the main channel reached and flowed over the land that is now Clarke lake in 1879 or not until "just before" the cut-off of 1881 is not material. The material fact is that the main channel did reach and flow over that land.

This brings us to the necessary conclusion that the land in Sections 13, 24 and 19, that lay to the left of the center of the channel as it existed just prior to and at the time of the cut-off of 1881 (an avulsion), was not in the state of Nebraska.

It follows that plaintiff is entitled to a decree making that finding and to appropriate relief based thereon.

However, we are confronted with a problem in determining just where that center line actually was at that time. Plaintiff has submitted his case upon the proposition that the land which he owns was on the left side of the river in 1879, as shown by the Suter survey (Chart 4). We think the evidence sustains his position as to the land *as of July, 1879.* However, at least a year and a half intervened between the 1879 survey and the cut-off of 1881. There is no evidence showing the exact date of the cut-off of 1881 nor the location of the channel as of that time. The survey of "October and November, 1881" (Chart 5) obviously made sometime after that cut-off occurred, shows that a considerable part of the northwest segment of the land that was on the left side of the river in 1879 had eroded, and that the channel of the stream (then named "Bellevue Chute") was at that place a considerable distance to the southwest of the channel as it existed in 1879. It also shows that land had accreted to the right bank in Section 13 and occupied an area that was river channel in 1879. As has been pointed out, plaintiff's Exhibit 3 and defendants' Exhibit B (the 1879 survey), show sand bars in the northwest quarter of Section 18 (to the east of 13) and extending over into the northeast quarter of Section 13. This area was, following the 1879 cut-off, on the inner curve of the bend at that point. We think it reasonable to conclude that that accretion continued until the cut-off of 1881. Obviously, that accretion was to the right or Nebraska bank. We think it also reasonable to conclude that the major change of the river channel took place prior to and not after the cut-off of 1881, when the volume and velocity of the water in the channel here was much reduced. This conclusion is based upon the

proposition, which finds support in the discussion of the characteristics of the Missouri river found in *Nebraska v. Iowa* and *Kansas v. Missouri, supra,* to-wit: That great erosion does not take place when the water is very high or very low, but at the intermediate stage, when, by undercutting the bank, the top soil falls into the river.

The exact location of the center of the channel at the time of the 1881 cut-off cannot be determined from the evidence before us. The center of the channel at that time determines what part, if any, of the land involved here was in Nebraska at the time the taxes involved herein were levied. We, therefore, reverse the decree of the trial court and remand the cause with directions to have a survey made, based on the 1881 map, and to locate the line by following down the center of the channel of Bellevue Chute, as shown thereon, to the point where it connects with Clarke's lake, then down the center of Clarke's lake longitudinally to the point where it intersects with the center line of Papillion creek extended and then downstream along the center line of the old river channel, and to decree that all land now lying to the left side of that line was not in the state of Nebraska at the time the taxes involved herein were levied, and granting plaintiff appropriate relief based thereon. The trial court's attention is directed to the provisions of the act of May 7, 1943, Vol. 2, page 1394, R. S. 1943.

REVERSED, WITH DIRECTIONS.

ALBERTA SMITH, EXECUTRIX, APPELLEE, V. MORTON MOTOR COMPANY, APPELLANT.

16 N. W. 2d 843

FILED DECEMBER 15, 1944. No. 31722.

1. **Master and Servant.** Notwithstanding an employer has been guilty of failure to comply with a statutory duty imposed for the benefit of employees, he can be held liable for injuries to his em-

ployees only if there is a causal connection or relation between his negligence and the injury of which the employee complains.

2. **Action**: DAMAGES. When a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the statute for the thing enacted for his benefit, or for the wrong done him contrary to its terms. But, it must be affirmatively shown that the person suffered some injury in consequence of the failure of the party to comply with the statute, and that such injury resulted proximately from such failure.
3. **Master and Servant.** Defendant was not an insurer of the safety of the place in which plaintiff was working, but was required only to exercise ordinary care in furnishing him a safe place, and it was likewise required to exercise only ordinary care to warn and instruct him as to such dangers or hazards of his occupation as were not obvious.

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

Kennedy, Holland, DeLacy & Svoboda and *Edwin Cassem*, for appellant.

Crofoot, Fraser, Connolly & Stryker and *George Evens, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

PAINE, J.

This is an action for personal injuries and death because of failure to comply with the health and safety regulations as found in chapter 48, art. 4, Comp. St. 1929. Jury returned a verdict for $3,458.10, from which defendant appeals.

Albert Schmuck filed the first petition on October 3, 1940, and died December 23, 1940. His widow, who had remarried, revived the suit in her name as executrix, and prosecutes the first cause of action, for pain and suffering up to the time of his death, and hospital and medical expenses, for the benefit of the estate.

In this amended petition in such first cause of action, she alleges that said Schmuck entered the employment of the defendant company as a fender repairman; that the de-

fendant's work shop is in the rear of Thirty-first and Farnam streets, Omaha, and is about 25 feet by 53 feet in size; that the repaired automobiles were at once painted in this room where plaintiff's deceased worked, which room was not provided with a fan or other mechanical device to carry away the paint fumes; that he relied on the defendant to furnish him a safe place to work and warn him of any danger, and to provide the necessary safety devices; that his health became impaired; that he experienced headaches, nosebleed, chest pains, and finally became sick and had to go to a hospital and secure medical aid to stop nosebleed, and was confined in St. Joseph's Hospital until December 3, 1940. He went to the Douglas County Hospital on December 9; that he left there on December 16 and went to Tulsa, Oklahoma, where he died December 23, 1940.

The second cause of action is for his wrongful death under the Lord Campbell's Act, and alleges that he was capable of earning $25 a week as a fender repairman; that he contributed sums to the maintenance of his two minor children, and would have continued to maintain and support them during their minority, and that their pecuniary damage on account of the death of their father is $10,000, in addition to the damages set out in the first cause of action.

The answer admits that the plaintiff's deceased worked for the defendant company as a repairman in the repair shop; alleges that no complete painting job was done there, but only some lacquer put on repaired fenders for about an average of one hour a day; that the defendant had no reason to believe that Mr. Schmuck would be injured by said fumes, and denies that he was so injured, and alleges that if there were any risks and dangers incident to plaintiff's employment they were open, apparent, and obvious, and any such risks were an incident of his employment, and were assumed by him.

A verdict was returned for $1,200 on the first cause of action and $2,258.10 on the second cause of action. Five errors are set out for reversal in the brief of the appellant,

the fifth one being that the court erred in refusing to direct a verdict in favor of the defendant for the reason that the evidence was insufficient to support a recovery for the plaintiff.

The bill of exceptions, of over 600 pages and many exhibits, discloses the following facts: The plaintiff, Alberta Smith, married Albert Schmuck on July 11, 1927, and two children were born to this union. She divorced him in 1929, and remarried August 3, 1931.

Mr. Schmuck left Omaha in 1929, and remained away for years. He was employed by Alvin Cothern at Corpus Christi, Texas, who testified that Mr. Schmuck worked for him off and on from 1934 until 1940. He usually worked a few days at a time. The longest time was four months in 1938. The last work was in January and February of 1940, the records showing that he put in a week and a half in January, for which he was paid $23.50, and two weeks in February, for which he was paid $40. He said that he was a steady drinker, drinking all day long, averaging about a pint a day. He usually worked two or three days and then would lay off one or two days. The witness saw him the last day before he started back to Omaha. He testified that Schmuck carried his liquor well, rarely staggered, and did not talk much when he was drinking.

While working at Corpus Christi, his personal physician was Dr. N. D. Carter, who also testified by deposition taken at Corpus Christi. He first treated Albert Schmuck for a ruptured appendix, which was removed in 1933. He testified that he considered him an habitual drinker, and he would often cry around his office, and always promised to take some kind of a treatment to get off liquor; that as early as November 1, 1936, he treated him for nosebleed and packed his nose, and he came into the office several times thereafter. On March 12, 1940, he was admitted to the Spohn Hospital at Corpus Christi, where clinical records were kept, and photostatic copies are in the record. He had a slight cold, and was under the influence of alcohol when he was admitted, and the record shows "He had been

drunk for about a week, in fact, he stays drunk most of the time. He stated that he wanted to stay in the hospital a few days until he could sober up and recuperate from his cold."

In April, 1940, he came to Omaha from Corpus Christi in his brother-in-law's car. Mrs. Maude Gorsuch became his landlady, as he took an apartment with her on April 6, 1940. She said that he was very, very careless and right down filthy; that when he was taken to St. Joseph's hospital she cleaned up his bedroom and found 14 or 15 whisky bottles under the bed and about the same number of beer bottles; that she had to make two trips to carry them all.

From May 12, 1940, to June 21, 1940, he was hired by the defendant to straighten automobile fenders. He did no painting at all. They did no complete paint job in this repair shop. When a fender was straightened out the paint gun would be run for a few seconds to paint that spot. This spray gun, with its quart container, had a 50-foot hose plugged in on the air line, and could be carried around the repair shop, wherever a fender had been repaired.

Mr. Parfitt, his boss, did all the painting, and had operated spray paint guns for 18 years, without a mask, the last five years for the defendant, and in all of that time Mr. Parfitt had never suffered any irritating or harmful effects. Schmuck usually worked about 12 or 14 feet away from where this painting would be done, and it was during six weeks in May and June, when all the windows and the doors in the shop were open.

The defendant company had two masks there to use, but no one ever used them. One of the two employees brought his own mask to the shop, but never used it. None of the expert witnesses called by either side testified that there was anything poisonous in the lacquer which was used in this spray gun.

Dr. William J. Nolan was called as an expert by the plaintiff, and told of the method of operating the spray gun and the chemical contents of the spray used, and of the pigments which give it color; that the effect of breathing the

fumes would be an irritation to the respiratory tract, but after one became accustomed to it there would be no further irritation; that headaches would be caused if the lungs did not get enough oxygen; that the membrane lining of the nose might become irritated and might start to bleed; that Mr. Schmuck first came to his office on July 9, 1940, and that he took down the history of his case, and took care of him at St. Joseph's Hospital and Douglas County Hospital from August 19 until December 9, 1940. He said Schmuck complained of shortness of breath, poor appetite, a constant cough, a loss of weight, swelling of his ankles, and a buzzing sensation in the back of his head. He testified that Schmuck was 47 years old, weighed 175 pounds stripped, was six feet one inch tall, his tongue was heavily coated, throat reddened and congested, muscles were a little weak, the heart was enlarged and very rapid beating, about 140 times a minute, and irregular, showing it was getting decompensated. The blood pressure at the time of examination was 185 over 150.

He had a chronic kidney inflammation called nephritis, and a chronic heart condition called myocarditis, and a general asthenia, which means loss of strength, which came from lack of food and lack of proper function of his body, a chronic inflammatory lung condition, and a high blood pressure. "My opinion was that * * * these noxious gases and fumes that he inhaled aggravated his general body condition so as to make that condition worse, and thereby incapacitated him."

When Mr. Schmuck left St. Joseph's Hospital on December 3, 1940, Dr. Nolan wrote in the record that the cause of his disabilities on that day "were heart instability. * * * I do not feel that further hospitalization will benefit this patient, so he is accordingly discharged and dismissed."

On cross-examination Dr. Nolan admitted that hospital charts showed that he prescribed two ounces of whisky three or four times a day, straight or diluted as he desired, and continued that for days in somewhat diminishing amounts. He thought that whisky would help his cough.

Dr. Edmond M. Walsh testified that he was a specialist in internal medicine, practicing in Omaha for 12 years, and was assistant professor of medicine at Creighton University school of medicine. Albert Schmuck was under his care at the Douglas County Hospital in December, 1940, and he had the hospital records with him. The history given showed that his father and mother had both died of heart disease. He had a hemorrhage from the nose, his left side was slightly paralyzed, and the examination disclosed that he had a high blood pressure of 238 systolic over 170 diastolic, and his color was a little blue, he was short of breath, ankles swollen, liver swollen. He left the hospital, and the concluding notation is, "Hypertensive Heart Disease Congestive Heart Failure Improved."

Dr. E. L. MacQuiddy, also a specialist in internal medicine, made a study of all the hospital charts on Albert Schmuck at St. Joseph's Hospital, appearing in the record. He said that a blood pressure of 220 to 260 over 160 to 170 is called a malignant hypertension, because it is a dangerous blood pressure, and they usually "suffer a stroke and usually go out;" that at the request of the defendant Dr. MacQuiddy inspected the paint room and shop at the defendant company, and watched them spray, and inhaled the lacquer fumes, having the characteristic banana oil odor, and although he got a good whiff of it, it was not irritating, and "you could just barely get the odor at the other end of the room," with all of the doors and windows closed.

He had reviewed all of the current literature pertaining to the use of lacquers at the University of Nebraska medical college, because it being one of the newer developments there was very little in the textbooks about it. He testified there was nothing in these lacquers that is irritating or produces a harmful effect on the body, although if a person was in this spray day after day he might inhale enough benzol to produce anemia, but testified there was no anemia present in Albert Schmuck, and that it was a straight case of malignant hypertension, with no sign of poisoning or anything of that kind; that nosebleed is a common occurrence in malignant hypertension.

In this case it is admitted that a fan was not provided, as required by section 48-403, Comp. St. 1929, and that section 48-418, Comp. St. 1929, provides that any person violating such provision shall be liable to any person injured as a result thereof. The evidence discloses that Schmuck worked for defendant company from May 12 to June 21, 1940, and never worked elsewhere thereafter before his death December 23, 1940.

The question at once arises, is a violation of a factory law, requiring this fan to carry away these fumes, conclusive on the question of the liability of the defendant?

"Notwithstanding an employer has been guilty of failure * * * to comply with a statutory duty imposed for the benefit of employees, he can, in the absence of any statutory imposition of liability, be held liable for injuries to his employees only if there is a casual connection or relation between his negligence and the injury of which the employee complains." 35 Am. Jur., sec. 126, p. 555.

"The law seems to be well settled that, when a statute commands or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his benefit, or for a wrong done him contrary to its terms. But it must be affirmatively shown that the plaintiff suffered some injury in consequence of the failure of the defendant to comply with the statute, and that such injury resulted proximately from such failure." *Strahl v. Miller,* 97 Neb. 820, 151 N. W. 952. See, also, *Omaha Street Ry. Co. v. Duvall,* 40 Neb. 29, 58 N. W. 531.

In the case at bar, the evidence, when carefully considered, proves that Mr. Schmuck had each and all of the symptoms and diseases which caused his death long before his few weeks' employment by the defendant. He had for years sought medical advice from doctors and aid from hospitals for extreme alcoholism and its attendant symptoms. He had had irritation of the nose and nosebleeds and headaches and had a cough long before he worked for defendant. He had also for some time had increasing difficulty from swollen ankles, and an excessively high pulse, as well

as a blood pressure which was so high that it indicated his death would occur within a short period, and none of these things were connected in the slightest way with the fact that he worked for defendant for a few weeks some months before he died, repairing fenders in a large room in May and June, with the windows open, when the fumes of "banana oil" from the lacquer, used only occasionally, were in the room.

"Defendant was not an insurer of the safety of the place in which plaintiff was working, but was required only to exercise ordinary care in furnishing him a safe place, and it was likewise required to exercise only ordinary care to warn and instruct him as to such dangers or hazards of his occupation as were not obvious." *Grant Storage Battery Co. v. De Lay*, 8 Cir., 87 Fed. 2d 726.

In our opinion, there was no connection proved between the fact that defendant failed to install a fan in this repair shop and the death of this unfortunate man some months later. Any possible connection would be but a mere guess, surmise, or conjecture; in other words, a mere possibility.

There can be no recovery when it is not proved that his working in a repair shop not provided with a fan, as required by law, affects the normal progress of his serious heart disease of long standing, nor that his ability to labor was thereby diminished, nor the date of his death substantially advanced.

This court has said in one case: "There is no evidence in the record that defendant's failure to comply with the building ordinances of the city of Omaha was the proximate cause of the injury. The only evidence on the subject is that plaintiff 'opened the door and stepped down and fell.' For aught we know she may have done any number of things that would have caused the accident and for which the defendant would not have been liable. The burden is upon the plaintiff and she has failed to produce any evidence to show that the act of defendant in violating the ordinance in any way contributed to this accident." *Winterson v. Pantel Realty Co.*, 135 Neb. 472, 282 N. W. 393.

Upon the record made in this case, the trial court erred in not directing a verdict for the defendant, for in our opinion plaintiff failed to prove a case, and the verdict and the judgment based thereon should be set aside and the action dismissed.

REVERSED AND DISMISSED.

STATE EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, ET AL., APPELLANTS, V. REX HASH ET AL., APPELLEES.
16 N. W. 2d 734

FILED DECEMBER 15, 1944. No. 31886.

1. **Appeal and Error.** Where a mandate of the supreme court makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon.
2. **Nuisance: INJUNCTION.** A court of equity has jurisdiction to enjoin the maintenance of a nuisance, and, where the necessities of the case require, it may enjoin the operation of the business which occasions such nuisance.
3. ———: ———. A decree of the district court enjoining specified acts constituting a business a nuisance does not meet the terms of a mandate requiring the abatement of the nuisance by permanently enjoining the operation of the business found to constitute a nuisance.

APPEAL from the district court for Madison county: LYLE E. JACKSON and FAY H. POLLOCK, JUDGES. *Reversed, with directions.*

Andrew D. Mapes, Walter R. Johnson, Attorney General, H. Emerson Kokjer and Rush C. Clarke, for appellant.

Frederick M. Deutsch, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CARTER, J.

This is an appeal by the state from a decree entered upon

the mandate of this court issued upon a judgment obtained in a former appeal in the same case. The appellee cross-appeals, claiming that the decree entered exceeds the scope of the controlling statute and the mandate of this court.

In the former appeal this court determined that the premises in question were being operated by the defendants contrary to the provisions of the Liquor Control Act and constituted a common nuisance as defined by the provisions of that act. This court then said: "But where, as here, the main business of the defendants contravenes the law of the state and the legitimate business of the place is either a sham or a minor part of the whole, the only adequate remedy consists of an abatement of the nuisance by closing the place by injunctive process in the manner prescribed by the legislature.

"We conclude therefore that the trial court was in error in failing to enjoin the operation of the roadhouse described in the petition, pursuant to the prayer thereof. The cause is therefore reversed with directions to the trial court to abate the nuisance, pursuant to the provisions of section 53-377, Comp. St. Supp. 1941." *State ex rel. Johnson v. Hash*, 144 Neb. 495, 13 N. W. 2d 716.

The pertinent part of the mandate issued upon the final determination of the issues presented in the former appeal is: " * * * it was considered by said Court a certified copy of the opinion of the court being hereto attached and made a part hereof, that the judgment rendered by you be reversed at the costs of said defendants taxed at $131.60 and the cause remanded with directions to abate the nuisance, pursuant to the provisions of Section 53-377, Comp. St. Supp. 1941."

The pertinent part of the judgment entered on the mandate is: " * * * that the defendants Rex Hash and Bertha Hash be and they are hereby perpetually enjoined from permitting or suffering upon the following described premises, to-wit: * * * each of the following acts: sale, possession or consumption of intoxicating liquor; spiking, selling or using set-ups or mixes; permitting the place to become

a resort for people to become intoxicated, noisy, profane, or vulgar; the presence of persons of vulgar, dissolute, and roistering habits to congregate on the premises or to engage in such activities thereon; maintaining, operating, permitting or suffering to be operated on said premises any slot machine or other gambling device, and from permitting or suffering gambling in any form upon said premises, to all of which plaintiff excepts. * * * that the buildings upon said above-described premises, described in the petition, shall be closed and padlocked for a period of one year * * *."

It is the contention of the attorney general that the mandate calls for the enjoining of the business as a common nuisance and the padlocking of the buildings upon the premises used in maintaining such nuisance agreeable to the provisions of section 53-377, Comp. St. Supp. 1941, now section 53-199, R. S. 1943. Appellee contends that the trial court is limited by the strict language of the mandate and that the decree entered exceeds its scope.

It will be noted that the mandate makes the opinion of the court a part thereof by reference. Under such circumstances, the opinion of the court can properly be examined in determining the nature and terms of the judgment to be entered or action to be taken. This seems to be the rule where the opinion is made a part of the mandate or where the remand is with directions to enter a decree in conformity with the views "herein expressed" or "in accordance with the opinion." In *Muhlke v. Muhlke*, 285 Ill. 325, 120 N. E. 770, a case similar in principle to the one at bar, it was said: "In construing the mandate or in determining what was decided by the reviewing court and what was ordered done the opinion of the court may be examined and consulted, where the remand is stated to be with directions to enter a decree in conformity with the views 'herein expressed.' (4 Corpus Juris, 1212; *West v. Brashear*, 39 U. S. 51.) As the mandate of this court in this case is only in the same general language of the opinion in its directions to the lower court, we must look solely to the opinion to determine the questions now before us." See, also, 5 C. J. S., p. 1494 *et seq.*

It is evident from an examination of the former opinion in this case that this court determined that the operation of the business of the defendants on the property described in the petition constituted a common nuisance within the meaning of the Liquor Control Act. The opinion expressly provided that "the only adequate remedy consists of an abatement of the nuisance by closing the place by injunctive process in the manner prescribed by the legislature." The enjoining of specific acts by the defendants does not meet the requirements of the opinion. This conclusion is supported by the reasoning in *State ex rel. Towle v. Eyen,* 130 Neb. 416, 264 N. W. 901, wherein it was said: "If the powers of the court in cases such as this are required to be limited to such an extent as to enjoin only the appellant from allowing misbehavior, vulgarity and profanity in and about his place of business, such a limitation would have the effect of rendering the exercise of such powers useless to prevent the mischief that was the cause of the injury. In a situation as shown by this record, if the evidence so justifies, the court may enjoin the operation of the business so as to prevent the injury and damage to the community committed by persons whose conduct and behavior are beyond the control of the appellant."

We are of the opinion that the trial court, under the mandate issued, is required to abate the nuisance by permanently enjoining the operation of the business found to constitute the nuisance. In addition thereto the trial court is required, by section 53-199, R. S. 1943, to order the building used in furtherance of the business closed and padlocked for not less than three months nor more than two years and until certain other conditions contained in the statute are met. The trial court in its decree ordered the building closed and padlocked for a period of one year and thereafter until the requirements of the statute were complied with. The defendants contend that the period of one year is excessive. We have examined the record and find no abuse of discretion on the part of the trial court in its disposition of this phase of the case.

The contention, that the action of the trial court in allegedly going beyond the scope of the mandate in entering its decree amounted to a confiscation of defendants' property without affording due process of law and without compensating therefor, is without merit. The trial court did not exceed the scope of the opinion and consequently it did not exceed the express terms of the mandate of which the court's opinion is a part. In fact, the trial court did not go as far as the mandate directed. The defendants have had their day in court on every issue raised by the parties to the litigation. Due process of law, meeting all constitutional requirements, has been afforded these defendants.

The judgment is reversed and the cause remanded with directions to enter a decree abating the nuisance by permanently enjoining the defendants from operating the business held to constitute a common nuisance under the Liquor Control Act and by entering a further order that the building in which the nuisance was furthered and maintained be closed and padlocked for a period of one year, and thereafter until the defendants, the owners thereof, shall give bond with sufficient surety to be approved by the court, in the penal sum of not less than $1,000 payable to the state and conditioned as required by law, and that during said period of one year defendants shall not enter upon said premises except for the purposes of making necessary repairs.

REVERSED, WITH DIRECTIONS.

JOSEPHINE JENSEN, APPELLANT, V. JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET AL., APPELLEES.
16 N. W. 2d 847

FILED DECEMBER 15, 1944. No. 31849.

1. **Appeal and Error: NEW TRIAL.** A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court and, on appeal, the ruling thereon will not be disturbed, unless a clear abuse of discretion is shown.

2. New Trial. Newly discovered evidence is not a ground for a new trial where the exercise of due diligence before trial would have produced it.
3. ———. A party should, in preparing his case for trial, proceed on the assumption that his adversary will produce evidence to make good the averments of his pleading.
4. ———. A motion for a new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial.

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

Ritchie & Swenson and *Edward F. Fogarty*, for appellant.

Gray & Brumbaugh, Kennedy, Holland, DeLacy & Svoboda and *L. J. Tierney, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

MESSMORE, J.

Plaintiff brought this action to recover damages for personal injuries sustained by her when she tripped over the lower panel of a door and fell through the opening, caused as the result of an opaque glass panel in the door having been broken. At the conclusion of plaintiff's testimony, the court directed a verdict in favor of the defendant building corporation and dismissed it from the case. The case proceeded against the defendant insurance company, the cause was submitted to the jury, and a verdict was returned in the amount of $650 and costs. Plaintiff and defendant insurance company filed motions for a new trial, both of which were overruled. Plaintiff appeals.

Plaintiff's motion for a new trial alleges: "The plaintiff has newly discovered evidence material for maintaining her cause which she could not with reasonable diligence have discovered and produced at the trial." Plaintiff contends that the court erred in overruling her motion for a new trial. The evidence, upon which plaintiff bases her right to a new trial, is, in substance, as follows:

The janitor of defendant building corporation testified

that he was called to the premises of the insurance company where plaintiff's accident occurred, for the purpose of obtaining glass to put in the door, and that he went to the insurance office after plaintiff fell. Her counsel had no way of knowing that such statement was not true. The insurance company introduced witnesses who testified that the janitor of the building corporation had measured the door, through which the plaintiff fell, before the accident. If this evidence were true, plaintiff contends, the janitor had negligently left the door closed, because the testimony shows that no one had gone near the door after the janitor had measured it for glass size, and such negligence was the proximate cause of plaintiff's accident and damage.

Affidavits of plaintiff's counsel in support of her motion for a new trial confirmed the foregoing and, in addition, set forth circumstances by which it is claimed there was no opportunity to interview or contact the employees of the insurance company concerning the accident, and that plaintiff had no knowledge of the testimony which would be adduced by such witnesses. Counsel who tried the case in his affidavit stated that prior to the trial he discussed the matter with the janitor of the building corporation; the latter advised the affiant, as the janitor later testified in court, that after he measured the door he left it in an open position; that the affiant had no knowledge that several employees of the insurance company would testify to facts which would prove the contrary, or he would have called such witnesses.

The plaintiff called as witnesses the employees of the building corporation and the district manager of the insurance company. On the latter's cross-examination the names of the other employees in the insurance office were given. Plaintiff did not call any of such employees, but the testimony given by them in defense of the insurance company is the evidence which plaintiff contends is newly discovered evidence, such as to warrant the granting of a new trial. The record discloses that the employees of the insurance company were available at all times and present in court

at different times. It is further disclosed that ample opportunity was afforded plaintiff's counsel to obtain evidence with reference to all of the circumstances, even during the course of trial.

"A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the court, and on appeal, the ruling thereon will not be disturbed, unless a clear abuse of discretion is shown." *Allender v. Chicago & N. W. Ry. Co.*, 119 Neb. 559, 230 N. W. 102. See, also, *Reinsch v. Pacific Mutual Life Ins. Co.*, 140 Neb. 225, 299 N. W. 632.

Under the circumstances, there was no abuse of discretion shown on the part of the trial court in denying a new trial. The claimed newly discovered evidence was available, had due diligence been exercised. There is no reason why the employees of the insurance company could not have been contacted and questioned about every matter pertinent to this case. There is nothing to disclose that plaintiff's counsel was denied this privilege. It was not even requested.

To make sufficient showing on the ground of newly discovered evidence, as contemplated by the seventh subdivision of section 20-1142, Comp. St. 1929, the proof must show that neither the litigant nor his counsel could have discovered the evidence by the exercise of due diligence. See *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766, 244 N. W. 298.

"Newly discovered evidence is not a ground for a new trial, where the exercise of due diligence before trial would have produced it." *Hardt v. Orr*, 142 Neb. 460, 6 N. W. 2d 589. See, also, *Gate City Co. v. Douglas County*, 135 Neb. 531, 282 N. W. 532; *Buzzello v. Sramek*, 110 Neb. 262, 193 N. W. 743.

Plaintiff contends that the evidence given in defense of the insurance company by its employees constituted surprise. Plaintiff's failure to move for an adjournment of the trial precluded a new trial on the ground that the plaintiff was surprised by the evidence of the insurance com-

pany. *Bonacorso v. Camden Fire Ins. Assn.*, 130 Neb. 203, 264 N. W. 442. See, also, *Hahn v. Doyle*, 136 Neb. 469, 286 N. W. 389.

The plaintiff's petition alleged that the door, through which she fell, was permitted to remain closed by the employees of the insurance company and the building corporation, and "thereby a dangerous trap was set." The building corporation in its answer denied the statement and alleged that "the condition of the door and its position were open, obvious and apparent and known to the plaintiff, * * * ." The separate answer of the insurance company alleged that prior to the fall of the plaintiff the glass in the entrance door to the office had been broken; that certain precautions were immediately taken to protect the employees and customers of the office from injury, the manager of the building corporation was notified, and the agent of such building corporation had assumed charge of the door and its repair. From the pleadings, the plaintiff, by the exercise of due diligence before trial, could have obtained the evidence which plaintiff now claims is her newly discovered evidence.

In the case of *Secord v. Powers*, 61 Neb. 615, 85 N. W. 846, this court held: "A party should, in preparing his case for trial, proceed on the assumption that his adversary will produce evidence to make good the averments of his pleading." Followed in *Kielian v. Kent & Burke Co.*, 131 Neb. 308, 268 N. W. 79.

Applications for a new trial are entertained with reluctance and granted with caution, because of the manifest injustice in allowing a party to allege that which may be the consequence of his own neglect in order to defeat an adverse verdict, and, further, to prevent fraud and imposition which defeated parties may be tempted to practice to escape the consequences of an adverse verdict. The trial court did not err in overruling plaintiff's motion for a new trial.

The plaintiff complains of the inadequacy of the verdict. From a review of the record, we conclude that the extent

of the plaintiff's injuries, the expense incurred thereby, and the amount to be allowed for pain and suffering are for the jury, and, where, as here, the amount allowed has not been shown to be inadequate or unreasonable under the proof adduced, the jury's verdict will not be disturbed.

AFFIRMED.

MARIE GROSS, PLAINTIFF IN ERROR, V. GARFIELD COUNTY ET AL., DEFENDANTS IN ERROR.
16 N. W. 2d 850

FILED DECEMBER 22, 1944. No. 31778.

Contempt. A prosecution for civil contempt is in the nature of a prosecution for crime, and where the evidence relied upon is wholly circumstantial it must be such that it is susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the person charged.

ERROR to the district court for Garfield county: WILLIAM F. SPIKES, JUDGE. *Reversed and dismissed.*

Harold A. Prince and *Davis & Vogeltanz*, for plaintiff in error.

W. F. Manasil, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CARTER, J.

This is a contempt proceeding against Marie Gross, growing out of an alleged violation of an injunctive order entered by the district court for Garfield county in 1924. The trial court found her guilty and assessed a fine of $10 and costs. From this judgment Mrs. Gross brings error proceedings to this court.

The record shows that in 1923 Marie Gross brought an action to enjoin Garfield county and its officers and agents from trespassing upon her real estate and attempting to

change the existing watercourse on said land by opening or constructing any ditch, waterway, dam or other earthworks upon or adjacent to her land. Defendants answered and cross-petitioned, alleging that Marie Gross had obstructed the natural watercourse, and praying for an injunction requiring her to keep the watercourse clear of weeds and other obstructions. The parties thereupon entered into a written stipulation which was duly filed in said action and in consequence of which the court on April 10, 1924, entered a decree by the terms of which the "plaintiff * * * are hereby perpetually enjoined and restrained from in anywise obstructing or altering the drainage of the surface water upon the said land of the said plaintiff, filling any ditches thereon or changing the said drainage from the condition in which it was at the time of the commencement of the said action or any time thereafter to the time of the entry of this decree, and from excavating any ditches or laterals changing in any manner the drainage of the surface waters thereon, * * * ." It must also be noted that the decree thus entered contained a finding that the facts stipulated by the parties were true, among them being the following: " * * * that there is a natural water course across the said south half of the southwest quarter of said section twelve, the exact course of which has been, and still is, in dispute; * * * ." It will be observed that no mandatory injunction was included in the decree for the very evident reason that the location of the natural watercourse was not determined. It is clear that the purpose of the injunction was to maintain the *status quo* in so far as the parties to the litigation were concerned.

On or about May 12, 1942, the county filed its motion for a citation directing Marie Gross to appear and show cause why she should not be proceeded against and punished for contempt for violating the injunctive order of April 10, 1924. The violation is charged in the following language: "That notwithstanding said decree, the plaintiff or her tenants and servants have disregarded and disobeyed the order of said court and has changed and altered the drainage

of the surface water upon the said land of the plaintiff and has thereby caused a large amount of the said surface water to be diverted from the natural water course and has caused said water to flow across and damage the Garfield county highway * * * ."

The land specifically involved in this litigation is the south half of the southwest quarter of the section. A state highway runs north and south along the west end of the tract and a county road runs east and west along the south side of it. The record discloses that two natural watercourses enter the tract from the north and come together at a point about 400 feet south of the north line. At a point approximately 200 feet south of this juncture the natural watercourse divides. One branch follows a southerly course slightly to the east. This watercourse crosses the Gross land and runs onto the county road along the south side thereof. The other branch pursues a southerly course slightly to the west until it reaches a point approximately 300 feet south where it again divides. At this point there appears upon the surface of the ground a ditch running west to the state highway at a point where a bridge was constructed to permit drainage waters therefrom to pass through. The other course was to the south in the general direction of the southwest corner of the tract where it runs into the road ditch paralleling the county road.

It is evident from a general consideration of the evidence that a drainage channel or slough ran from the point of this last diversion in a westerly direction to what is now the state highway at and prior to the entry of the first decree in 1924. The evidence is conflicting as to whether water ran south from this point during that period. That the west watercourse had a natural tendency to fill up with mud and débris is evident from the record, in addition to the fact that the county saw fit to clean this drain in 1938. It seems clear to us that the drainage area of these enumerated drains has increased or that increased precipitation has brought about changing conditions in this immediate territory. The natural drainage course was not determined

in the former litigation. No evidence of any overt act on the part of any person has been shown. There is evidence that a small obstruction was once observed in the ditch. This was explained as having been placed there by the seven-year-old son of the tenant, while at play. The natural tendency of the west ditch, generally referred to as the dug ditch, to fill with débris and silt is something that cannot be charged to Mrs. Gross in view of the absence of any mandatory requirements in the injunctive order. The results complained of as a basis for the citation for contempt could as well have been the work of uncontrolled floodwaters as that of the alleged contemner or her tenants or servants. Under such circumstances a conviction for contempt cannot be sustained in the absence of proof of an overt act, properly established by the evidence, which is violative of the terms of the injunctive order alleged to have been violated.

It is urged that this fact has been established by circumstantial evidence. We cannot agree with this contention. For a conviction for contempt to be sustained on such evidence it must be such that it is susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the alleged contemner. We think the evidence in the present case is insufficient to meet the requirements of this rule. This court has held that contempt proceedings are in their nature criminal and no intendments will be indulged in to support a conviction; also, that it is necessary to establish guilt beyond a reasonable doubt. *Gentle v. Pantel Realty Co.*, 120 Neb. 630, 234 N. W. 574; *State ex rel. Wright v. Barlow*, 132 Neb. 166, 271 N. W. 282. It is also required that the disobedience of the injunction must be willful before a breach thereof may be punished as a contempt. *Hawthorne v. State*, 45 Neb. 871, 64 N. W. 359; *Whipple v. Nelson*, 138 Neb. 514, 293 N. W. 382.

We are of the opinion that the evidence does not sustain a finding beyond a reasonable doubt that the alleged contemner willfully violated the terms of the injunctive order entered on April 10, 1924. The evidence adduced does not

show that Mrs. Gross, or any one acting through or under her, did anything affirmatively which obstructed or altered the drainage of surface waters, or filled any ditches or changed the direction of any watercourse contrary to the terms of the injunctive order claimed to have been violated. There is ample evidence to sustain a finding that the matters complained of were caused by the action of exceptionally heavy precipitation, flash floods and the natural action of uncontrolled surface waters. We are bound to accept this reasonable hypothesis shown by the evidence rather than that the circumstances indicate a willful violation of the injunction by the person charged.

This conclusion makes a discussion of other alleged errors unnecessary. The judgment of the trial court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

PERSIE E. CHAFFEE, EXECUTRIX, ET AL., APPELLANTS, V. CITY OF OMAHA, ET AL., APPELLEES.
16 N. W. 2d 852

FILED DECEMBER 22, 1944. No. 31852.

1. **Limitation of Actions.** A cause of action arises on municipal warrants when it appears that the assessments of taxes levied to provide a fund for their payment have failed and will continue to fail to produce funds for such purpose, when there is sufficient money in the fund for their payment, or when the municipal officers have had reasonable opportunity to provide funds to pay them and have refused and neglected to do so.
2. ———. As a general rule, statutes of limitations run in favor of, as well as against, municipalities.
3. ———. The statute of limitations begins to run against warrants issued by a municipality at the time a cause of action arises thereon.
4. ———. The rule that the statute of limitations does not begin to run against city warrants drawn on a special fund until the fund is actually created applies only when such fund is the exclusive source of payment, in other words, when the existence

of the fund is essential to the creation of the cause of action. *Rogers v. City of Omaha*, 82 Neb. 118, 117 N. W. 119, overruled in so far as it is in conflict with the foregoing rule.

5. **Estoppel.** The failure of municipal officers to perform their statutory duty cannot estop the municipality to invoke the statute of limitations.

6. **Limitation of Actions.** Where a petition shows the lapse of more than 40 years from the time city warrants were registered for payment and the date suit was commenced, the statute of limitations will be deemed to have run against said suit in the absence of a pleading of facts excusing such unconscionable delay.

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

W. A. Ehlers and *John N. Baldwin*, for appellant.

Harold C. Linahan, G. H. Seig, Edward F. Fogarty and *Edward Sklenicka, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CARTER, J.

This is an appeal from an order of the trial court sustaining a general demurrer to plaintiff's petition for a writ of mandamus or suitable equitable relief in enforcing payment of six unpaid special fund warrants issued by the city of Omaha as evidence of the damages to be paid in a condemnation proceeding.

The amended petition shows that on April 23, 1887, the city council of the city of Omaha commenced proceedings to condemn certain lands for street purposes. An award of damages was made and the adjoining and abutting property owners in the district were assessed the value of the benefits and improvements to their respective premises in the total sum of $10,772.84 for the purpose of creating a special fund to pay the cost of opening the street and its subsequent improvement. The city thereafter issued its several special fund warrants in varying sums payable from said special fund as evidence of the amount due under the condemnation award. There was collected and paid into

said fund the sum of $7,357.59, of which $7,193.04 was paid out on warrants, leaving a balance on hand of $164.55. Warrants remaining unpaid amounted to $3,638.75, each one of which exceeded $164.55 in amount. The petition alleges that all of the unpaid assessments have been canceled by the district court for Douglas county, or are unpaid and appear uncollectible after the lapse of many years. The petition further alleges that the city has failed and neglected, in violation and disregard of duty, to create and collect a sufficient fund from which the warrants in suit could be paid. The petition shows that each of the unpaid warrants was presented for payment and payment was refused on January 20, 1892. Each unpaid warrant was registered for payment as of that date.

Plantiff thereupon alleges that there is now due on said warrants, including interest at 12 per cent per annum from date of registration, the sum of $22,814.47. Plaintiff prays for a writ of mandamus, a judgment for this amount, or such other and further relief as to the court may appear just and proper to the end that the amount due shall be paid.

To this amended petition the city filed a general demurrer which was sustained and the action dismissed by the trial court. The city contends that such petition shows on its face that a recovery is barred by laches and the statute of limitations.

The warrants in suit were issued on December 10, 1891, and registered for payment on January 20, 1892. This suit was commenced on April 15, 1933. The setting out of the dates of the happening of the subsequent events pleaded in the petition appears to have been meticulously avoided. In any event, an unreasonable delay in the prosecution of the case is shown upon the face of the petition itself. No attempt is made to excuse the unconscionable delay in enforcing the payment of the warrants sued upon. Plaintiff contends that the statute of limitations does not begin to run against a warrant issued by a municipal corporation payable out of a specific fund until the corporation has

provided a fund from which it could be paid. For the purposes of this case it is conceded that no such fund was ever fully raised.

We think the correct rule is that where a municipal corporation issues a warrant payable from a special fund, and no other remedy exists for enforcing payment, the statute of limitations does not begin to run until the fund is provided with money with which to pay it. 34 Am. Jur., sec. 141, p. 114. In other words, for the foregoing rule to apply, the existence of the fund must be necessary to the creation of the cause of action. *Little v. Emmett Irrigation District,* 45 Idaho 485, 263 Pac. 40; *Denver-Greeley Valley Irrigation District v. McNeil,* 10th Cir., 80 Fed. 2d 929. We do not doubt the correctness of the foregoing rule when properly restricted by the words "and no other remedy exists for enforcing payment." But where an additional remedy exists, the statute of limitations commences to run when such remedy accrues. The law is well settled that when a municipal corporation enters into a contract of this character, it thereby agrees to create the special fund by the levying of valid assessments and, upon a failure to so do, it is liable generally upon the obligation. *Daniels v. City of Gering,* 130 Neb. 443, 265 N. W. 416. This being true, a cause of action is not dependent upon the creation of the special fund and the rule does not apply. Consequently, plaintiff cannot rely upon the failure to create the special fund as a tolling of the statute of limitations. If no cause of action exists until the fund is created, no cause of action yet exists for the fund has never come into existence.

Plaintiff relies upon the case of *Rogers v. City of Omaha,* 82 Neb. 118, 117 N. W. 119, wherein we said: "The statute of limitations does not commence to run against warrants issued by a municipal corporation, payable out of a special fund to be created, until such fund has in fact been created, and there is sufficient money in the fund with which to pay the warrants." The facts in that case are very similar to the one at bar. We think the rule announced is correct in so far as it applies to a case where

the creation of the special fund is necessary to create a cause of action. But we are of the opinion that the court was in error in applying it to a case where the special fund was not necessary to the creation of a cause of action and where such failure to create the fund provided the holder of the warrants with additional remedies for the enforcement of payment of the warrants as general obligations of the city. The rule was incorrectly applied in the *Rogers* case and to the extent that it conflicts with the rule herein announced it is overruled.

As a general rule, statutes of limitations run in favor of, as well as against, municipalities. In the case at bar, upon the failure of the city to create a fund sufficient for the payment of the warrants in suit, plaintiff could have asserted the general liability of the city. At that time the plaintiff could have commenced his action against the city. There is no reason apparent from this record why he could not then have commenced the action that he now seeks to have litigated. For some unknown reason he permitted more than 40 years to pass by from the time he registered his warrants until this action was commenced. It is true that he does not plead the date when the warrants became general obligations of the city, assuming they were not always such, although we think they were. A city, by the mere process of setting up a special fund from which a general obligation of the city is to be paid, cannot thereby evade its general liability on the obligation. In any event, the fund was not created on January 20, 1892, when the warrants were registered for payment, almost five years after the condemnation proceeding was commenced. For 41 years the plaintiff and his assignors of the warrants have sat by and passively observed the flight of time. Not years, but decades, passed without the least manifestation of interest on the part of the plaintiff and his antecedents. Such a reckless disregard of one's own rights imposes a right upon the part of the defendant to assert the statute of limitations as a statute of repose. It is not to the public interest to enforce such ancient claims after so many

years have elapsed and after so many complications have arisen, unless good reason is shown for the delay. The action is clearly barred by the statute of limitations.

The plaintiff contends that the duty imposed upon the officers of the city to make and collect assessments and to pay the warrants from the fund thus raised was a continuing one. "Such failure of officers to perform their statutory duty, cannot estop the district to invoke the statute of limitations." *Little v. Emmett Irrigation District, supra.* The plaintiff pleads, however, that many of the assessments were canceled by the district court. He then knew that the creation of an adequate fund to pay these warrants had failed. Although he had this knowledge, neither he nor the antecedent owners of the warrants bestirred themselves from their lethargy. In *Warren v. County of Stanton, ante,* 220, 15 N. W. 2d 757, we held that the statute of limitations does not begin to run against county warrants until after it appears that taxes levied to create a fund for the payment of the warrants have failed and will continue to fail to produce payments to the fund, or until there is sufficient money in the fund upon which they are drawn, or until the proper officers have had opportunity to provide funds to pay them and have refused or neglected to do so. See *Bacon v. Dawes County,* 66 Neb. 191, 92 N. W. 313. We think the lapse of 40 years, in the absence of a pleading of facts excusing such unconscionable delay, is amply sufficient to bring the case within the latter portion of this holding, even if it might be said the former portion is inapplicable.

A further answer is that if the statute of limitations did not start to operate because no cause of action had accrued to plaintiff until within five years prior to the commencement of the action on April 15, 1933, then no cause of action now exists because nothing is shown to have occurred on or after that date which would give rise to a cause of action. In other words, if a cause of action exists at all, it must have existed more than five years prior to the filing of this suit. Consequently, the action is either barred by

the statute of limitations or it has not yet arisen, in which event the suit was prematurely brought. Whichever horn of the dilemma the plaintiff assumes, it can avail him nothing in this suit. *McDermott v. Alger*, 186 Mich. 278, 152 N. W. 991; *Little v. Emmett Irrigation District, supra.*

It is not necessary to determine the nature of the action. Whether it be to obtain a writ of mandamus, a money judgment, or for general equitable relief, the same rules barring a recovery are applicable. Our holding that the action is barred by the statute of limitations makes it unnecessary for us to decide other issues raised by the appeal.

The trial court was correct in sustaining defendant's general demurrer and in dismissing the action.

AFFIRMED.

GOTTHILF C. HUEFTLE ET AL., APPELLEES, V. THE FARMERS ELEVATOR, APPELLANT: IMPLEADED WITH GUSTAV A. HUEFTLE ET AL., APPELLEES.

16 N. W. 2d 855

FILED DECEMBER 22, 1944. No. 31859.

1. **Corporations.** A corporation has no power to adopt articles of incorporation or bylaws which impair or destroy the obligations of contracts, or rights thereunder, or vested rights; and articles of incorporation or bylaws which have that effect are invalid and unenforceable against a person whose contractual rights are materially impaired or destroyed thereby.
2. ———. A majority of the stockholders of a corporation cannot, by amending the articles or bylaws of the corporation, deprive the minority without their consent of their contractual rights to dividends under the articles and bylaws in effect when their stock was purchased.
3. ———. A purchase of stock in a corporation at a time when a method is prescribed for amending the articles and bylaws does not operate to confer authority to make amendments constituting a fundamental change in the nature, purposes and objects of the corporation, or to impair or destroy contract rights of minority stockholders.
4. **Pleading.** Where defendant admits the material facts in plain-

tiff's petition and pleads a waiver, an estoppel, or matters in avoidance as a defense thereto, such material facts will be treated as true, though the answer also contains a general denial.

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

Cloyd E. Clark, for appellant.

Butler, James & Morrison, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CARTER, J.

This is an appeal from a decree enjoining a distribution of dividends in accordance with amendments to the articles of incorporation and bylaws of The Farmers Elevator, Eustis, Nebraska, a corporation, on the ground that said amended articles and bylaws violate the contractual rights of minority stockholders and are not consistent with the nature, purposes and objects of the corporation as stated in its original articles and bylaws.

The record shows that plaintiffs are stockholders in the corporation. They allege that The Farmers Elevator was organized for the purpose of carrying on the business of buying and selling grain, hay, livestock and other agricultural products and that it purchased an elevator and office building to carry on the business in Eustis, Nebraska. Plaintiffs then allege the intent of the directors of the corporation to distribute the profits of the corporation on the basis of and in proportion to the amount of the business done with the corporation, rather than as dividends on the stock of the corporation. It is also alleged that said corporation directors are assuming the power to recall the stock of the corporation and to give in exchange therefor a new and different type of share and certain so-called participation certificates on which they purport to pay patronage dividends rather than the stock dividends required by the articles of incorporation. It is alleged that a large amount of profits have accrued and that defendants, unless enjoined,

will pay them out as patronage dividends to the irreparable injury of plaintiffs. The petition also alleges the invalidity of certain amended articles of incorporation under which the defendants are purporting to act. The petition prays for an injunction enjoining defendants from proceeding in any manner under the amended articles of the corporation.

The defendants by their answer allege that on March 4, 1943, at a regularly called meeting of the stockholders of the corporation, certain amendments to the articles of the corporation were adopted which purported to change The Farmers Elevator to a co-operative corporation and provided for the distribution of dividends upon a patronage basis. Subsequently the officers and directors adopted bylaws in conformity with the amended articles and have since proceeded to act in accordance therewith. The answer admits the purposes of the corporation as originally formed and pleads the adoption and validity of the amended articles and bylaws giving rise to the present litigation. There are additional allegations in the answer to the effect that plaintiffs are barred by estoppel and laches from asserting their claim.

Plaintiffs filed a general demurrer to the answer which the trial court sustained. Defendants elected to stand on their answer, an injunction decree was entered as prayed for in the petition and an appeal taken therefrom. The correctness of this ruling is the sole question raised by the appeal.

The fundamental question to be determined is whether the adoption of amended articles of incorporation by a majority of the stockholders, whereby it is sought to convert a stock corporation organized under the general corporation laws of the state into a co-operative corporation distributing dividends on a patronage basis, is violative of the contractual rights of minority stockholders and constitutes such a fundamental change in the nature, purposes and objects of the corporation as to make such amendments invalid.

The purpose of the suit is to prevent the distribution of

the profits of the corporation in the manner provided by the amended articles and bylaws. It is self-evident that stockholders under the original articles will be deprived of dividends to which they were entitled thereunder. By their purchase of stock they acquired a contractual right to share in the net profits in the form of dividends on stock. An attempt to make a distribution of net profits on a patronage basis constitutes a violation of plaintiffs' contract rights.

"It is settled law that a corporation has no power to adopt by-laws which impair or destroy the obligations of contracts or rights thereunder or vested rights, and that by-laws which have that effect are invalid and unenforceable against a person whose rights are impaired or destroyed thereby." 8 Fletcher, Private Corporations (Perm. ed.) sec. 4188. The foregoing rule applies with equal force to amendments to the bylaws.

In a case very similar on fact and principle this court said: "In 1916 there was an attempt to amend the articles of incorporation by changing the Farmers Elevator Company to a co-operative association within the meaning of the statute cited. Later defendants planned to distribute profits under the amendment. Such a course, if pursued, would deprive plaintiffs of dividends to which they were entitled under their contracts as original stockholders and would destroy their contractual rights. This neither the legislature nor the defendants can lawfully do." *Allen v. White,* 103 Neb. 256, 171 N. W. 52.

In *Supreme Commandery Knights of the Golden Rule v. Ainsworth,* 71 Ala. 436, the court said: "A corporation has not capacity, as the legislative power from which it derives existence has not competency, by laws of its own enactment, to disturb or divest rights which it had created, or to impair the obligations of its contracts, or to change its responsibilities to its members, or to draw them into new and distinct relations."

The amendments change the fundamental arrangements and plans of the corporation as it was organized when plaintiffs became stockholders and impair the contractual

rights which they then acquired. It follows that the amendments and the proceedings of the defendants taken thereunder are void.

Defendants urge that plaintiffs are estopped to question the validity of the amended articles and bylaws for the reason that they permitted defendants to advertise and solicit business for approximately seven months without objection thereto, that the articles and bylaws provided for their own amendment at the time plaintiffs purchased their stock and they are bound thereby, and that previous amendments to the articles and bylaws had been made to which plaintiffs had acquiesced. We find no merit in these contentions. A delay of seven months cannot be deemed unreasonable where, as here, no effort was made to distribute dividends on a patronage basis until shortly before the suit was brought.

While it is true that the right to amend the articles and bylaws was reserved at the time plaintiffs became stockholders, the right to amend was not absolute. The power to amend articles and bylaws is an incident of the power to adopt them and a general reservation of the right to amend ordinarily creates no different situation than if it were not reserved at all. In either event, the fact that a stockholder may purchase stock at a time when the right to amend the articles and bylaws is reserved does not operate to confer authority to make an amendment which will amount to the destruction or impairment of the vested or contract rights of the member. Neither does the fact that a stockholder acquiesces in previous amendments estop him from asserting his rights when a subsequent article or bylaw is amended which materially affects his interests.

Defendants contend that a general denial was included with the affirmative matters pleaded in their answer and that the trial court therefore was in error in sustaining the general demurrer thereto. An examination of the answer reveals that all the material facts were admitted therein and affirmative defenses pleaded thereto. We think the situation is covered by the following rule: "Facts alleged in

a petition to which the defendant in his answer pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, though the answer also contains a general denial." *Nason v. Nason*, 79 Neb. 582, 113 N. W. 139; *Fielding v. Publix Cars, Inc.*, 133 Neb. 818, 277 N. W. 331.

We are of the opinion that the amendments to the articles of incorporation and bylaws here involved constitute such a fundamental change in the nature, purposes and objects of the corporation and such an impairment of the contractual rights of the plaintiffs, that the trial court was correct in declaring their invalidity. The trial court was right in sustaining the demurrer to defendants' answer and in entering the injunctive order prayed for in plaintiffs' petition when defendants elected to stand on their answer.

AFFIRMED.

MARIE E. CHARD, GUARDIAN OF AMELIA A. CHARD, APPELLEE, V. NEW YORK LIFE INSURANCE COMPANY, APPELLANT.
16 N. W. 2d 858

FILED DECEMBER 22, 1944. No. 31791.

1. Insurance. Ordinarily the provisions of a cessation clause added to a policy of life insurance which contains an insuring clause providing for total disability benefit payments, do not change the liability created by the insuring clause of the policy.
2. ———. A policy of insurance providing for total disability benefits when the insured has become totally disabled by bodily injury or disease, so that he is and will be thereby wholly prevented from performing any work, following any occupation, or engaging in any business for remuneration or profit, means inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner.
3. ———. Where different minds may reasonably draw different conclusions as to whether the facts establish liability for total disability, it is the duty of the trial court to submit the question to the jury under appropriate instructions for their decision.
4. Trial. Instructions relating to the burden of proof should not impose a greater burden on either party than the law requires nor relieve a person of the burden imposed by law.

5. Appeal and Error. It is reversible error to instruct the jury upon a question not raised by the pleadings nor applicable to the evidence when such instructions have a tendency to mislead the jury or have a prejudicial effect upon the rights of the party complaining.

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

Brown, Crossman, West, Barton & Fitch and *John O. Sheldahl*, for appellant.

Merril R. Reller and *John McArthur, contra.*

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

CHAPPELL, J.

This is an action at law prosecuted by Marie E. Chard, Guardian of Ameila A. Chard, as plaintiff, against the New York Life Insurance Company, defendant, to recover certain monthly total disability benefits alleged to have accrued under and by virtue of the provisions of an insurance policy purchased by the ward and effective as of October 18, 1930. The action was originally filed in the municipal court for Lincoln, Nebraska, where plaintiff obtained a judgment from which defendant appealed to the district court for Lancaster county. Upon trial there a jury awarded plaintiff a verdict for $393.04. The trial court entered judgment upon the verdict and allowed plaintiff's attorney a fee of $150. Motion for new trial was overruled and defendant appeals to this court, assigning as error that the verdict and judgment are not sustained by the evidence and are contrary to law; that the trial court erred in overruling defendant's alternative motion made at the conclusion of all the evidence to dismiss or instruct a verdict for defendant; and erred in the refusal and giving of certain instructions. We decide that the trial court erred in the giving of certain instructions which were prejudicial to defendant's rights, but that defendant's other assignments of error are without merit.

It is conceded that the policy was in full force and effect during the period of the alleged total disability and that total disability payments thereunder were approved and made by defendant for twenty months just preceding January 15, 1934, and from April, 1934, until they were discontinued on January 13, 1943.

The sole issue presented to the trial court by the pleadings and the evidence was whether the insured ward was totally disabled within the meaning of the policy from January 13, 1943, to and including August, 1943.

The policy provides that, "Upon receipt by the Company at its Home Office of due proof, as hereinafter provided, that the Insured has become totally disabled by bodily injury or disease so that he is and will be thereby wholly prevented from performing any work, following any occupation or engaging in any business for remuneration or profit, and that such disability has already continued uninterruptedly for a period of at least four months (such total disability of such duration being presumed to be permanent only for the purpose of determining liability hereunder), * * * ." Thereafter followed provisions for waiver of premiums and payment of $49.13 per month to insured during continuance of total disability. The policy also contained a defeasance section which provided, "Before making any income payment or waiving any premium, the Company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. If such proof shall not be furnished, or if at any time the Insured shall become able to perform any work, follow any occupation, or engage in any business for remuneration or profit, no further income payments shall be made nor premiums waived * * * ."

For many years this court has followed the rule that, "A contract of insurance should be given a reasonable construction so as to effectuate the purpose for which it was made. In cases of doubt, it is to be liberally construed in favor of the insured." *Hamblin v. Equitable Life Assur-*

ance Society, 124 Neb. 841, 248 N. W. 397. See, also, *Oswald v. Equitable Life Assurance Society*, 128 Neb. 173, 258 N. W. 41. In *Woods v. Central States Life Ins. Co.*, 132 Neb. 261, 271 N. W. 850, both the insurance clause and the cessation or conduct clause were almost identical with those here involved. In that connection this court in its opinion quoted from and approved a statement appearing in *Stoner v. New York Life Ins. Co.*, (Mo. App.) 90 S. W. 2d 784, a similar case, to the effect that, "There is then no conflict between the two clauses. The latter has no effect to limit or vary the former. It is but declaratory of the former." Following the quotation this court said: "It is clear, therefore, that the addition of the cessation clause in no way changes the liability created in the first-quoted section (the insuring clause) of the policy." Upon this premise the court in construing such policy provisions, held that, "A policy of insurance providing for total disability benefits when the insured 'has become wholly and permanently disabled by bodily injury or disease, so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation or profit, or from following any gainful occupation,' means inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner." The rule above stated is in accord with the great weight of authority and is *stare decisis* in this jurisdiction. See Annotations, 79 A. L. R. 857; 98 A. L. R. 789. It was followed and amplified in *From v. General American Life Ins. Co.*, 132 Neb. 731, 273 N. W. 36, wherein it was held that, "Where an insurance policy provides for the payment of disability benefits when insured has become totally and permanently disabled from bodily disease, so that he is thereby and will be permanently, continuously and wholly prevented from pursuing any occupation whatsoever for remuneration or profit, such provision does not mean that the insured must be absolutely and literally helpless and unable to do anything. The term 'occupation,' as used in the policy, means the occupation or

employment of the insured in which he was engaged or for which he was fitted. The words 'total and permanent disability' do not mean that the insured must be rendered absolutely and totally unable to perform every duty of his occupation 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." See, also, *Reinsch v. Travelers Ins. Co.*, 133 Neb. 249, 274 N. W. 572; *Bennett v. Metropolitan Life Ins. Co.*, 136 Neb. 785, 287 N. W. 609. It was also held in *Miceli v. Equitable Life Assu. Society*, 138 Neb. 367, 293 N. W. 112, that, "If an insured's ability to do substantially and practically any of the material acts necessary for the transaction of his usual business or vocation is affected, or if, while attempting to do all of such acts, he is jeopardizing his health and safety, or ought not actually to be so engaged, he will be held to be totally disabled within the meaning of a disability provision in an insurance policy." Upon motion for rehearing in such *Miceli* case, in a supplemental opinion found at p. 374, this court adhered to its former opinion and held that, "Inability to do any of the material acts necessary for the transaction of an insured's usual business or vocation, which prevent the substantial and practical conduct or pursuit of such business or vocation, is equivalent, in insurance law, to inability to do all the substantial and material acts necessary to the prosecution of the insured's business or occupation in his customary and usual manner." See, also, *Reinsch v. Pacific Mutual Life Ins. Co.*, 140 Neb. 225, 299 N. W. 632. It is well established that where different minds may reasonably draw different conclusions as to whether the facts establish liability for total disability, it is the duty of the trial court to submit the question to the jury under appropriate instructions for their decision. *Schultz v. John Hancock Mutual Life Ins. Co.*, 134 Neb. 885, 280 N. W. 165. Also, that the trial court should not direct the verdict of the jury unless the evidence is so clear upon every point upon which the verdict must depend that reasonable minds could not come to any other conclu-

sion. *Oswald v. Equitable Life Assurance Society, supra.*

Bearing these rules in mind, the evidence becomes important to decision. The record discloses that the insured graduated from the University of Nebraska with honors, majoring in romance languages. Her occupation or profession at the time the insurance contract was made and at the time that total disability first resulted, was that of a French instructor, tutor and interpreter. She has had no training or experience qualifying her to engage in other occupations or professions. In April, 1932, while a French instructor in the senior high school at Beatrice, Nebraska, and while tutoring special students there, she became seriously ill, had a major surgical operation, and suffered a nervous and mental breakdown causing disability which resulted in private hospitalization and treatment by physicians and psychiatrists for approximately two years. In the early part of this period she made claim to defendant for total disability benefits. It is admitted by defendant that her claim was approved and such payments were made for twenty months and until discontinued in January, 1934, at which time the insured returned to her employment. She suffered a relapse within a short time, requiring further medical treatments with hospitalization and was unable to continue with her teaching. It is admitted by defendant that the insured again made claim for total disability benefits on or about April 13, 1934, which claim was approved and such payments were made by defendant from that time until January 13, 1943.

On or about September 29, 1934, this plaintiff, the insured's mother, was appointed guardian for the insured, is now serving, and has served as such ever since that time and has handled all money matters for the insured. The guardian took the insured to Colorado for her health but upon failure to obtain relief they returned to Omaha where competent physicians and psychiatrists were consulted and she was again placed in a private hospital for many months. Physicians have treated and prescribed for her from that time up to the trial. She has improved in health. How-

ever, her physician testified that she has not yet recovered and gave it as his opinion that she was not able to resume her teaching; that for her to do so would be dangerous and jeopardize her health. The insured personally appeared at the trial and testified that she had attempted to tutor and teach French, but was unable to do so. She testified that she is not well, has difficulty in concentration of thought, in performing routine tasks, becomes easily exhausted, is unable to handle her own affairs, and cannot mingle with crowds or handle numbers of people as required in teaching.

The specialist in nervous and mental diseases who examined the insured at the request of defendant a week before the trial was called as a witness for defendant. He gave as his opinion that if insured desired she could resume her teaching but that she was not yet perfectly normal; that she was sensitive about her personal life and did not realize fully the nature of her mental breakdown; that she was too much concerned about herself physically; protected her sensitive feelings; is deceived by her own emotions as to the nature of her illness; is laboring under misinterpretation and misconception; and that based upon the symptoms present should receive psychiatric treatment, in form psychological, for the purpose of establishing insight and understanding into the emotional nature of her illness so that she could gradually regain emotional self-confidence, and establish as complete insight as possible.

The difficulty with defendant company upon the policy of insurance arose when insured's physicians arrived at a time in her treatment when they thought she might be rehabilitated in employment. With this in mind, being friendly with the management of the Blackstone hotel, they prevailed upon the latter, because of the present labor shortage, to employ the insured for that purpose. Beginning in December, 1942, she worked a few days in the salad department of the hotel at the rate of $60 a month. On January 15, 1943, she began work as a night clerk, from 11 p. m. to 7 a. m., six days a week, at $85 a month, which was increased to $100 in September, 1943, at a time when the sal-

aries of other employees were also raised. The Blackstone hotel is what is known as an apartment hotel, located approximately twenty blocks from the business district of the city of Omaha. The large proportion of its guests reside permanently at the hotel. Registrations after 11 p. m. are very few and they generally follow previous reservations. The cashiers of the restaurant and bar after their closing time at night turn in reports at the office showing how much money they have taken in. It was insured's duty to make a summary of these reports for the information of the manager, register guests arriving after 11 p. m., and post charge accounts of guests for purchases charged by them in the cafe or bar during the night. Her work is done in comparative quiet, with lack of confusion, and she is not required to meet many people. The employment does not require exceptional skill, tact, or great mental concentration. She does the work fairly well, but makes many mistakes ordinarily not made by others and for that reason has been required upon many occasions to stay overtime to complete her duties.

Applying the rules of law heretofore set forth to these circumstances appearing in the evidence, we can only conclude that whether the insured was totally disabled during the period involved was a question for the jury to determine. Therefore, the trial court did not err in overruling defendant's motion to dismiss or direct a verdict for defendant at the conclusion of all the evidence.

We turn to a consideration of the instructions and conclude that defendant's requested instruction No. 1 was clearly contrary to the rules of law heretofore set forth and the court did not err in refusing it. It follows that instructions No. 4 and No. 6 given by the trial court on its own motion were not erroneous since they clearly do conform to the rules of law heretofore stated. Instruction No. 6 is not subject to criticism because it is predicated upon a conditional finding of facts by the jury rather than an abstract statement of a rule of law defining total disability. "An instruction which merely points out the legal consequence of

certain facts, of which there is evidence, in case the jury find them to be established, is not erroneous." *Schmuck v. Hill,* 2 Neb. (Unof.) 79, 96 N. W. 158. See, also, 1 Randall's Instructions to Juries, 165, sec. 86; *Frizzell v. Omaha Street Ry. Co.,* 124 Fed. 176, 59 C. C. A. 382. Further, the words, "for any considerable time in the future" as they appear in instruction No. 6 were favorable to rather than prejudicial to defendant.

However, instructions No. 2 and No. 7 given by the trial court on its own motion present a more serious situation. Instruction No. 2 reads as follows: "The burden of proof is upon the plaintiff to establish all of the material allegations of her petition by a preponderance of the evidence, except as the same are admitted or shown by defendant in its answer or on trial, *and except as she may have pleaded or shown herself in making her case.*" (Italics supplied.) That part of the instruction to and concluding with the word "trial" is proper and without criticism. However, the effect of the words "and except as she may have pleaded or shown herself in making her case" is to remove the burden theretofore imposed and place no burden of proof whatever upon the plaintiff. The applicable rule in such a situation is found in 64 C. J. 710, wherein it is stated: "Instructions relating to the burden of proof must embody a correct statement of the law, they must also be sufficient, but not too broad, ambiguous, or confusing and misleading. So, too, the instructions should not impose a greater burden on either party than the law requires nor relieve a person of the burden imposed by law."

As heretofore stated the period of time involved, and for which plaintiff claimed recovery for total disability, was from January 13, 1943, to and including August, 1943. It is admitted in the answer and in the evidence that plaintiff had been totally disabled during a previous period and that defendant had made payments for total disability to her for twenty months from 1932 to January 13, 1934, and to her or her guardian from April, 1934, to January 13, 1943, but it is alleged by defendant that on that date she had fully

recovered. Nevertheless, the trial court in instruction No. 7 told the jury, "On the other hand, if you find from the evidence that the insured *was never under such disability that she could not return to her teaching* or that *at the time of the commencement of this action she had recovered from her indisposition or ailment* and was able either to return to her teaching or to gain a livelihood elsewhere for a considerable and reasonable time in the future, then and in such case you should find she is not entitled to recover and your verdict should be in favor of the defendant." (Italics supplied.)

In this connection we find that no issue was made by the pleadings and the evidence that plaintiff "was never under such disability that she could not return to her teaching," and the time of her alleged recovery of health was January 13, 1943, and not "at the time of the commencement of this action" in August, 1943. The effect of the first part above quoted was to deny defendant the opportunity to recover a verdict because defendant had admitted both in the answer and in the evidence that the insured had been totally disabled in the past and prior to January 13, 1943. The effect of the second part above quoted was to postpone the time of the insured's recovery from total disability until after the entire period for which plaintiff was claiming total disability, in which event it would be impossible for defendant to recover a verdict.

It is stated in 64 C. J. 704, that, "An instruction which misstates the issues or defenses and has a tendency to confuse or mislead the jury is erroneous, * * * ." Also, in Abbott, Civil Jury Trials (3d ed.) 676, sec. 19, "But it is error to submit to the jury, as a disputed question of fact for their determination, an issue which has been admitted by the pleadings, or one which is established by the uncontradicted evidence."

This court has held that, "Instructions which allow the jury to find the existence of elements of a cause of action not stated in the pleadings are erroneous." *Chicago, B. & Q. R. Co. v. Clinebell*, 5 Neb. (Unof.) 603, 99 N. W. 839.

Also, that "The trial judge's statement of the issues to the jury should state the issues as the case is being finally presented to the jury on the pleadings and the evidence adduced." *Dawson County Irrigation Co. v. Dawson County*, 103 Neb. 692, 173 N. W. 696. See, also, *Citizens Nat. Bank v. Sporn*, 115 Neb. 875, 215 N. W. 120. And, "It is reversible error to instruct the jury upon a question not raised by the pleadings nor applicable to the evidence, when such instructions have a tendency to mislead the jury or have a prejudicial effect upon the party complaining." *Sabin v. Cameron*, 82 Neb. 106, 117 N. W. 95. See, also, *Shepard v. Hamaker*, 114 Neb. 42, 205 N. W. 937.

We have not overlooked the rule announced in *Roberts v. Carlson*, 142 Neb. 851, 8 N. W. 2d 175, to the effect that, "In determining whether there is error in the giving of a sentence in an instruction, it must be considered in connection with the instruction of which it is a part and all other instructions given by the court. The true meaning of instructions is to be determined not from a separate phrase or paragraph, but by considering all that is said on each subject or branch of the case." However, after applying it to the case at bar we can only conclude that instructions No. 2 and No. 7 given to the jury by the trial court on its own motion were clearly erroneous and prejudicial to defendant's rights. For that reason the judgment is hereby reversed and the cause remanded for a new trial.

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1945

GEORGE MEANS, APPELLEE, V. JEANNE MEANS, APPELLANT
17 N. W. 2d 1

FILED JANUARY 5, 1945. No. 31826.

1. **Domicile.** A person does not change his legal residence by removal to a new dwelling place without an intention to make the new dwelling place his home.
2. ———. One's legal residence is where he has his established home, and to which, when absent, he intends to return. To effect a change there must not only be a change of residence, but an intention to permanently abandon the former residence.
3. ———. The residence of a person in the military service of his country is in no way affected by such service. He does not abandon or lose the residence he had when he entered such service by being required to live at certain army posts in other states or countries.
4. **Divorce.** The matter of primary concern in awarding the custody of a little child is its welfare and best interests. Where its mother lives outside the jurisdiction of the court, and has not shown herself willing or able to properly care for a child, and the father is a fit and proper person to have its custody, and during his service in the army his mother will give it a good home, the father will be given its legal custody.

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

R. B. Hasselquist and *Edmund Scarpino*, for appellant.

Sam Klaver, contra.

Heard before SIMMONS, C. J., PAINE, CARTER, MESSMORE, YEAGER, CHAPPELL and WENKE, JJ.

PAINE, J.

This is a divorce action, brought by the husband on the ground of extreme cruelty, in which he asks for the custody of minor child. Defendant filed answer and cross-petition, asking for divorce. Prayer of petition was granted generally, and custody of minor given to plaintiff's mother. Defendant appeals.

The appellant asks reversal of the decree on the grounds that the parties had not lived in Nebraska for two years and the court was therefore without jurisdiction to try the case; that the court erred in dismissing the appellant's cross-petition and refusing to grant her a divorce, and in awarding the custody of the child to the plaintiff's mother.

It appears that Clara Delaney filed an application setting out that her son, the plaintiff, is now serving in the United States army, and unable to appear before the court, or protect the interests and welfare of his minor child, Larry Means, aged two years and six months, and that the defendant is threatening to take said child from her and take him to Iowa, and applicant asks that a restraining order be issued.

The district court for Douglas county thereafter issued an order, in which it found that the plaintiff's mother then had the custody of said child, and has had its custody for a goodly portion of the child's life, and that plaintiff was then serving in the United States army and unable to obtain a release to protect the interest of said child, and therefore the court awarded the care and custody of said child to Clara Delaney, its grandmother, until further order of the court.

George Means, the plaintiff, was born in Omaha, is 24 years old, and has lived there practically all his life. He enlisted in the United States army on November 15, 1938, for three years. He was stationed at different places, and met defendant while stationed at Fort Des Moines. After an acquaintance of about two months, they went to Lancas-

ter, Missouri, and were married on May 4, 1940. He was then transferred to Fort Riley, Kansas, where the child, Larry, was born. The plaintiff's mother, Clara Delaney, was called to Fort Riley from her home in Omaha to help out about six weeks before the child was born, and when the baby was less than two months old she brought it back to Omaha, and it stayed there with her, with the exception of a few weeks, from that time until it was over a year old, she caring for it all that time.

The defendant's mother died when she was four years old, and she was raised by her grandmother in Des Moines. Defendant was 21 years old on March 8, 1944, being the day after the trial in the district court.

The evidence fully sustains all of the charges of cruelty made by plaintiff, and we will not set out in this opinion her objectionable conduct in detail.

The Nebraska statute, section 42-303, R. S. 1943, provides that, when the cause of action arose out of the state, the petitioner must have resided within the state for at least two years before bringing action for divorce.

Defendant filed a special appearance and affidavit, attacking the jurisdiction of the court on the ground of residence, and while defendant's attorney in open court withdrew such special appearance and filed an answer and cross-petition, in which the question of plaintiff's residence was not raised, still we are required to be satisfied on the question of residence.

This plaintiff was born in Omaha, and never resided elsewhere, except temporarily, and never intended to establish a residence elsewhere. He enlisted in the United States army in 1938 at Omaha, which expired in 1941. He was thereafter registered in the draft from his residence in Omaha, and while temporarily working in Des Moines kept his Omaha draft board advised of his address. Plaintiff left Des Moines on April 10, 1943, and came back to his home in Omaha, and made application for re-enlistment in the army there, and was accepted on April 26, 1943, and is now a staff sergeant. The facts appear that his intention

has been at all times to maintain his legal residence in Omaha, and his intention is the controlling element. *Miller v. Sovereign Camp Woodmen of the World,* 140 Wis. 505, 122 N. W. 1126.

"A person cannot change his domicil by removal to a new dwelling-place without an intention to make the new dwelling-place his home." Restatement, Conflict of Laws, sec. 18.

"One's residence is where he has his established home, and to which, when absent, he intends to return. To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home." *State v. School District,* 55 Neb. 317, 75 N. W. 855. See, also, *Wood v. Roeder,* 45 Neb. 311, 63 N. W. 853; *In re Estate of Meyers,* 137 Neb. 60, 288 N. W. 35.

The residence or domicile of a person in the military or naval service of his country is in no way affected by such service. He does not abandon or lose the residence he had when he entered such service, for his various locations while in the service are fixed by the will of others superior to him in rank. Therefore, he does not ordinarily acquire one at the place he serves. See 17 Am. Jur., sec. 73, p. 634; Annotation, 148 A. L. R. 1413. In Florida, and perhaps a few other states, this general rule has been changed by the legislature. See *Mills v. Mills,* 153 Fla. 746, 15 So. 2d 763; Annotation, 150 A. L. R. 1468.

In the case at bar it is clear, from the evidence and the law, that plaintiff's service in the army, and his temporary abode at various army camps, did not in any way change his legal residence, which was at all times in Omaha, Nebraska.

The pleadings, arguments, and assignments of error raise the question of the custody of this little boy, which was temporarily placed by the court's order in the plaintiff's mother before the trial and then given to her in the decree. She is the one who has had the care of it the greater part of its life, and the defendant, its mother, sent for her to come and get the baby at times, and had always been

willing to have the plaintiff's mother keep the baby up until this divorce action came on for trial. The mother has shown herself unfit to properly care for the child. She was raised by her grandmother, Mrs. Anna Zook, a woman 70 years of age, who says she is willing to give up a little apartment for defendant to live in if she gets custody of her minor child. Mrs. Zook testified that Mrs. Clara Delaney has taken good care of the child when she has had him.

The matter of primary concern, in awarding the custody of a little child, is its welfare and best interests. In the case at bar, its father is serving in the United States army, its mother lives outside the jurisdiction of the court, and has not shown herself willing or able to care for her child. The district court saw all the parties who testified orally before him, and decided in the preliminary application that the plaintiff's mother, Mrs. Clara Delaney, was a fit and proper person to continue to keep the child in her custody. Another district judge later tried the divorce case, and reached the same conclusion on this matter.

This court finds that the father is a fit and proper person, and he is granted the care, custody and control of his minor son, with the right of defendant to visit the child. The court further finds that, during the enforced absence of said father while serving in the army of the United States, the care, nurture, and maintenance of said minor child are, at the father's request, placed in Clara Delaney, the plaintiff's mother.

As modified thus to give the primary custody of the child to the plaintiff, the decree of the district court is hereby affirmed.

AFFIRMED AS MODIFIED.