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HYMEN ZELEN, APPELLANT, V. DOMESTIC INDUSTRIES, INC., APPELLEE.

282 N. W. 387

FILED NOVEMBER 10, 1938. No. 30391.

1. **Evidence.** The rule that parol evidence is admissible to prove that contemporaneously with, or preliminary to, the execution of a written contract the parties entered into a distinct oral agreement as a condition on which the performance of the written contract is to depend does not apply where the written contract is unambiguous and complete in itself, and expresses a contractual consideration.
2. **Contracts.** When the plaintiff has breached his contract with the defendant, the defendant may cancel the contract and treat it as void without subjecting himself to liability for damages.
3. ———. A contract for the sale of goods must obligate the seller to deliver, and the buyer to accept, a definite quantity of the goods, or the contract is lacking in mutuality and therefore void.

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

Mockett & Finkelstein, for appellant.

Stewart, Stewart & Whitworth, contra.

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

CARTER, J.

This is an action for damages for an alleged breach of contract entered into on March 1, 1932, between the plaintiff, Hymen Zelen, doing business under the trade-name of Western Electric Supply Company, and the defendant, Domestic Industries, Inc., a nonresident manufacturing corporation. At the close of plaintiff's evidence, the trial court directed a verdict in favor of the defendant and plaintiff appeals.

This is the second appearance of this case in this court, the former opinion appearing in 131 Neb. 123, 267 N. W. 352.

Under the terms of the contract entered into by the parties, the Western Electric Supply Company agreed to act

as the sole distributor of Buckeye electric refrigerators within the state of Nebraska, the defendant being the manufacturer thereof. Plaintiff further agreed to purchase 1,000 refrigerators at the price fixed by the contract for delivery in monthly quantities of not less than 100 from March to October of 1932, the terms of sale being sight draft with bill of lading attached, f. o. b. Columbus, Ohio.

On March 12, 1932, defendant shipped one car-load of refrigerators and forwarded a sight draft with the original bill of lading attached to the First National Bank of Lincoln for collection. Plaintiff refused to honor the sight draft, claiming that an oral agreement had been made previous to the signing of the written contract to the effect that plaintiff was not to be held to the quantity of refrigerators set out in the contract and that any refrigerators shipped were to be on open account and not by sight draft with bill of lading attached. After considerable correspondence, defendant waived the provision of the contract requiring plaintiff to honor the sight draft and released the car-load of refrigerators to the Union Terminal Warehouse Company, to be held by it subject to the order of the Western Electric Supply Company upon payment of the contract price of the refrigerators as they were removed from the warehouse.

On April 8, 1932, plaintiff ordered a second car of refrigerators and asked that they be shipped to the Union Terminal Warehouse Company, the same as before. Defendant again waived the terms of payment provided in the contract and shipped the refrigerators to the Union Terminal Warehouse Company. Plaintiff did not order any more refrigerators and on June 14, 1932, defendant canceled its contract with the plaintiff because of plaintiff's failure to take refrigerators in accordance with the quota contained in the contract.

Plaintiff contends that the court erred in sustaining objections to oral conversations had between the plaintiff and the agents and officers of the defendant company, which purported to show the inducements held out to plaintiff to obtain his signature to the contract. A reformation of the

contract was not sought. Fraud in obtaining the contract was not pleaded. The contract was completed and unambiguous. The applicable rule is that parol evidence of prior or contemporaneous agreements is not admissible to vary or contradict the terms of a complete and unambiguous written contract. *Weidenfeld v. Olson,* 132 Neb. 303, 271 N. W. 806. The trial court was correct in its ruling on this point.

The evidence discloses an express waiver by the defendant of the terms of sale of the first two car-loads of refrigerators shipped. The plaintiff ordered and received 75 refrigerators from defendant during March, 1932, his contract requiring him to take and pay for 100. The second car-load was shipped in April and contained 75 refrigerators, plaintiff's contract requiring him to take 150 during that month. Plaintiff failed to take any refrigerators in May, his contract requiring him to take 200 during that month. No refrigerators were ordered prior to June 14, 1932, the date of the cancelation of the contract by defendant. We have searched the record and have been unable to find any evidence of a waiver of the amount of refrigerators to be delivered under the contract. The contract itself provides: "You may cancel any monthly schedule or the entire order, however, this is only cancelable by your giving us thirty days notice before shipment is to be made. In the event that such cancelations are made, we have the privilege at our option to eliminate the exclusive arrangements in this territory or cancel the entire arrangements with your company." No notice was ever given in accordance with the above provision. If the notice had been given, defendant could, at its option, cancel the contract. Can it be said that the failure to give the notice can place the plaintiff in any better position? We think not. The contract by its terms makes the delivery and acceptance of the refrigerators according to the quota accompanying the contract an express obligation on the part of the plaintiff. Clearly plaintiff breached his contract in failing to receive and pay for the number of refrigerators called for in the contract. The

defendant therefore was acting within its legal rights when it canceled the contract.

But even if the contention of plaintiff was true that the agreement had been modified so as to eliminate the number of refrigerators to be purchased, still plaintiff could not recover, the applicable rule being: Where defendant agrees to supply plaintiff with certain merchandise to the extent that plaintiff may require, but plaintiff did not obligate himself to purchase any of such merchandise, the transaction between the parties does not constitute an enforceable contract, it being analogous to an option without consideration and it could be rescinded at any time. *Gross v. Stampler,* 165 N. Y. Supp. 214; *McAllister Lumber & Supply Co. v. Eldora Resort & Power Co.,* 51 Colo. 91, 116 Pac. 1038; *George W. Jennings, Inc., v. Hirsch Rolling Mill Co.,* 242 S. W. (Mo. App.) 1003.

We necessarily conclude that the trial court was right in directing a verdict for the defendant. The judgment is

AFFIRMED.

MARY HALEY, APPELLEE, V. WILLIAM C. DEER, APPELLANT.
282 N. W. 389

FILED NOVEMBER 18, 1938. No. 30415.

1. **Negligence.** The law places those who come upon the premises of another in three classes: Briefly defined, invitees are those who are expressly or impliedly invited, as a customer to a store; licensees are persons whose presence is not invited, but tolerated; trespassers are persons who are neither suffered nor invited to enter.
2. ———. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but a licensee takes the premises as he finds them, for the only duty of the occupier to a licensee is to give notice of traps or concealed dangers.
3. ———. A person going into a store to use a pay telephone maintained for the use of its customers is an invitee.
4. ———. If one goes into a store to use a pay telephone, and while there uses toilet facilities provided for its customers, and

while returning from the toilet falls through an unguarded and unlighted trap-door opening to the basement, reasonable damages for her injuries may be recovered.

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

Fred C. Foster, for appellant.

Allen, Requartte & Wood and *James L. Brown, contra.*

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

PAINE, J.

This is an action for personal injuries sustained by plaintiff by a fall into the basement at the Gold Dust Tavern, located at the corner of Ninth and O streets in Lincoln, Nebraska. At the close of plaintiff's evidence defendant moved the court to direct a verdict in his favor, thereupon the plaintiff also moved for a directed verdict. After argument the trial court discharged the jury and entered a judgment in favor of the plaintiff and against the defendant, William C. Deer, for $2,400 and costs. Defendant appeals.

The plaintiff is a widow, aged 64 years at the time of the trial. On March 7, 1936, she was in the Gold Dust Tavern, in which meals are served and drinks furnished, for about three-quarters of an hour between 3 and 4 o'clock, with her sister-in-law and niece, during which time the plaintiff had a lunch and a glass of beer, this being a family tavern, patronized by many older townspeople. She wanted to use a pay telephone that was there, and the young man showed her how to drop the nickel in and use the telephone. While she was there in the afternoon she saw other women, who were customers there, go back to the ladies' toilet, indicated by a sign on the wall.

After leaving the Gold Dust Tavern, she shopped awhile and then went to Gold's store to buy a dress for her granddaughter, then decided to look further before purchasing, and started down to the Golden Eagle store. However, she decided to telephone to a relative first to come for her, as it

was about 6 o'clock in the evening, and went on to the Gold Dust Tavern for that purpose. The defendant, Deer, gets 25 per cent. of the excess tolls above $5.50 a month from this pay telephone in his tavern. Plaintiff decided, when in the tavern, to use the facilities of the ladies' toilet in the back part of the room. She went back through a short, narrow hallway, as directed by a large sign on the wall, which said, "Ladies' Toilet." Coming out of this toilet, it was quite dark, as the light in the passageway had not been turned on. She missed the turn to go north to the main front room, and, going straight ahead for a few steps as she came out of the door of the ladies' toilet, she fell through an opening in the floor which led to the basement. She recovered consciousness at the St. Elizabeth Hospital, where she remained for some three weeks. Her back and whole right side were injured, but the most serious injury was to the right side of her head, beginning about in the temple and tearing her ear, requiring many stitches, and after long surgical treatment a part of the ear was saved.

The defendant relies upon the following errors for reversal: That the judgment is not supported by the evidence, and is contrary to the evidence and the law; admission of evidence over the objection of the defendant, and for excessive damages appearing to have been given under the influence of passion or prejudice.

The principal argument of the defendant is that plaintiff entered the defendant's place of business solely for her own convenience or benefit, and was a bare licensee, and the defendant owed her no duty except to refrain from wilfully or wantonly inflicting injury upon her, and cites several cases in support of this contention.

In one of these cases, the customer left the store because she was not waited upon promptly, and it was held that she was negligent in not looking where she was walking, and a verdict in favor of the defendant was affirmed in *Mullen v. Sensenbrenner Mercantile Co.*, 260 S. W. (Mo.) 982, 33 A. L. R. 176. This case is followed in the A. L. R. by a long annotation, with citations from federal and state

courts, in which is cited the case of *Broadston v. Beddeo Clothing Co.*, 104 Neb. 604, 178 N. W. 190, in which it was held that a proprietor is only bound to exercise reasonable care and prudence to keep the premises to which the public is invited safe for that purpose, and the fact that the customer falls upon a stairway does not in itself raise any presumption of negligence.

The defendant also relies upon the case of *Wright v. Salvation Army*, 125 Neb. 216, 249 N. W. 549, in which it was held that one who walks into an open elevator shaft without looking to see whether the elevator has been moved is guilty of gross contributory negligence and cannot recover. But in this case he had been there upon many occasions for the purpose of buying rags. He was in a part of the building which was not open to the public. There were warning signs, marked "Danger" and "Elevator." He does not claim that he had ever been given permission to cross the elevator to go to the rag room, and our court stated definitely that the injury in this case occurred when the plaintiff exceeded his invitation and attempted to go where he had no permission to go.

We are also cited by the defendant to the case of *Kruntorad v. Chicago, R. I. & P. R. Co.*, 111 Neb. 753, 197 N. W. 611, in which upon motion the case was taken from the jury and a judgment directed for the defendant. Plaintiff was descending a stairway erected on an embankment by the defendant company, and one of the steps gave way and plaintiff was injured. It was held by this court that the defendant was under no legal obligation to keep the stairway in a safe condition, for, while a license was implied to use the same, it was for the convenience and benefit of the person using it, with no common interest or mutual advantage, and therefore the plaintiff was a bare licensee.

In *Wall v. F. W. Woolworth Co.*, 209 Ky. 258, 272 S. W. 730, a customer, in assisting a clerk to untangle a clothesline, stepped around the counter and through a small swinging gate, where she fell down a stairway, inflicting injuries. The customer, therefore, was not within the area of the

store set apart for the use of customers. The court said the customer was at that time either a trespasser or a licensee. Verdict for defendant affirmed.

Defendant relies upon the case of *Herzog v. Hemphill,* 7 Cal. App. 116, 93 Pac. 899, in which case the plaintiff's intestate came to his death while showing another through a dark hallway from a tamale stand to a urinal which was not for the use of the patrons of the tamale stand. Held, the deceased was a mere licensee.

The defendant's cases support the contention that, where one solely for his personal pleasure, convenience, or benefit enters upon the premises of another, with his consent but without an invitation, express or implied, he is a bare licensee, and the occupier of the premises owes no duty to him save to refrain from wilfully or wantonly inflicting injury upon him.

In *Collins v. Sprague's Benson Pharmacy,* 124 Neb. 210, 245 N. W. 602, the customer asked to use toilet facilities which were there solely for the convenience of the employees, and not for customers. But in the case at bar, we believe that the plaintiff was more than a mere licensee.

The law places those who come upon the premises of another in three classes: Invitees are those who are expressly or impliedly invited, as a customer to a store; licensees are persons whose presence is not invited, but tolerated; trespassers are persons who are neither suffered nor invited to enter. The duty of the owner toward an invitee is to exercise reasonable care to keep the premises in a safe condition, but licensees take the premises as they find them, the only duty of the occupier being to give notice of traps or concealed dangers. Toward trespassers the occupier need only refrain from wilful or wanton injury as modified by the "attractive nuisance" line of cases. See 20 R. C. L. 69, sec. 60.

We will now examine cases closely in point with the case at bar. In *Dowling v. MacLean Drug Co.,* 248 Ill. App. 270, the plaintiff was an invitee upon the premises of the defendant in its drug store, having gone there for the pur-

pose of using a public pay telephone. She fell over the base of a weighing machine which was on the floor, and sustained an injury. While she saw the scale, which was obvious to her, she did not see nor anticipate that the base of it protruded into the aisle. It was not failure to exercise due care on her part to assume that there was no obstruction in her path. She was walking along the passageway, upon which patrons in the store were invited to walk on their way to the telephone booths. The law does not charge one with anticipating dangerous and negligent conditions, but *he may assume that others have done their duty to give proper warning of hidden dangers.* The second syllabus in this case is: "A person going into a drug store to telephone from a booth maintained by the proprietor is an invitee."

In *Main v. Lehman,* 294 Mo. 579, 243 S. W. 91, the toilet in defendant's store was allowed to be used by his customers as well as his employees, and plaintiff, a customer, asked an employee where the customers' toilet was, and was told it was on the third floor and how to reach it, and it was held that plaintiff was not a mere licensee, but an invitee.

In *MacDonough v. F. W. Woolworth Co.,* 91 N. J. Law, 677, 103 Atl. 74, the plaintiff entered a store with a vague purpose of buying something if she saw anything that took her fancy. There was a book-rack, of five shelves about four feet long, filled with books, the sign above saying that any book could be bought for ten cents. There was a dim electric light six inches above the bookcase, and in order to read the titles it was necessary to enter the passageway, from which she fell down a stairway, which she did not see. The gate to the stairway was tied open with a string. Judgment for plaintiff affirmed.

Our court has said: "Storekeeper who places racks of merchandise about a railing around a stairway to basement so as to obstruct the view of customers is negligent." *Rogers v. Penney Co.,* 127 Neb. 885, 257 N. W. 252.

In *Gibeson v. Skidmore,* 99 N. J. Law, 131, 122 Atl. 747,

an assistant to the librarian hung her coat and hat upon hooks in an adjoining storeroom rented from the library, the hooks being above a trap-door. When she went to get them, the owner of the property had without her knowledge raised the trap-door and left it open, and she fell through such opening, sustaining injury. A judgment for the defendant was reversed, and it was held that an owner of premises who, by express or implied invitation, induces persons to make use of the premises is under a duty to exercise ordinary care to render such premises reasonably safe for such purpose. See, also, *Glenn v. Grant Co.*, 129 Neb. 173, 260 N. W. 811.

If one goes into the store of another to use a pay telephone, and while there uses the toilet facilities provided for customers, she has the rights of an invitee, and the owner is liable if he leaves an unguarded, unlighted opening into the cellar which would ordinarily be closed by a trap-door, and the danger of which opening is well known to the owner but not to the invitee. A case somewhat in point is that of *Glaser v. Rothschild,* 221 Mo. 180, 120 S. W. 1, 22 L. R. A. n. s. 1045.

A customer of a place of business retains the status of an invitee while going to or returning from a toilet maintained for the use of customers.

It is not necessary to cite additional cases, for hundreds of them may be found in the annotations in 33 A. L. R. 181, 43 A. L. R. 866, 46 A. L. R. 1111, 58 A. L. R. 136, and more than 50 pages of the later cases appear in the excellent annotation, 100 A. L. R. 710, where many exactly in point may be found.

We find no prejudicial errors in the admission of evidence over the objections of the defendant. The plaintiff, in the loss of nearly all of an ear, and other facial injuries, will be disfigured for life, and the other injuries she suffered were serious. The trial judge, who saw the plaintiff and listened to the testimony, fixed her recovery at $2,400. This judgment does not seem to the court to be excessive, and the same is hereby

AFFIRMED.

HARRY KUWITZKY, APPELLANT, V. JOSEPH O'GRADY, WARDEN OF STATE PENITENTIARY, APPELLEE.
282 N. W. 396

FILED NOVEMBER 18, 1938. No. 30487.

1. **Habeas Corpus.** The application for a writ of habeas corpus is the proper procedure to review the sentence under count two of the information, the sentence under count one having been served in full.
2. **Criminal Law.** The habitual criminal provision (Comp. St. 1929, sec. 29-2217) does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties.
3. ———. Habitual criminality is a state, not a crime, and warrants greater punishment because of past conduct.
4. **Habeas Corpus.** Appellant, being unlawfully imprisoned, without due process of law, is entitled to his release and discharge.

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

Robert A. Nelson and *Palmer McGrew,* for appellant.

Richard C. Hunter, Attorney General, and *Bert L. Overcash, contra.*

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

PAINE, J.

Application by Harry Kuwitzky for a writ of habeas corpus, alleging that his sentence for ten years to the state penitentiary, under the second count of an information charging him with being an habitual criminal, is null and void, for which reason he prays to be discharged and restored to his liberty. A hearing was had in the district court, evidence produced and case argued and submitted to the court, and writ of habeas corpus denied and application dismissed. Appellant's motion for new trial was overruled.

There is no dispute as to the facts in this case. On May 29, 1934, the county attorney of Otoe county filed an information against the appellant herein for burglary of a

storehouse in Otoe county on March 19, 1934. In the second count of the information the county attorney charged that on October 8, 1918, the appellant was convicted of the crime of car stealing in Otoe county and sentenced to a term of not less than one year nor more than seven years, and that on June 7, 1920, the appellant was convicted of the crime of burglary in Otoe county and sentenced to the penitentiary for not less than one year nor more than ten years; that on October 20, 1924, appellant was convicted of the crime of burglary in Otoe county and sentenced to the penitentiary for a term of not less than three years nor more than ten years; that on July 8, 1931, the appellant was convicted of the crime of burglary in Otoe county and was sentenced to the penitentiary for a term of three years, and that by reason thereof the said Harry Kuwitzky, appellant, is an habitual criminal, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state of Nebraska; that on the same day the information was filed the appellant was taken before District Judge Livingston, waived time to plead, was duly arraigned, and entered a plea of guilty to each count in said information. He was thereupon sentenced to serve a term of five years in the state penitentiary (he being a second offender) on the first count of said information, and in addition, upon his plea of guilty to the second count, he was sentenced to serve a term of ten years in the state penitentiary, and it was further ordered that these sentences run concurrently. It is further set out that the next day, to wit, May 30, 1934, the appellant was delivered by the sheriff of Otoe county to the warden of the state penitentiary at Lincoln, Nebraska.

It was stipulated by the parties that the appellant has served his first sentence of five years given under the first count of the information, and that upon the day of the hearing, to wit, May 14, 1938, he has also served two months and 16 days of the sentence given under the second count of the information, and that he is now being held and detained in the penitentiary under the sentence given under

his plea of guilty to the second count of the information.

The sole and only question presented to this court for determination is whether or not his detention in the penitentiary at this time is lawful.

The application for the writ of habeas corpus may not be brought until a legal sentence has been served. *In re Schwartz,* 1 Cal. App. (2d) 401, 36 Pac. (2d) 445; *In re Miller,* 133 Cal. App. 228, 23 Pac. (2d) 1034.

No complaint is made but that the crime of burglary was properly set out in the first count, and upon his plea of guilty thereof his sentence of five years to the penitentiary was proper, and his term of service under that sentence by reason of his good behavior has now terminated.

The application for a writ of habeas corpus is now the proper procedure for the review of the judgment in the case at bar, under sections 29-2301 to 29-2316, Comp. St. 1929. *In re Resler,* 115 Neb. 335, 212 N. W. 765.

Each separate count of an information charges the defendant with a separate and distinct crime, and he may be acquitted on a count charging one crime and convicted on a count charging another crime. *George v. State,* 59 Neb. 163, 80 N. W. 486; 14 R. C. L. 196, sec. 41.

We will now consider the second count of the information, which was based upon section 29-2217, Comp. St. 1929, reading in part as follows: "Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, shall upon conviction of a felony committed in this state after the taking effect of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the penitentiary for a term of not less than ten years, provided that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern."

Mr. Justice Hughes, in rendering the opinion in *Graham v. State of West Virginia,* 224 U. S. 616, said: "The pro-

priety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796, and in Massachusetts in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts. *Ross's Case,* 2 Pick. (Mass.) 165, 170; *Plumbly v. Commonwealth,* 2 Met. (Mass.) 413, 415."

The Penal Code of Montana provides that ten years may be given to an habitual offender. In the case of *State v. Connors,* 27 Mont. 227, 70 Pac. 715, that court considered a sentence of five years for assault and five years for prior conviction of a felony, making the full term ten years. Upon this sentence being brought to the supreme court, that court found that the trial court manifestly intended to sentence the defendant for a term of ten years for assault in the second degree. However, in the case at bar no such question can arise, for the sentence was definitely to ten years upon count two of the information.

When the same question arose in Oklahoma, the court said: "Allegation of previous conviction is not a distinct charge of crime, but is necessary to bring the case within the statute, and goes to the punishment only." *Ex parte Wray,* 61 Okla. Cr. 162, 66 Pac. (2d) 965. "Judgment of conviction for 'habitual criminal' under information charging petit larceny as a second offense after prior conviction *held* void, entitling accused to habeas corpus, since there was no such offense as 'habitual criminal.'" *Ex parte Wray,* 66 Pac. (2d) 965 (61 Okla. Cr. 162).

An habitual criminal statute is sound in principle and sustained by reason. The legislature may well enact such a law to permit law enforcement officers to take into consideration the persistence of an offender in his criminal course. That the defendant has been guilty of a second

felony does not make him guilty of an offense for which he may be separately sentenced, but, upon proof that the habitual criminal statute applies to his case, he may have his punishment for the last felony of which he has been convicted increased as provided by law. 8 R. C. L. 271, secs. 284, 285; *Mundon v. State,* 196 Wis. 469, 220 N. W. 650; *State v. Zywicki,* 175 Minn. 508, 221 N. W. 900. Our Nebraska court has said: "Where, under a prosecution for felony, the state seeks to have the accused punished as an habitual criminal under section 10177, Comp. St. 1922, it is proper to allege in the information and prove upon the trial that the accused has been previously convicted as provided in said section." *Taylor v. State,* 114 Neb. 257, 207 N. W. 207. See, also, *Booth v. State,* 122 Neb. 544, 240 N. W. 753.

Provisions for increasing the punishment for habitual criminals are found in the laws of nearly every state. In a few states the law may be so phrased as to require the filing of a supplemental information to present an issue of fact to be determined by a jury, first, as to the identity of the defendant, and, second, as to his former conviction and the execution of the sentence. In other states it presents a question of fact for the purpose of increasing the length of the sentence which may be imposed upon conviction of the felony. The two annotations, of great length, found in 58 A. L. R. 20 and 82 A. L. R. 345, give an exhaustive discussion of the various phases of the question, with citations from the various states.

The federal courts have often been called upon to pass upon these laws when applications have been made for writs of habeas corpus.

In a recent case from the circuit court of appeals for the seventh circuit, the court used this language: "Habitual criminality is a state, not a crime. * * * Habitual criminal statutes, such as that of Indiana, do not create or define a new or independent crime, but they prescribe circumstances wherein one found guilty of a specific crime may be more severely penalized because of his previous criminalities as

they are alleged and found. This was definitely decided in *Barr v. State,* 205 Ind. 481, 187 N. E. 259. In *McDonald v. Massachusetts,* 180 U. S. 311, 21 Sup. Ct. Rep. 389, 390, 45 L. Ed. 542, the court, in considering a statute imposing greater punishment because of prior convictions for crimes, said: 'The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute, and goes to the punishment only.' " *Goodman v. Kunkle,* 72 Fed. (2d) 334.

Let us examine our statute. We find that chapter 28, Comp. St. 1929, is entitled, "Crimes and Punishments." In it we find 56 pages setting out at length all crimes, beginning with "homicide" and ending with "stealing a ride on a train." The section on "habitual criminal" is not in that chapter, but is section 2217 of chapter 29, entitled "Criminal Procedure," in which the law relating to the arrest, extradition, indictments, pardons and paroles, and sentences of wrong-doers is found.

We are of the opinion that count 2 of the information filed in Otoe county against the appellant in the case at bar did not charge a separate and distinct offense under the laws of Nebraska; that the previous convictions on several felonies alleged therein would, if proved, show the appellant to be an habitual criminal, and permit his punishment for the act of burglary charged in count 1 to be increased, but that the trial court was without authority to render a distinct, separate judgment and sentence upon count 2 of said information, as was done.

The appellant is, therefore, being unlawfully imprisoned without due process of law, and is entitled to be released and discharged. The denial of the trial court of a writ of habeas corpus is hereby

REVERSED.

RICKA WINTERSON, APPELLANT, V. PANTEL REALTY COMPANY, APPELLEE.

282 N. W. 393

FILED NOVEMBER 18, 1938. No. 30362.

1. **Judgment.** A judgment notwithstanding the verdict can only be rendered when the pleadings of the party in whose favor the verdict was rendered confess facts entitling the other party to judgment.
2. **New Trial.** If the trial court is of the opinion that it erred in submitting the case to a jury and should have directed a verdict for the defendant because of the insufficiency of plaintiff's evidence to make a case, the proper remedy is to grant a new trial.
3. **Landlord and Tenant.** Ordinances requiring protective measures to be taken in constructing apartment houses, and other like ordinances, impose a mandatory and affirmative duty upon the owners of such property, and a failure to perform such a duty so enjoined is negligence *per se*, and if any person to whom the duty is owed, or for whose protection the ordinance is enacted, is injured in consequence of such violation, a case is made.
4. **Negligence.** The burden of proof is upon the plaintiff in a personal injury action to establish that some one of the acts of negligence charged in the petition was the proximate cause of the injury of which complaint is made.

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

Brome & Thomas and *Robert Smith*, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

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

CARTER, J.

This is an action for damages for personal injuries against the owner of an apartment house. Plaintiff alleged that she suffered injuries by falling on a stairway that was negligently constructed and maintained by the owner of the building. At the close of plaintiff's case, the defendant moved for a dismissal on the ground that the evidence was insufficient to constitute a cause of action, which motion was overruled by the trial court. The motion to dis-

miss was renewed at the close of all the evidence and it also was overruled. The case was submitted to the jury and a verdict of $2,000 was returned for the plaintiff. Defendant then moved for a judgment notwithstanding the verdict and for an order sustaining defendant's motion for a dismissal. Defendant also filed a motion for a new trial. The trial court sustained defendant's motion for judgment notwithstanding the verdict, entered an order sustaining the motion to dismiss, and overruled defendant's motion for a new trial.

We are of the opinion that the trial court erred in sustaining the motion for a judgment notwithstanding the verdict. Under our practice a judgment notwithstanding the verdict may be had only when the pleadings confess facts entitling the moving party to a judgment. Our statute on the subject provides: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." Comp. St. 1929, sec. 20-1315.

In *Manning v. City of Orleans,* 42 Neb. 712, 60 N. W. 953, we said: "Section 440 of the Code of Civil Procedure (Comp. St. 1929, sec. 20-1315) provides a remedy substantially like the motion for judgment *non obstante veredicto* of the common law. Such a judgment can only be rendered when the pleadings of the party in whose favor the verdict was rendered confess facts entitling the other party to judgment." See, also, *Kenesaw Mill & Elevator Co. v. Aufdenkamp,* 106 Neb. 246, 183 N. W. 294; *Hamaker v. Patrick,* 123 Neb. 809, 244 N. W. 420. The pleadings do not entitle the defendant to a judgment and it is not so contended. It is clear, therefore, that a judgment notwithstanding the verdict cannot be granted because the evidence is deemed insufficient to sustain the verdict. The remedy in such case is governed by the following authorities:

"In a case in which a party is entitled to a jury trial, and where the pleadings do not confess the right to a judg-

ment, the court cannot disregard the verdict and enter such judgment as the evidence warrants. If the verdict is not sustained by the evidence, the remedy is by motion for a new trial on that ground." *Manning v. City of Orleans*, 42 Neb. 712, 60 N. W. 953.

"If the trial court is of opinion that, in view of plaintiff's evidence, it erred in submitting the case to the jury and should have directed a verdict for the defendant, the proper course is to grant a new trial." *Barge v. Haslam*, 65 Neb. 656, 91 N. W. 528.

"As applicable and mandatory at the stage of the proceedings set forth in the instant record, without reference to the bill of exceptions, this court has long announced, as the doctrine controlling, that, 'If the trial court is of the opinion that, in view of plaintiff's evidence, it erred in submitting the case to the jury and should have directed a verdict for the defendant, the proper course is to grant a new trial.' *Barge v. Haslam*, 65 Neb. 656.

"So, too, in reviewing a record involving the limitation under consideration, we have said: 'In a case in which a party is entitled to a jury trial, and where the pleadings do not confess the right to a judgment, the court cannot disregard the verdict and enter such judgment as the evidence warrants. If the verdict is not sustained by the evidence, the remedy is by motion for a new trial on that ground.' *Manning v. City of Orleans*, 42 Neb. 712." *Hamaker v. Patrick*, 123 Neb. 809, 244 N. W. 420.

We necessarily come to the conclusion that there is nothing in the pleadings that warrants the granting of a judgment notwithstanding the verdict. Likewise, the authorities hold that, if it appears to the trial court that plaintiff's evidence was insufficient to warrant the submission of the case to the jury and that a verdict should have been directed for the defendant, the proper course is to grant a new trial. The trial court was therefore in error in dismissing plaintiff's case.

Defendant cites the following cases in support of a contrary view: *Netusil v. Novak*, 120 Neb. 751, 235 N. W. 335;

Bielfeldt v. Grand Island Transit Co., 123 Neb. 368, 243 N. W. 76; *LeBarron v. City of Harvard*, 129 Neb. 460, 262 N. W. 26; *First Nat. Bank v. Broyles*, 122 Neb. 414, 240 N. W. 546; *Pinches v. Village of Dickens*, 127 Neb. 239, 254 N. W. 877. The first three cases are clearly distinguishable. The rule announced by them in effect is: When a verdict has been returned by a jury that is in all respects free from prejudicial error, and the court thereafter wrongfully sets it aside, this court may correct the error by reversing the trial court's wrongful order and reinstating the original verdict and judgment based thereon. This procedure presupposes a valid verdict and judgment, free from prejudicial error. Such was not the situation in the case at bar. In *Pinches v. Village of Dickens, supra,* the disposition in this court was in accordance with the foregoing rule. The statement in the opinion, however, that the procedure followed in the district court in that case was in accordance with that suggested in *Netusil v. Novak, supra,* is not correct under the facts recited in that opinion. Clearly under the authorities herein cited, the trial court in that case was without authority to set aside a verdict and judgment and sustain defendant's motion for a directed verdict. The proper remedy, if the court felt the evidence was insufficient, was to grant a new trial. In *First Nat. Bank v. Broyles, supra,* the opinion shows that the pleadings sustained the entry of a judgment notwithstanding the verdict in accordance with the statute and cases cited in the forepart of this opinion.

The only question remaining is whether the trial court erred in vacating the verdict and judgment. Defendant contends that the evidence is insufficient to sustain the verdict. If defendant's contention is correct, the trial court rightfully set aside the verdict and judgment, which would require a new trial of the case.

Plaintiff's evidence may be summarized as follows: The plaintiff had resided in the Morris Apartments for eleven years prior to September 22, 1934, the date of the accident. On that day she was taking some flowers to the receiving

room for the housekeeper to deliver for her. To go to the receiving room she descended by a small stairway which led out of a small hall adjacent to the freight elevator. The only evidence as to how the accident happened was that of the plaintiff, who testified as follows: "Well, I walked out to the door and around that little corridor, and opened the door and stepped down and fell." The evidence discloses that the stairs were not constructed in accordance with the ordinances of the city of Omaha in force at the time in that the risers were ¼ to ½ inch higher than the prescribed height and the treads were 1¼ to 1⅜ inches narrower than the prescribed minimum width. It is also contended that the defendant was negligent in not maintaining proper light on the stairway.

The rule respecting the violation of ordinances such as we have in this case was stated by Letton, J., in *Stevens v. Luther,* 105 Neb. 184, 180 N. W. 87, in the following language: "Statutes requiring protective devices to be placed upon machinery, upon barbed-wire fences, scaffolding statutes, railroad fencing statutes, fire escape statutes, and other statutes of like nature, impose a mandatory and affirmative duty upon the owners of such property, and even in states where the violation of speed statutes is held to be only evidence from which negligence may be inferred, the courts generally hold that a failure to perform a mandatory duty so enjoined is negligence *per se,* and if any person to whom the duty is owed, or for whose protection the statute is enacted, is injured in consequence of such violation, a case is made."

In *Hoopes v. Creighton,* 100 Neb. 510, 160 N. W. 742, we said: "The building was not equipped with fire-escapes as required by the statute. The evidence clearly shows that this neglect was the proximate cause of Rickard's death, and the defendant is liable in damages."

Also, in *Vanderveer v. Moran,* 79 Neb. 431, 112 N. W. 581, we said: "The failure to perform a statutory duty specifically imposed for the protection of the public is negligence, and, in the absence of contributory negligence, a

recovery may be had for the injury thereby occasioned."

In *Strahl v. Miller,* 97 Neb. 820, 151 N. W. 952, this court said: "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."

See, also, *Thompson v. Young Men's Christian Ass'n,* 122 Neb. 843, 241 N. W. 565; *Wendell v. Roberts,* 125 Neb. 619, 251 N. W. 264.

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.

Plaintiff also claims that there was not sufficient light on the stairway. The evidence is that plaintiff had used this stairway from time to time for eleven years. The lights provided were burning and produced a light of no less intensity than on former occasions when plaintiff had used the stairs. Plaintiff testified that she was familiar with the stairs and all the circumstances surrounding their use. There is no evidence in the record that the lights, or a lack thereof, were the proximate cause of the injury. A verdict cannot rest on speculation and conjecture. The burden is upon the plaintiff to establish that the negligence of the defendant was the proximate cause of the injury. This the plaintiff has failed to do.

After giving plaintiff's evidence the benefit to which it is entitled, we necessarily conclude that the trial court was right in setting aside the verdict and judgment because of an insufficiency of the evidence to support them. The trial court should have granted a new trial. The order of the court in sustaining the motion for judgment notwithstanding the verdict and the judgment of dismissal thereafter entered are reversed, with instructions to grant a new trial in accordance with the holdings of this opinion.

REVERSED.

STATE, EX REL. C. A. SORENSEN, ATTORNEY GENERAL, V. SOUTH OMAHA STATE BANK, E. H. LUIKART, RECEIVER, APPELLEE: GLENS FALLS INDEMNITY COMPANY, INTERVENER, APPELLANT.

282 N. W. 382

FILED NOVEMBER 18, 1938. No. 30385.

1. **Banks and Banking.** An order fixing a time for the filing of petitions in intervention by a claimant whose claim has been classified as invalid by the receiver of an insolvent bank, as provided by section 8-1,100, Comp. St. 1929, is not a judgment within the meaning of chapter 20, art. 20, Comp. St. 1929.
2. **Assignments.** Ordinarily, a check is not an assignment *pro tanto* of the fund in the drawee bank.
3. ———. In order for a check which has not been presented and accepted to operate as an equitable assignment of a deposit in the bank upon which it is drawn, it must be accompanied by special facts and circumstances establishing it as such.
4. **Banks and Banking.** Where an agent of an insurance company, who has contracted to hold premiums collected by him in trust until delivered to the company, deposits them in a bank in a private account and comingles them with other funds, thereby causing their identity to become lost, all of which were subject to check, without an express trust agreement or facts from which such a relation could be inferred, the bank is not a trustee of the fund even though the agent was also the president of the bank.

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

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

F. C. Radke and *O'Sullivan & Southard, contra.*

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

CARTER, J.

This is an appeal from an order of the district court for Douglas county denying the claim of the Glens Falls Indemnity Company that it was the owner of a certain deposit in the South Omaha State Bank of Omaha, Nebraska, at the time it became insolvent.

It appears from the record that John McGurk, the president of the bank, entered into an agency contract with the Glens Falls Indemnity Company in which he agreed to write various kinds of insurance for the company. It was further agreed that all premiums paid to the agent should be held at a fiduciary trust until delivered to the company. It further appears that C. W. Hepler was associated with McGurk in the Glens Falls Indemnity Company contract. Premiums received were deposited in an account entitled "Insurance Department, South Omaha State Bank, Omaha, Nebraska." At the time the bank was closed, the bank's records showed a balance of $1,472.58 in this fund. On the day the bank closed, McGurk delivered a check for $1,402.21 on the fund to the Glens Falls Indemnity Company, which was never paid. This check was given in settlement of the amount due the company for the month of June, 1931. The bank closed its doors on August 14, 1931, and at that time the amount owing by the agency to the company was $1,846. The company filed a claim with the receiver of the bank for $1,846, and C. W. Hepler also filed a claim for $1,472.58, the amount shown in the account on the records of the bank. On December 18, 1931, the receiver classified both claims as invalid, and the district court thereupon allowed 45 days for each of said claimants to file petitions in intervention to establish their claims.

On February 1, 1932, C. W. Hepler filed a petition in intervention under the name of "Insurance Department of the South Omaha State Bank, by C. W. Hepler, its agent." On March 30, 1932, the court sustained a demurrer to the petition and on the same day granted the Glens Falls Indemnity Company leave to intervene. On March 31, 1932, the petition in intervention of the company was filed. After a trial of the case, the court by a decree entered on April 28, 1937, disallowed the claim and the Glens Falls Indemnity Company now brings the case to this court for review.

The contention is made that the district court was without jurisdiction to authorize the filing of a petition in intervention in behalf of the Glens Falls Indemnity Company. It appears that on December 18, 1931, an order was entered ordering all persons with claims that were classified as invalid by the receiver, and who were dissatisfied with such classification, to file petitions in intervention within 45 days. The Glens Falls Indemnity Company obtained leave to and did file its petition in intervention more than 45 days after the order was made and at a subsequent term of court. The attorneys for the receiver contend that under the holdings in *State v. Security State Bank,* 125 Neb. 516, 251 N. W. 97, and *Bliss v. Bryan,* 123 Neb. 461, 243 N. W. 625, the order approving the classification of claims is a final judgment which cannot be modified at a subsequent term unless it comes within the provisions of chapter 20, art. 20, Comp. St. 1929. We quite agree that the allowance of a claim by the court is a judgment and the cases above cited are authority for this statement. But an order requiring the formation of issues and pleadings within a time to be fixed by the court on a claim that has been classified as invalid by the receiver presents an entirely different question. The applicable part of the statute in force at the time was as follows: "At the time of said hearing, the court shall fix a time for hearing on the claims filed by the receiver as invalid, and recommended by him for disallowance, * * * and the court shall direct the manner of making

up the pleadings on said claims and the notice which shall be given thereof to claimants." Comp. St. 1929, sec. 8-1,100. It will be noted that this statute does not provide for the entry of a judgment disallowing the claims classified by the receiver as invalid. As a matter of fact it provides for a further hearing on claims classified as invalid before a judgment is entered. It will also be observed that the manner of making up the pleadings and the notice to be given rests in the discretion of the trial court. Under such circumstances, the court had the right to authorize the Glens Falls Indemnity Company to file a petition in intervention after the 45 days provided therefor by the court's previous order had elapsed. No definite limitation for the filing of petitions in intervention having been fixed by the statute and the manner and time of their filing having been placed expressly within the discretion of the district court, no error in permitting the filing of the petition in intervention has been shown.

It is not disputed that John McGurk had the sum of $1,472.58 on deposit in the South Omaha State Bank under the name of "Insurance Department, South Omaha State Bank, Omaha, Nebraska." On the day the bank closed McGurk delivered a check to the Glens Falls Indemnity Company in the amount of $1,402.21. The company insists that this constitutes an assignment *pro tanto* of $1,402.21 of the amount on deposit.

A check is not ordinarily an assignment *pro tanto* of the fund in the drawee bank. Comp. St. 1929, sec. 62-1606; *State v. State Bank of Belvidere,* 122 Neb. 797, 241 N. W. 755.

The contention is advanced that the Glens Falls Indemnity Company comes within the exception that a check may operate as an equitable assignment of moneys belonging to the drawer in the hands of the drawee when it is drawn against a specific fund with such particularity as will clearly show the intent of the parties to charge the special fund. In support of this contention, appellant cites the following quotations from American Jurisprudence:

"It is clear, from the provision of the Uniform Negotiable Instruments Act that a check 'of itself' does not operate as an assignment, that special facts and circumstances attending the drawing and delivery of a check may give to its issuance the character of a *pro tanto* assignment of the funds in the hands of the drawee. Thus, it appears that an express agreement between the drawer and drawee that the check will be paid by the drawee from the funds of the drawer on deposit will have this effect, even though such agreement may be unknown to the payee. Upon like principle, if the check is drawn upon a particular, specific, and designated fund, it will be treated as an equitable assignment *pro tanto* of that fund." 7 Am. Jur. 387, sec. 535.

"Although a check may not of itself operate as an assignment of the drawer's funds on deposit with the drawee bank, yet it has been the well-settled rule, both before and after the adoption of the Uniform Negotiable Instruments Act, that a check drawn upon the whole or a part of a particular or specific fund, though the check is unaccepted or is not certified, operates as an equitable assignment *pro tanto* of such fund as between the drawer and the payee and as against mere volunteers and parties charged with notice, and gives the holder a right in equity to recover the amount from the drawee bank." 7 Am. Jur. 388, sec. 536.

It cannot be disputed that premiums collected by McGurk for the Glens Falls Indemnity Company were deposited in this fund. The record also shows that other funds, the origin of which is not shown by the record, were also deposited in the same account. None of them was deposited for any specific purpose. It is apparent that these funds were deposited in the name of "Insurance Department" for the convenience of McGurk and for no other purpose. They were subject to check by McGurk and for all purposes appear to have been treated as an ordinary checking account by him. Under these circumstances, a debtor and creditor relationship was established between McGurk and the South Omaha State Bank. The check given by McGurk to the Glens Falls Indemnity Company for $1,402.21 is in

no different status than a personal check drawn by him on the bank. There are no special facts or circumstances shown in the record that take it out of the general rule that a check does not of itself constitute a *pro tanto* assignment of the fund against which it is drawn. The assets of the bank were in no way augmented by the transaction. The transaction includes no circumstances from which it could be inferred that there was any intention on the part of McGurk to assign an interest in this deposit. There having been no presentment and acceptance of the check by the South Omaha State Bank, the Glens Falls Indemnity Company has obtained no rights against the bank or its receiver.

Appellant contends that the fund designated as "Insurance Department" in the bank was a trust fund created for the benefit of the Glens Falls Indemnity Company. There is no direct evidence of any such an arrangement. The record shows that moneys obtained from premiums on insurance written for the Glens Falls Indemnity Company were placed in this fund. But other funds were also kept in this same account, the source of which the record does not disclose. The amount of the fund that was derived from premiums on insurance sold for the Glens Falls Indemnity Company is not satisfactorily established by the record. There is no evidence of any intent to segregate the fund from the funds of the bank. It was clearly intended by McGurk as a general deposit for his own convenience. The knowledge of the bank was no greater than that of McGurk himself, he being its president. Essential elements are lacking to make the Glens Falls Indemnity Company the beneficiary of a trust.

The trial court was therefore right in denying the claim of the Glens Falls Indemnity Company. The judgment is

AFFIRMED.

GLOBE INDEMNITY COMPANY, APPELLEE, V. THAYER COUNTY BANK, APPELLANT.

282 N. W. 400

FILED NOVEMBER 18, 1938. No. 30374.

Banks and Banking. Where a draft is deposited with a bank and credited by it to the depositor, forwarded to a corresponding bank for collection and there paid by the drawee, the corresponding bank crediting the account of the forwarding bank with it in the amount of the draft; subsequently the drawee notifies both banks by telegram that the bill of lading attached to the draft is a forgery and warns the forwarding bank not to divert the funds to the drawer of the draft; and where the forwarding bank has had notice and has not disbursed the funds evidencing the draft; *held*, the forwarding bank received the funds as agent, and the funds so paid by the drawee were paid under circumstances existing at the time of payment that would entitle the payer to recover the funds back from the principal, and the forwarding bank, as agent, is liable to the payer for the funds so received so long as such funds remain in the forwarding bank, and where the evidence discloses that there has been no alteration in the situation of the forwarding bank towards its principal in relation to such payment.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

John L. Richards, Stewart, Stewart & Whitworth and *Charles B. Paine*, for appellant.

Hall, Cline & Williams, contra.

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

MESSMORE, J.

The plaintiff, as assignee of Goffe & Carkener, Inc., brought this action to recover from the Thayer County Bank the proceeds of a draft, dated February 1, 1930, with an attached, forged bill of lading. The draft was paid by Goffe & Carkener without knowing that the bill of lading was a forgery. The second amended petition details at considerable length evidentiary facts relating to the transaction.

The second amended answer admits the execution and payment by the plaintiff of the draft, with the forged bill of lading attached, and notice of such forgery; alleges evidentiary facts which defendant contends constitute the defense of payment, and alleges and sets forth facts which defendant contends constitute estoppel. The reply is a general denial, with the admission of certain evidentiary facts.

At the conclusion of all the evidence, the district court for Thayer county directed a verdict in favor of the plaintiff in the sum of $1,909.70, and from this verdict of the jury and the judgment of the court thereon, the defendant appeals.

The evidence is mostly by stipulation and discloses the following: George Hayes was doing business in the name of the Hebron Grain Company, at Hebron, Nebraska, and on January 29, 1930, deposited with the defendant bank a draft for $1,300, dated January 29, 1930, drawn upon Goffe & Carkener, which draft was accepted and paid on January 31, 1930, by Goffe & Carkener to the Stock Yards National Bank of Kansas City. On January 31, 1930, George Hayes, representing the Hebron Grain Company, deposited with the defendant bank a draft for $1,400, dated January 31, 1930, on the Updike Grain Company, which draft was accepted and on February 1 was paid by the grain company to the Stock Yards National Bank. Attached to both drafts were forged bills of lading. The draft sued on in this action was for $1,300, dated February 1, 1930, deposited with the defendant on the same day, drawn on Goffe & Carkener, and accepted and paid by it on February 3, 1930, to the Tootle-Lacy National Bank, of St. Joseph, Missouri. George Hayes took his own life on February 3, 1930. When the three drafts, as above set out, were deposited with defendant, they were credited to the account of the Hebron Grain Company and forwarded by defendant to its respective corresponding banks for collection. On January 29, 1930, at the time of the deposit of the draft of that date, there was a balance of $2,687.03, including the 1,300-dollar draft, in the defendant bank, in favor of the Hebron Grain Com-

pany. Subsequent to such date, and prior to the death of George Hayes, the Hebron Grain Company had withdrawn a total amount of $3,742.64. On January 31, 1930, a deposit of $2,520.31 was made in the account, and on February 1 a deposit of $1,300, being the last deposit made therein. These two deposits, added to the balance of $2,687.03, and totaling $6,507.34, constituted the account of the Hebron Grain Company with the defendant from January 29 up to the date of the death of George Hayes. Deducting the withdrawals, taken from the balance, left a credit to the Hebron Grain Company of $2,764.70, at the time of George Hayes' death.

On February 5, 1930, Goffe & Carkener, by telegram, notified defendant that the bill of lading attached to the 1,300-dollar draft, paid by it on February 3, was probably a forgery, advised defendant that it would be held responsible if the proceeds were diverted to the estate of George Hayes, and suggested that defendant take steps to recover for its credit. On February 19, 1930, Goffe & Carkener sent a telegram to defendant, referring to its telegram of February 5, making demand on defendant for refund of the payment on the forged bill of lading attached to the draft sued on. The defendant replied that the Hebron Grain Company account contained a balance of $50; that the Stock Yards National Bank and the Fidelity Trust Company of Kansas City paid $2,700 on drafts which they held because of the instructions of Goffe & Carkener. The two drafts, one for $1,300, dated January 29, 1930, against Goffe & Carkener, and one for $1,400, dated January 31, against Updike Grain Company, which had been forwarded to the Stock Yards National Bank were collected by said bank, and later said amounts were impounded by the courts and not remitted by the Stock Yards National Bank to the defendant. The action to impound these amounts was filed by Goffe & Carkener some time after February 12, 1930, and by the Updike Grain Company February 21, 1930. The Stock Yards National Bank paid Goffe & Carkener $1,300, which evidently was in payment of the January 29 draft,

and paid the Updike Grain Company $1,400 in payment of the draft of January 31. Obviously, the draft for $1,300, sued on in this action, dated February 1, for which the Tootle-Lacy National Bank was the collecting agent, had nothing to do with the payment of the two other drafts. The $2,700 was charged to the defendant's account by the Stock Yards National Bank. The record does not disclose that the defendant was served with process in the action brought by Goffe & Carkener and Updike Grain Company against the Stock Yards National Bank and the defendant.

After the Stock Yards National Bank had charged the defendant's account with $2,700, the defendant reduced the deposit of the Hebron Grain Company with it in the sum of $2,700, which left in the defendant bank to the credit of the grain company the amount of $54.40, $9.30 having been paid out for a telephone account and $1 for elevator rent under date of February 4, 1930. The evidence further discloses that on February 15, 1930, the defendant bank closed its account with Tootle-Lacy National Bank by withdrawing the funds then on hand. The evidence shows that defendant held a chattel mortgage against the Hebron Grain Company for indebtedness of the company to the bank. This mortgage was dated October 2, 1925, and the chattels under it were sold by the administrator of the Hayes estate in March or April, 1931, for $11,525, out of which defendant bank received $9,300 and remitted to the estate $2,225. The defendant claims that it had no notice of any other claim of Goffe & Carkener, or of any other person, based on any other draft than that of February 1, 1930, the draft here in suit, and produced two witnesses who testified that the first notice they had of the plaintiff's claim was in 1932, one witness testifying that it was on July 21 of that year.

The defendant contends that the verdict and judgment are contrary to the evidence and the law.

Defendant contends that it actually paid the proceeds of the draft of February 1 to the plaintiff; that the Stock Yards National Bank gave credit for the proceeds of the

January 29, 1930, draft to the defendant, and that it actually disbursed the proceeds to Hayes prior to his death, which disbursement was two days before defendant had notice even of the February 1 forgery. Defendant also claims that the evidence shows that the Stock Yards National Bank, without authorization from defendant, paid plaintiff $1,300 because of some action taken by or at the instance of plaintiff, and that the Stock Yards National Bank charged the $1,300 against the defendant's account with it; that is, defendant involuntarily paid the $1,300. "Involuntary" is defined as "Not proceeding from choice." Webster's New International Dictionary.

Defendant contends that the burden is on the defendant to establish payment and on plaintiff to show that an admitted payment was properly applied on another debt, citing in support thereof *Davis v. Hall*, 70 Neb. 678, 97 N. W. 1023; *Krause v. Cox*, 105 Neb. 728, 181 N. W. 611; and *Hill v. Pettit*, 23 Ky. Law Rep. 2001, 66 S. W. 188. Under the facts of each case cited, we can readily admit that the principle of law therein announced is thoroughly applicable. In furtherance of its contention, defendant urges that the payment being an involuntary payment the burden of proof is on the plaintiff to prove that the involuntary payment was properly applied upon an enforceable claim, citing in support thereof *Breslin v. Boyle*, 4 Walker (Pa.) 428; *Scheffer v. Tozier*, 25 Minn. 478; and 3 Williston, Contracts, 3110, sec. 1797.

In *Breslin v. Boyle, supra*, an action was brought by a creditor against the widow of a deceased debtor, to recover for the total amount of merchandise furnished both the husband and the wife during the lifetime of the husband, and, after his death, for the account against the wife. The wife admitted that the plaintiff could recover for the amount of goods furnished her, but that she was under no legal obligation to pay the indebtedness of her husband during his lifetime. The court held that the widow was under no legal or moral obligation to pay for the merchandise ordered during her coverture, as a claim therefor could not be enforced

against her either in law or in equity; that plaintiff could not appropriate therefor, without her consent, payments made after coverture was removed at a time when he had neither a legal nor a valid claim against her.

The case of *Scheffer v. Tozier, supra,* had to do with a contract for the sale of timber, to be cut on a specified piece of ground. A certain amount of timber was cut, some of which was not on the land to which one of the contracting parties held title. The court merely held that payment was not due to the contracting party on timber not owned by him and that he could only recover payment on the timber cut on the land where he could give title thereto.

In 3 Williston, Contracts, 3110, sec. 1797, it is said: "Of course, application cannot be made by the creditor to a claim which has no validity, * * * it seems clear that since the debtor, though not directing the exact application of a payment, may exclude a particular application; and since it should be the primary principle that no violence is done to the intention of the debtor as expressed to the creditor by words or acts or circumstances, the creditor cannot appropriate the payment to a claim which he knows is disputed however little ground there may be for the dispute."

Analyzing the evidence in the instant case, we find the facts very different from those in the cases cited by defendant on its propositions of law hereinbefore set out. In the case at bar, the suit was brought on the draft dated February 1, with a bill of lading, admittedly forged, attached. The defendant was in a position to know, and obviously did know, that three drafts had been deposited with it, which it credited to the account of the depositing party, forwarding the drafts to defendant's respective corresponding banks for collection. The Stock Yards National Bank did collect the draft of January 29 for $1,300, which Goffe & Carkener paid, and the draft of January 31 for $1,400, which the Updike Grain Company paid. The defendant had knowledge of the amount of each draft and received notice from the Stock Yards National Bank that the money had been impounded by Goffe & Carkener and by the Updike Grain

Company. And, after the Stock Yards National Bank had charged defendant's account with the $2,700, defendant reduced the deposit of the Hebron Grain Company by $2,700, as testified to by Martin J. Dagefoerde, a witness for the defendant: "Q. What became of that money, can you tell? A. The $2,700? After the bank at Kansas City charged our account with $2,700 we had to reduce our balance there by that amount, see, and in doing that we had to put the currency out of the safe back into the bank in order to offset that $2,700 charge which was paid by the Kansas City bank." J. R. Kenner, on direct examination, testified: "Q. What charges did you make against that account after the death of George Hayes? A. There was $2,700 deducted from the funds appropriated by the Stock Yards National Bank." There is evidence also that officers or employees of the Stock Yards National Bank called the defendant and related the circumstances of the impounding of the money in the Stock Yards National Bank. The Stock Yards National Bank paid to Goffe & Carkener and to the Updike Grain Company the amount of money that had been advanced by them in payment of the drafts. The action of the defendant in this behalf speaks for itself, as a recognition of the validity of the two claims and that the two drafts were an enforceable obligation by Goffe & Carkener and Updike Grain Company, and, in fact, the circumstances and evidence constitute an acquiescence in and ratification of the action of the Stock Yards National Bank in paying the claims of Goffe & Carkener and of Updike Grain Company. No case cited by defendant to support its contention meets such a state of facts as existed in the instant case, and, without denying the principles of law stated in the cited cases, the circumstances and facts in the instant case are not such that the principles of law as announced in the cases cited by defendant are applicable.

On the proposition of estoppel, urged by defendant, in that it claims to have parted with valuable security and turned over a sufficient amount of funds to the administrator of the Hayes estate to have protected itself against

loss, had the defendant had knowledge of any claim other than the draft of February 1 of Goffe & Carkener against the defendant until after the security had been sold, we believe the facts, as hereinbefore set out, clearly establish that estoppel is not a defense.

The defendant received the draft of February 1, 1930, deposited it to the credit of the Hebron Grain Company, and forwarded the draft to its corresponding banks for collection. The defendant was serving in the capacity of an agent of the Hebron Grain Company. The Tootle-Lacy National Bank received the draft for collection and was acting for and on behalf of the defendant as a subagent. Goffe & Carkener, by telegram, both to the Tootle-Lacy National Bank and defendant, notified them that the bill of lading attached to the draft was probably a forgery. The defendant at the time the last telegram was received, on February 19, had the funds in its possession and had not diverted them to the estate of George Hayes; in other words, had not paid out any of such funds to its principal, the Hebron Grain Company.

Plaintiff cites 2 Am. Jur. 264, secs. 335 and 336. Section 335 reads in part as follows: "An agent to whom money has been paid for his principal through error, or under other circumstances existing at the time of payment that would entitle the payer to recover it back from the principal, is individually liable to the payer for the money so received so long as it remains in his hands and there has been no alteration in the situation of the agent towards his principal in relation to such payment."

Section 336 reads: "The effect of the agent's payment over to the principal of money which has been paid to him by a third person under mistake of fact to relieve the agent of personal liability depends upon whether the agent at the time of making payment to the principal had notice of the facts. If the agent turns the money over to the principal before he has notice that the principal is not entitled to it he is not liable therefor to the payer. If, however, the agent knows that his principal is not entitled to the funds received

for the principal from a third person, he is under a duty to return them to the one rightfully entitled thereto; if he turns over such funds to the principal with knowledge that the latter is not entitled thereto, he becomes personally liable therefor.

"For settlement with or payment to the principal to relieve the agent from liability, the settlement must be an actual one and not the constructive one arising from a change in their relations from agent and principal to debtor and creditor. Merely placing the payment to the credit of the principal will not exonerate the agent from liability to the payer in event of his recalling the payment."

Plaintiff contends that the above propositions of law apply to the facts in the instant case, and in further support thereof cites the early Massachusetts case of *Garland v. Salem Bank,* 9 Mass. 407, and *Metropolitan Nat. Bank v. Merchants Nat. Bank,* 182 Ill. 367, 55 N. E. 360, as meeting the principles of law announced in said sections 336 and 335, respectively. See, also, *Hirning v. Federal Reserve Bank,* 52 Fed. (2d) 382; *National Park Bank v. Seaboard Bank,* 114 N. Y. 28, 20 N. E. 632; *Bromfield v. Gould,* 289 Mass. 80, 193 N. E. 796; *Elliott v. Swartwout,* 10 Peters (U. S.) 137; Restatement, Agency, sec. 339.

We believe that the evidence discloses that plaintiff has proved the agency theory, pleaded in its second amended petition. In view of our holding, it is not necessary to discuss the warranty theory; nor the applicability of the federal bill of lading act and certain of its provisions to this case.

The district court did not err in directing a verdict for the plaintiff.

AFFIRMED.

FEDERAL LAND BANK OF OMAHA, APPELLEE, V. RALPH M. WORLEY ET AL., APPELLEES: OMAHA NATIONAL BANK, TRUSTEE, ET AL., APPELLANTS.
282 N. W. 476

FILED NOVEMBER 26, 1938. No. 30402.

1. **Mortgages: EVIDENCE.** Fraud vitiating the transfer of unmatured negotiable paper secured by mortgage may be shown by circumstances proving that transferee took the paper in bad faith, and good faith of a subsequent encumbrancer in reliance upon the fraudulent release of the mortgage of record may be shown in the same manner.
2. **Executors and Administrators.** One dealing in good faith with an administrator of an estate or trustee appointed by a court or attorney at law in good standing may reasonably infer the fiduciary is acting in a representative capacity in the performance of duty, in absence of knowledge to the contrary or of circumstances indicating fraud.
3. **Estoppel.** "Where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the wrongful act should bear such loss." *Nebraska State Bank v. May*, 117 Neb. 262, 220 N. W. 276; *First Trust Co. v. Danielson*, 132 Neb. 141, 270 N. W. 680.
4. **Subrogation.** A surety on a fidelity bond who partially restores a loss created by the fraud of the principal obligor cannot thus acquire by subrogation a greater right than that formerly possessed by the party for whose benefit the bond was given.
5. ———. "The right of subrogation must in every case rest upon some recognized subject of equitable cognizance." *Chicago Lumber Co. v. Anderson*, 51 Neb. 159, 70 N. W. 919.

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

Kennedy, Holland, De Lacy & Svoboda, Edwin C. Cassem and *Anson H. Bigelow*, for appellants.

William H. Hein, Philip M. Wellman, Franklin L. Pierce, Philip N. Johnston, Mitchell & Gantz and *Donald E. Williams, contra.*

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

ROSE, C. J.

This is a suit in equity commenced by the Federal Land Bank of Omaha, plaintiff, to foreclose a 6,000-dollar mortgage as a first lien on 1,092.57 acres of land in Box Butte county. Plaintiff is mortgagee and Ralph M. Worley and Edith Worley, husband and wife, are mortgagors and defendants. Others claiming an interest in, or lien on, the mortgaged land are also defendants.

When Thomas Dean owned this land, he sold it to Guy L. Worley and took from the purchaser and the latter's wife, Nell Worley, April 7, 1917, a 12,000-dollar mortgage thereon, payable April 7, 1927, for part of the purchase price. In 1917 or 1918, Ralph M. Worley, defendant, purchased from his brother, Guy L. Worley, the title to the land and assumed the purchase-money mortgage of $12,000 thereon.

With this mortgage in favor of Thomas Dean unpaid, Dean willed his property to the United States Trust Company of Omaha in trust for testator's three sisters and one brother. The trustee was directed to pay the income from the estate of testator to a sister, Maria Lund, during her life, and at her death to divide the residue, when reduced to cash, among two other sisters and testator's brother. The will was duly probated in the county court of Douglas county May 10, 1923. The nominees named in the will for executors and the trustee selected by testator declined to serve, and George H. Merten, attorney, under court order, became administrator with the will annexed. He was also appointed trustee for the beneficiaries under the trust created by the will. He made his final report as administrator and procured the discharge of himself and his surety in the county court of Douglas county without accounting for the 12,000-dollar mortgage then unpaid. Maria Lund died in 1931.

For a recited consideration of $3,500 Thomas Dean by formal written instrument without limitation, filed of record, had assigned the $12,000 mortgage to the Alliance National Bank August 3, 1922, and the latter, "for value received," transferred "all its rights, title and interests"

therein to Sam Riseman by formal writing, also recorded.

In lieu of the unpaid Dean-Worley purchase-money mortgage for $12,000, which Ralph M. Worley assumed, the latter and his wife executed and delivered two mortgages on the same land, one for $6,000 and the other for $5,000. The first of the two was payable to the Federal Land Bank of Omaha, mortgagee, plaintiff. It paid the borrowed money or the net proceeds of this loan, $5,650, September 21, 1925, to George H. Merten for Sam Riseman by direction of mortgagors. This is the mortgage which plaintiff seeks to foreclose herein. The mortgage for $5,000 was dated August 1, 1925, and was payable in 10 annual instalments of $500 each with interest to Sam Riseman, who, "in consideration of the payment of the debt," released and satisfied of record, October 2, 1925, the 12,000-dollar mortgage.

In a former suit in equity, the Dean heirs and the beneficiaries under the trust created by the probated will of Thomas Dean, deceased, recovered in the district court for Douglas county a judgment setting aside the discharge of George H. Merten as administrator and his surety and requiring Merten to account for $8,315.15 lost to the Dean estate through his neglect and fraud. Judgment therefor was entered against him. *Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114. As trustee, Merten was succeeded by the Omaha National Bank, defendant.

The Federal Land Bank, plaintiff, pleaded that the mortgage for $12,000 was paid and released of record and that its 6,000-dollar mortgage was the first lien on the land described therein. Defaults in payments were alleged in the petition of plaintiff and there was a prayer for foreclosure.

All necessary parties were brought into court. Defendants Worley filed a general denial.

The Omaha National Bank, defendant, trustee, and the beneficiaries of the Dean trust, by answer and cross-petition, alleged in effect that the 12,000-dollar mortgage was part of the trust estate; that it was assigned by Thomas Dean to the Alliance National Bank as collateral security for a note for approximately $3,000; that, subject to this

pledge, the mortgage belonged to the Dean estate or the beneficiaries of the trust; that the assignment to Riseman was procured by the fraud of Merten and Riseman; that the release of the mortgage belonging to the Dean estate and the subsequent mortgages to plaintiff and Riseman were procured by Merten and Riseman for the purpose of defrauding the Dean heirs for whom Merten had been trustee; that plaintiff and the defendants Worley were chargeable with knowledge of the fraud and with bad faith in their negotiations; that, in an accounting required by all the fraudulent transactions, the purchase-money mortgage be reinstated and foreclosed as a first lien for the amount due the beneficiaries of the Dean trust.

The principal issues in the controversy were the good faith of plaintiff in lending the Worleys $6,000 on their mortgage and the good faith of the Worleys as participants in the refinancing of the 12,000-dollar mortgage on their land by the execution and delivery of the two subsequent mortgages aggregating $11,000.

Upon a trial of the issues herein, the district court decreed foreclosure of plaintiff's 6,000-dollar mortgage as a first lien for unpaid principal and interest amounting to $8,433.83; decreed foreclosure of the 5,000-dollar mortgage as a second lien for unpaid principal and interest amounting to $3,489.08 owing to the Omaha National Bank, present trustee, and the beneficiaries of the trust created by testator in his will; decreed the dismissal of the cross-petition of the same trustee and beneficiaries for the foreclosure of the 12,000-dollar mortgage.

The Omaha National Bank, trustee, and the beneficiaries of the trust appealed to the supreme court, insisting that the purchase-money mortgage for $12,000, subject to the assignment by Dean to the Alliance National Bank as collateral security for his unpaid debt of $3,093, was the property of the Dean estate or of the Dean heirs; that the assignment to Riseman was fraudulent and did not transfer to him the interests of the Dean heirs; that Riseman's release of the mortgage was also fraudulent and did not dis-

place the prior lien; that the facts, transactions and circumstances in evidence were such as to charge plaintiff and the Worleys with knowledge of the fraud and to disprove their pleas of good faith in their transactions with Merten and Riseman in dealing with trust property.

On appeal the trustee and beneficiaries invoke the rule that fraud vitiating the transfer of unmatured negotiable paper secured by mortgage may be shown by circumstances proving that transferee took the paper in bad faith. Comp. St. 1929, secs. 62-402 to 62-406; *Western Union Life Ins. Co. v. Mayhew, ante,* p. 6, 280 N. W. 250. The following circumstances in evidence are cited to prove bad faith of plaintiff in lending the Worleys $6,000: Assignment of the note and first mortgage for $12,000 as collateral security for the 3,500-dollar note to the Alliance National Bank and assignment to Riseman of that bank's "rights, title and interests" only; offer of $8,500 to Merten for the note secured by the 12,000-dollar mortgage; Merten without county court's authority to sell the Dean-Worley note; check of plaintiff for the proceeds of the 6,000-dollar loan and mortgage payable to Merten personally, not as administrator.

Other evidence of circumstances indicates fraud perpetrated by Merten, neglect, betrayal of trust and conversion of trust funds.

The only benefit accruing to the Dean estate or to the Dean heirs from the Worley mortgages through the transactions in which Merten participated was the discharge of the debt of $3,093 owing by the Dean estate to the Alliance National Bank and this transaction was essential to the consummation of the fraud perpetrated. The neglect and fraud of Merten as administrator, trustee, or attorney at law resulted in two complicated suits in equity in the district court for Douglas county, in two appeals to the supreme court of Nebraska and in perplexing litigation in federal courts of Montana. The present record is burdened with evidence of former litigation in efforts to redress wrongs perpetrated by the trusted officer of the courts. No one would deliberately assume such hazards without some

plan to escape detection. Fraud may deceive the innocent and the vigilant and the resulting loss may fall upon others who are honest and without fault. Loss caused by fraud is not always fully restorable in equity. In the present case there are also circumstances indicating good faith of plaintiff and the Worleys.

The Federal Land Bank, plaintiff, was engaged in the business of lending money. The application for the loan and subsequent negotiations therefor were regular. Plaintiff exacted an abstract showing title in the Worleys. When Merten received for Riseman the check of plaintiff for the 6,000-dollar loan to the Worleys, the abstract and the public records showed that the title to the land was in the Worleys; that Riseman had become the holder of the 12,000-dollar mortgage and had satisfied it of record as paid; that counsel in good standing had examined the abstract and in effect advised plaintiff its loan of $6,000, if secured by mortgage, would be the first lien. Plaintiff and the Worleys relied on the public records. There is direct evidence that they were without knowledge of the fraud and that they acted in good faith. If so acting, they had a right to contract for the reduction of the purchase-money mortgage to liens aggregating $11,000. At that time no part of the principal of the 12,000-dollar mortgage had been paid by the Worleys to the Dean estate or to the beneficiaries of the trust. The purpose of Merten to appropriate to his own use the proceeds of plaintiff's loan, if a fact, was not then known. It was a natural inference that as administrator or trustee or attorney he would perform his duties in those capacities. Owners of notes and mortgages may lawfully sell them for less than their face value. The fact that the assignment from the bank to Riseman recited only "rights, title and interests" of assignor transferred was not necessarily a warning to look out for fraud, since the public record showed Dean's transfer of the entire mortgage to the Alliance National Bank was without reservation.

Dean himself made fraud and loss possible by failing to limit his assignment to its real purpose—collateral security for his note. The pertinent rule of equity is:

"Where one of two innocent persons must suffer a loss occasioned by the wrongful act of a third person, the one who made it possible for the third person to commit the wrongful act should bear such loss." *Nebraska State Bank v. May,* 117 Neb. 262, 220 N. W. 276; *First Trust Co. v. Danielson,* 132 Neb. 141, 270 N. W. 680.

The preponderance of the evidence is that Merten, in connection with the fraudulent transactions in which he participated, acted as administrator or trustee or attorney and that plaintiff and the Worleys understood he acted in a representative capacity.

Circumstantial evidence may be as effective to prove good faith as to prove bad faith in transfers involving unmatured negotiable notes and mortgages securing them. On the whole record, considered from every standpoint, the preponderance of the evidence proves that plaintiff and the Worleys acted in good faith in the transactions resulting in the execution and delivery of the 6,000-dollar mortgage and that it is the first lien on the Worley land.

The appeal presents another problem. The beneficiaries of the Dean trust pursued Merten's surety, the Southern Surety Company of New York, in federal courts of Montana, attached bonds of the surety there and received $7,500 in partial settlement of that litigation. Louis H. Pink, liquidator of Merten's surety, intervened in the suit at bar and, to the extent he had restored to the Dean heirs the amount of his payment to them, prayed for subrogation to their rights in the mortgage for $12,000 or, in the alternative, to the rights of the Dean heirs in the 5,000-dollar mortgage payable to Riseman.

The district court found there was no equity in the plea for subrogation and dismissed the petition of intervener. From that order he appealed.

The surety was not entitled to subrogation. "The right of subrogation must in every case rest upon some recognized subject of equitable cognizance." *Chicago Lumber Co. v. Anderson,* 51 Neb. 159, 70 N. W. 919. As already determined, the Dean heirs had no interest in the released

mortgage which they could enforce against the innocent Worleys. The surety, therefore, could not acquire by subrogation an interest or right not formerly possessed by the Dean heirs. *American Surety Co. v. School District,* 117 Neb. 6, 219 N. W. 583. No part of the debt owing to the Dean heirs under the Riseman mortgage was paid by the surety and the equity essential to subrogation had no existence.

Prejudicial error in the proceedings and judgment below has not been found.

AFFIRMED.

DALTON STATE BANK, APPELLEE, V. JACOB W. ECKERT ET AL., APPELLANTS.
282 N. W. 490

FILED NOVEMBER 26, 1938. No. 30406.

1. **Attorney and Client.** Where it appears that two judgments arising out of the same transaction have been obtained by each of two parties against the other, equity will subordinate an attorney's lien to the right of set-off.
2. **Judgment.** If the equities subordinate an attorney's lien to the right of set-off, where there are two judgments, it is immaterial that one may be founded upon contract and the other on tort.

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

M. V. Beghtol, A. J. Kinnersley and *Golden P. Kratz,* for appellants.

Neighbors & Coulter and *Paul L. Martin, contra.*

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

PAINE, J.

This case involves the right of priority between an attorney's lien and the right of offset of a judgment creditor. From an adverse ruling, the attorneys have appealed.

As the question at issue grew out of several lawsuits, it is necessary, for a proper understanding, to make a rather complete statement of the facts.

Defendant Jacob W. Eckert lived in Morrill county, and became indebted to the Dalton State Bank in the sum of $2,900. He gave a note secured by a second mortgage upon real estate and also by a mortgage upon certain chattels. In 1932, the said bank having temporarily suspended business, its cashier, for the purpose of taking additional security, divided this same loan and the interest due thereon into two notes, one of $900 and one of $2,137.75, and, in addition to the security already given, the cashier took a new chattel mortgage upon farm implements, machinery, live stock, and other chattels to secure the new $900 note, and agreed to return to him the old note of $2,900 if the bank reopened, but, in the event it failed to reopen, then the two new notes and mortgage would be returned, but no return was ever made of either.

On January 13, 1934, the First Trust Company of Lincoln, as trustee, started to foreclose its first mortgage upon Eckert's land, and on March 5, 1934, the Dalton State Bank filed a cross-petition on its second mortgage on this same land, and a decree was entered April 16, 1934, finding the amount due on the first mortgage to be $9,097.50, and on the second mortgage the sum of $3,618.71.

On April 9, 1934, which was shortly before the entry of the above decree of foreclosure, the Dalton State Bank brought an action in replevin in the district court for Morrill county, and replevied all the chattels covered by the chattel mortgage given to secure the $900 note. The chattels so replevied were sold, and this amount was credited on the $900 note given by Eckert.

In said action Eckert charged in his answer and cross-petition that the indebtedness involved in the replevin action was the same as the indebtedness represented by his original note of $2,900, and that no permission of court had been obtained to commence the action at law while the foreclosure action was still pending.

On June 29, 1934, an agreement for attorney's fees was entered into between Jacob W. Eckert and attorneys Golden P. Kratz, of Sidney, and A. J. Kinnersley, of Dalton, in which Eckert agreed to pay them $1,000 out of any money or property to be recovered in the replevin action brought by the bank under which his farm stock and equipment were sold, or out of any judgment secured against the Dalton State Bank, and if no judgment was secured the attorneys were to receive no fee. It was clearly stated in the contract that, if the judgment secured against the bank was $1,000 or less, the attorneys should receive it all. It was also provided in the contract that other suits were pending against Eckert and that they should continue to represent him in the other cases, and their fees in such other cases should be approximately double what ordinary attorney fees would be, because of the fact that they could only be paid in case they secured a judgment against the bank in the replevin case.

After trial therein, defendant Eckert secured a judgment for damages against plaintiff bank for the tort it had committed in the replevin case. Eckert's attorneys had filed notice of their lien in the replevin case on October 2, 1934, and shortly after the entry of the judgment in favor of Eckert he duly assigned the same to his attorneys. This judgment was assigned in Morrill county, and the Dalton State Bank was located in Cheyenne county; therefore, in June of 1935 a transcript was filed in Cheyenne county, where the bank is located, and the bank asked to have the execution of the judgment of Eckert enjoined until such time as it could go into the Morrill county district court and secure a deficiency judgment against Eckert there on the foreclosure, which it claimed would be paramount to the attorneys' lien which the attorneys held.

The foreclosure case was pending for a considerable time, due to stays of various kinds, but on February 17, 1937, it came on to be heard upon the application of the bank for a deficiency judgment upon its second mortgage. The court found that the original note was for $2,900, upon which

$228.92 had been paid; that on September 26, 1934, the bank had filed a remittitur, and a balance remained due and unpaid in the sum of $3,292.11, with interest at 10 per cent., which was duly entered as a deficiency judgment.

After the deficiency judgment was entered, the court held that the right of offset to the bank because of this deficiency judgment was superior to the attorneys' lien and the judgment which had been assigned to them, and that ruling is assigned as error and brought here for review.

The plaintiff bank contends that Eckert's attorneys charged him a fee of $1,000 in their contract with him, when they well knew that the property taken in the replevin action had been appraised April 10, 1934, as of the aggregate value of $915.

It is further charged by the bank that the contract between Eckert and his attorneys was entered into for the purpose of defrauding his other creditors, and that, as they had been attorneys for him from the beginning of the first case, they were well advised of his situation.

This court faces the question whether the judgment of the plaintiff and the judgment against the plaintiff obtained by the defendant arose out of the same subject-matter; and, if the two judgments arose out of the same subject-matter, can a judgment based on contract be offset against a judgment arising on tort?

Section 20-816, Comp. St. 1929, provides: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court."

One of the early cases is that of *Cooper v. Bigalow,* 1 Cow. 206. This case was decided by the New York supreme court in August, 1823. A set-off was pending at the previous term, but Bigalow, who was then in prison under the insolvent act, had assigned a judgment in his favor to his attorney. The court said: "The right of set-off had attached; and the attorney had full notice that it was claimed, at the time he took the assignment from Bigalow."

In *Kisthardt v. Betts,* 321 Pa. St. 270, 183 Atl. 923, the

defendants were permitted to set off their judgment against a judgment held by the plaintiff and assigned by the plaintiff to a third person in consideration of attorney's fees, notwithstanding defendants did not assert the right to set-off when plaintiff brought the suit. The court said: "The set-off of one judgment against another is not a legal right, * * * but is allowed by the courts under their inherent powers in the administration of justice and is governed by the principles of equity;" and adds that in Pennsylvania each case is to be determined on its own circumstances and merits.

The case of *Commercial State Bank v. Ketchum,* 1 Neb. (Unof.) 454, 96 N. W. 614, is quite in point. Commissioner Pound said: "Where a decree enjoining collection of a judgment and allowing a set-off against it, conditions the injunction upon payment into court of a sum more than sufficient to satisfy an attorney's lien upon such judgment, it is unnecessary to consider the relative priorities of the right to a set-off and such attorney's lien." This case is in point with the case at bar in that the plaintiff replevied certain personal property, but, by reason of the insufficiency of the affidavit, after a jury trial the defendant recovered judgment for the value of the property replevied, and after trial a decree was rendered allowing the set-off, but the court did not pass upon the priorities of the attorney's lien and the right to set-off. The defendant there was insolvent, and it is admitted that the defendant in the case at bar had no property left and was working in a café at Sidney.

The record in the case at bar clearly shows the insolvency of Eckert; and insolvency was recognized as sufficient ground for allowing set-off in *Wells v. Cochran,* 88 Neb. 367, 129 N. W. 533, in which it was held: "Where peculiar equities intervene between the parties, a court of equity may enjoin the collection of a judgment until the debtor litigates an unliquidated claim against his creditor, and if the debtor succeeds the court may set off the judgments so far as one may equal the other." This controversy was

so close that it came to this court three times. Also to the same effect see *State v. Farmers State Bank,* 113 Neb. 497, 203 N. W. 629; *Rogers v. Buettgenback,* 114 Neb. 834, 211 N. W. 168; 7 C. J. S. 1197, sec. 232; *Thrall v. Omaha Hotel Co.,* 5 Neb. 295; 24 R. C. L. 806, sec. 14; 9 Neb. Law Bulletin, 346; *Jacobsen v. Miller,* 50 N. Dak. 828, 198 N. W. 349, and annotation as found in 34 A. L. R. 317.

The doctrine of set-off is of equitable origin, and not limited to demands which have been reduced to judgment. An unsatisfied judgment is a "thing in action" as respects statutory right to set off an assigned judgment against another judgment, and the assignee stands in same position as assignor at time of assignment. Where different claims arise in relation to the same matter, it is undoubtedly equitable that these equities should be arranged between the parties without reference to an attorney's lien, which is only on the clear balance due to his client after all the equities are settled. "If equities subordinate an attorney's lien to the right of set-off where there are two judgments in the same action, * * * it is immaterial that one may be founded upon contract and the other upon a tort." *Lee v. Sioux Falls Motor Co.,* 65 S. Dak. 401, 274 N. W. 614. See, also, *Yorton v. Milwaukee, L. S. & W. R. Co.,* 62 Wis. 367, 21 N. W. 516, 23 N. W. 401.

In *Field v. Maxwell,* 44 Neb. 900, 63 N. W. 62, it was held: "An attorney's lien for services performed in prosecuting an action is not measured by the amount which his client claims to be his due, but cannot exceed the amount in the hands of the adverse party belonging to his client or the amount owing to him, and is not paramount to any proper set-off or other available defense in such action." See, also, *Richardson v. Doty,* 44 Neb. 73, 62 N. W. 254; *Jones v. Driscoll,* 46 Neb. 575, 65 N. W. 194; *Stone v. Snell,* 86 Neb. 581, 125 N. W. 1108.

In the case at bar, the exact amounts of the judgments against each party have been determined by the court, and injustice is prevented by allowing a set-off. The plaintiff bank did not lose its right to a set-off because defendant

Eckert became insolvent, or because he had assigned the judgment he secured to his attorneys, as an attorney's fee of $1,000 for work that other attorneys testify was of the value of $150.

After reviewing all the facts in the case at bar, this court holds that the attorney's lien was subject to the right of the judgment debtor to set off its deficiency judgment. The trial court listened to the testimony of all the parties to this litigation, and had a full knowledge of the subject-matter, and held that the plaintiff had a lien upon the proceeds of the mortgaged property, even though it held that the plaintiff bank then had no present right to maintain the replevin action. The trial court was right in holding, under the rather peculiar facts in this case, that the judgment based on tort could be offset against a judgment arising on contract where both judgments arose out of the same subject-matter.

AFFIRMED.

ROY L. DUNN, APPELLANT, V. MUTUAL BENEFIT HEALTH & ACCIDENT ASSOCIATION, APPELLEE.
282 N. W. 487

FILED NOVEMBER 26, 1938. No. 30420.

1. **Evidence.** Parol evidence is inadmissible to prove a collateral or contemporaneous oral agreement to vary or contradict the terms of a written contract when it apparently embraces all the particulars necessary to make a complete agreement and is designed to express the whole arrangement between the parties.
2. **Contracts:** CONSTRUCTION. In determining the meaning of an indefinite or ambiguous contract, the interpretation or construction given it by the parties, while engaged in its performance before any controversy has arisen, is one of the best indications of its true intent and meaning, and the courts will ordinarily enforce such construction.

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

Foster & Yates, for appellant.

Cleary, Horan & Skutt, contra.

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

CARTER, J.

This is an action by an agent to recover from his principal the amount alleged to be due under an express agreement for hire. The plaintiff's petition consisted of four causes of action, the second of which was dismissed by plaintiff during the course of the trial. The trial court sustained plaintiff's motion for a directed verdict as to the third cause of action and a judgment was entered thereon. On the first and fourth causes of action the court directed verdicts for the defendant and from these orders the plaintiff appeals.

The evidence shows that plaintiff entered into a written contract with the Mutual Benefit Health & Accident Association of Omaha, hereafter referred to as the defendant, by which he agreed to represent the defendant as its general agent in the Great Falls district in Montana. As a consideration, plaintiff was to receive certain stated commissions on first premiums on policies based upon applications solicited by him in his territory, also the overwrite on all premiums based upon policies sold by his sub-agents, a collection fee on all premiums collected through his office in Great Falls and an overwrite collection fee on all premiums collected at points where the defendant company had not appointed local treasurers. The duties of the plaintiff were set forth in the contract in the following words: "In consideration of this appointment the second party hereby accepts said appointment subject to all provisions and conditions of this contract and agrees to devote his time and energy to the duties as agent for the association and to act exclusively for it and to advance its best interests subject to such instructions as have been or may hereafter be given by the association."

Plaintiff alleges that C. C. Criss, treasurer of the defendant company, during the negotiations with the plain-

tiff, orally agreed with plaintiff as follows: "That they would like to have him adjust and settle a few minor claims in Great Falls, Montana; that the adjusting of the claims would assist plaintiff in making contacts and help him to write insurance; that if the adjusting of the claims became burdensome or took up the time that he should be giving to the writing of insurance, that the company, in that case, would either send a claim adjuster to take care of the claims or would pay plaintiff additional compensation for his time and recompense him for his expenses." Plaintiff testified that he adjusted 2,157 claims for losses that were not covered by his contract of hire and that the reasonable value of his services in handling them was $10,000.

According to the evidence, plaintiff went to Great Falls and took over the office about June 10, 1930. The contract was not finally approved by an executive officer of the defendant, as required by the contract itself, until June 16, 1930. We are of the opinion that the alleged oral agreement cannot be admitted in evidence to contradict or vary the terms of the written agreement, it having been made as a part of the preliminary negotiations leading up to the making of the written contract. *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621, 75 N. W. 1092; *Crook v. O'Shea*, 126 Neb. 67, 252 N. W. 456; *Weidenfeld v. Olson*, 132 Neb. 303, 271 N. W. 806. The provisions of the contract heretofore set forth relating to the services to be performed by plaintiff are indefinite and uncertain in some respects. We know of no better way of determining the intent of the parties than by giving the contract the effect that the parties themselves gave it. Plaintiff worked under the contract for 33 months and during that time there were many acts and much correspondence which bear directly upon the meaning of the contract as the parties themselves construed it.

The record discloses that plaintiff took over the agency about June 10, 1930. On June 14, 1930, plaintiff wrote the company treasurer that "there were around one hundred unpaid claims on file in this office when I arrived." While

the plaintiff contends that these claims were taken in to the home office, nevertheless it appears that they were soon in his hands for handling. It is clear, therefore, that plaintiff commenced handling claims almost from the very beginning of the employment. This is established in a letter from plaintiff to the company treasurer under date of June 25, 1930, in which he said that we "have waded in with the result that we have the collections running along smoothly and the pending claims taken care of up to date."

On October 16, 1931, the assistant secretary of the company wrote to the plaintiff regarding a charge of $300 for the office equipment in the Great Falls office as follows: "We were informed further that your claim adjustments have been meeting with the approval of the claims committee and it seems quite likely that you are spending a good deal of time on them. In view of all this, and further in view of the fact that probably in the future you will be called upon to take care of unusual situations which might arise, we are asking the accounting department to relieve your account of the $300 charge and you will not be annoyed further about it."

On December 9, 1931, plaintiff wrote the company's agency director in part as follows: "There are many of the collections on accounts which are notified to pay this office who for some reason or other remit direct to the home office. We get nothing whatever by way of returns out of these accounts but we do get all of the claims to pay that arise from this very business who pay direct to the home office, and when I say that these claims take up 75% of our time, I am putting it mildly. Then too the postage is no small item in the handling of these claims. On the whole works where the business is paid direct into the home office we do not realize a cent. We have come to the place where we must get something for our work on claims and we don't know of any other source from which to expect it; if you do we would certainly be glad to hear from you."

On June 30, 1932, the company's superintendent of claims wrote the plaintiff as follows: "We have your letter with further reference to compensation for handling claims and in replying beg to advise that in view of the fact that we are in the midst of one of the greatest financial stringencies the country has ever known, during this time and in view of the fact that we find it absolutely necessary to cut salaries and expenses wherever possible, we do not feel that we could, right at this time, recommend any increase of expenditure on the part of the association."

And on August 23, 1932, plaintiff wrote the agency director of the company as follows: "This claim situation is very serious in Montana and I find it is the same all over the country. It takes practically all my whole time and as you know I don't get anything from settling claims but have to depend upon the collections and on the new business which I get off the territory."

We have examined all the correspondence in the record and nowhere does the plaintiff claim that he was entitled to additional compensation for handling claims under an agreement. We are of the opinion that the evidence quoted herein clearly indicates that plaintiff knew that he was to handle claims as a part of the services to be rendered under the written contract. He used the fact that the work on claims was excessive as a basis for obtaining the cancelation of the $300 charge for office equipment. He attempted to get his commission schedule increased for the same reason. He also requested financial assistance on his office overhead because of the volume of claims he was required to handle. He, likewise, requested that he be allowed commissions on collections sent direct to the company office as an additional compensation for his work in handling these claims. But at no time did he claim any right under an agreement to additional compensation for handling claims during the 33 months he was in defendant's employ. At various times he had the assistance of four claim adjusters sent out by the home office. As late as August 23, 1932, he wrote "and as you know I don't get anything

from settling claims but have to depend upon the collections and on the new business which I get off the territory." We are not unmindful of the fact that the contract was prepared by the defendant and that, in the event of ambiguity or indefiniteness, it would ordinarily be construed against the party making it. But the fact remains that both parties gave the contract the same construction during the whole period that the contract was in force.

Whether the handling of claims was a part of the duties to be performed by the plaintiff under his contract with the defendant is indefinite and uncertain and, in our opinion, constitutes an ambiguity. The evidence shows that, during the 33 months that plaintiff worked under the contract, both parties considered that the handling of claims was a part of plaintiff's duties under that part of the contract hereinbefore quoted. The court is entitled, we think, to place the same construction on the contract. The following rules of interpretation apply:

"In the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms. In fact the courts will generally follow such practical interpretation of a doubtful contract. It is to be assumed that parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be." 12 Am. Jur. 787, sec. 249.

"The interpretation or construction given contracts by the parties to them, while engaged in their performance before any controversy has arisen, is one of the best indications of their true intent and meaning, and the courts should ordinarily enforce such construction." *Hull Co. v. Westerfield,* 107 Neb. 705, 186 N. W. 992. See, also, *Ord*

Hardware Co. v. J. I. Case Threshing Machine Co., 83 Neb. 353, 119 N. W. 682; *Cady v. Travelers Ins. Co.*, 93 Neb. 634, 142 N. W. 107; *Farmers Ed. & Coop. Union v. Farmers Ed. & Coop. State Union*, 133 Neb. 397, 275 N. W. 464; 4 Neb. Law Bulletin, 149.

The parties having construed the contract as including the handling of claims during the 33 months that parties operated under it, the plaintiff cannot now urge a different interpretation. Whether the alleged oral agreement was admissible in evidence for any purpose in this case, it is not necessary for us to decide. In any event, the contract, whether it be that which was reduced to writing alone, or whether it be the written instrument as explained by the oral agreement, is subject to the construction placed upon it by the parties. The trial court was right in directing a verdict on the first cause of action.

Plaintiff also complains of the action of the trial court in directing a verdict against him on his fourth cause of action. The evidence discloses that defendant employed plaintiff as a claim adjuster, after he returned from Great Falls, at a salary of $150 a month. The fourth cause of action alleges that plaintiff was not paid for the month commencing June 10, 1932, and it is for this amount that he sues. The evidence disclosed that plaintiff did not adjust any claims following June 10, 1932. It appears that plaintiff was totally disabled on and subsequent to June 10, 1932, and that he performed no services for defendant during that period. Plaintiff was paid total disability benefits by the defendant company during the time of his disability. Upon this evidence, the trial court directed a verdict for the defendant, and, we think, correctly so. The plaintiff failed to make a case, and, under such circumstances, it is the duty of the court to direct a verdict.

The judgment of the trial court is in all respects correct and it is

AFFIRMED.

JOSEPHINE BARNARD, SPECIAL ADMINISTRATRIX, APPELLEE, v. OSCAR G. HEATHER, APPELLANT.
282 N. W. 534

FILED DECEMBER 9, 1938. No. 30426.

1. **Automobiles: RECKLESS OPERATION.** To constitute "reckless operation" of a motor vehicle, within the meaning of the "guest" statute of Iowa, the proof must be such as to justify a finding that the operator was proceeding without heed of, or concern for, the consequences. *Siesseger v. Puth*, 213 Ia. 164, 239 N. W. 46.
2. ———: ———. Evidence examined and analyzed, *held* insufficient to warrant the trial court in submitting the cause to the jury on reckless operation of motor vehicle by driver, within the contemplation of the Iowa "guest" statute. (Iowa Code 1935, sec. 5026-b1).

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

Crofoot, Fraser, Connolly & Stryker, for appellant.

McKenzie & Dugan, contra.

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

MESSMORE, J.

This action was brought in the district court for Douglas county to recover damages for the death of plaintiff's intestate, alleged to have been caused by the reckless operation of the automobile of defendant in which plaintiff's intestate, her husband, was riding. The jury returned a verdict for the plaintiff in the sum of $3,250. Defendant appeals.

The pleadings admit the appointment of the plaintiff as the administratrix of her husband's estate, the accident, and the place at which it occurred. The pertinent allegations of plaintiff's amended petition relating to the cause of action may be summarized as follows: That the accident was due to gross negligence and reckless driving of the automobile by the defendant, in the matter of speed, management and control of his automobile, in attempting to pass

an automobile going in the same direction, and at the same time an automobile approaching from the opposite direction; in attempting to pass between the two automobiles, running in opposite directions; in failing to remain on the right-hand side of the road and properly control the automobile and keep careful and proper lookout; and in failure to see the automobile coming from the south towards the north, or the oncoming automobile, and in driving in a reckless and careless manner, in utter disregard of the safety of other persons having occasion to use the highway. Pertinent provisions of the Iowa Code are set out in the amended petition and later received in evidence.

The second amended answer of the defendant cites the guest statute (Iowa Code 1935, sec. 5026-b1), and alleges that the plaintiff's intestate was riding in defendant's automobile as a guest, by invitation and not for hire, as such statute has been construed by the supreme court of Iowa. The answer further denies that the accident was caused by any reckless operation of the automobile, as has been defined by the law of Iowa, or by any violation of the Iowa statute. The reply is a general denial.

On September 11, 1936, the defendant, Oscar G. Heather, the plaintiff's intestate, Ray O. Barnard, and one Hans J. Hansen left their homes in Omaha at 3:15 a. m. to go to Alexandria, Minnesota, on a fishing trip. The defendant was driving his 1934 Studebaker sedan. Seated at his right was the plaintiff's intestate, and Mr. Hansen was in the rear seat. The accident occurred about 7:45 in the morning on highway No. 75, a paved highway 18 feet wide, with seven-foot dirt shoulders, being the main highway from Sioux City, Iowa, to Minnesota, running directly north. The country is rolling, but the hills are not steep. The weather was clear and dry and the visibility good.

The most competent evidence relating to the accident is the testimony of John Beernink, a farmer, who was an eyewitness of the accident. Mr. Beernink lived about four miles southwest of Sioux Center, Iowa. On the morning of

September 11, 1936, he was driving his Ford V-8 automobile towards Sioux Center, going north and down-hill. The road leads downgrade several hundred feet to the bottom, and then starts upgrade. Mr. Beernink was driving at the rate of 40 miles an hour on the east side of the road. When about a mile and a half south of Sioux Center he saw a car coming from the north. Defendant's automobile was coming from the south, and was not noticed particularly by the witness until it was practically alongside of his Ford car. There was nothing unusual about the car and it was not making any noise. The automobile approaching from the north was at that time 75 to 100 feet from the Ford car. The defendant's car cut in sharply in front of the Ford car to avoid the car coming from the north; otherwise there would have been a head-on collision with the southbound car. The right rear fender of the Studebaker struck and dented the left front fender of the Ford car, jarring it slightly. Defendant's automobile then proceeded onto the shoulder on the east side of the highway, after swinging in front of the Ford car, and on making the turn to the east side of the road it continued to go north, its right wheels being from a foot to two feet off the paving, following the shoulder of the road on the east side for 30 or 40 feet. Defendant's car then swung over to the west side diagonally across the paving 40 or 45 feet. It upset in a ditch and rolled over two or three times. The speed of defendant's car was fixed by the witnesses at 35 or 40 miles an hour; the speed of the oncoming car from the north and of the Ford car at 40 miles an hour. The evidence further discloses that, at the time Mr. Beernink noticed defendant's car and the driver's attempt to go around the Ford car, Beernink tried to momentarily slacken his speed, in an attempt to slow down, to make more room for the Studebaker to pass in front of the Ford. The oncoming car from the north apparently did not slacken its speed; nor is there any evidence that the brakes were applied on any of the cars. Mr. Beernink could plainly see that defendant first tried to prevent the accident by

cutting in at his right and then made an effort to control the car and get it back onto the pavement. The driver of the southbound car and the driver of the Ford then went to the scene of the accident. No one in defendant's car said anything about how the accident happened. The driver of the southbound car left, and his evidence was never obtained. The plaintiff's intestate received a broken neck in the accident and died some 20 minutes thereafter in a hospital at Sioux Center.

The testimony of the sheriff, who arrived at the scene of the accident about 8:30 a. m., showing the course traveled by the defendant's car and its position on the road, would add nothing of particular advantage to the evidence, as no definite measurements were taken. The testimony of defendant discloses that he could see a mile and a half ahead, and certain portions of his testimony are set out by plaintiff, to the effect that the defendant did not pass any cars that he knew of; he did not see any car that he knew of before the accident happened or at the time of the accident; did not see or meet any cars; that he could not recall how he happened to go off the left-hand side of the road, and before the crash did not see anybody coming towards him; did not see a car between himself and the end of the mile and a half distance; that the view was clear; he did not know what occurred; did not recall seeing the Ford car ahead of him or any car from the north, and did not know how the accident happened. Defendant also testified, in substance, that he was not able to reconstruct in his mind all that happened; that he had tried to do so, and that he could not bring the happening of the accident or any of the events occurring at the time back to his mind; that he did not recollect seeing the car approaching him. There is also in the record evidence that defendant had no recollection of the accident. He was injured; the accident occurred in less than a second's time, and there is nothing unusual in defendant's testimony that he could not recall just what happened, when he was stunned a few moments after the accident. He had driven an automobile for 17 years.

The evidence of Hans J. Hansen is of little value as it relates to the accident. He was engaged in looking over road maps in the rear seat. One statement is attributed to this witness, when he said "Oscar, he got you," perhaps referring to the fact that he thought defendant's car had been sideswiped either by the southbound automobile or by the Ford car.

The town marshal of Sioux Center testified that he talked to the defendant; that defendant stated he was going at a rate of speed of 28 miles an hour. The witness testified: "Q. What else did he say? A. Then he said he passed a car that was ahead of him and turned in to the right to avoid a car coming from the north." On cross-examination the witness testified: "Q. He told you everything he remembered about the accident? Did he say anything about his car being sideswiped? A. He mentioned to me it looked like the car coming from the north sideswiped him. Either the northbound car or southbound car sideswiped him, was his idea." The foregoing facts, as disclosed by the record, are sufficient for an analysis of the instant case.

The appellant contends that the trial court erred in overruling defendant's motion for a directed verdict at the close of all the evidence.

Section 5026-b1, Iowa Code 1935, reads: "The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless damage is caused as a result of the driver of said motor vehicle being under the influence of intoxicating liquor or because of the reckless operation by him of such motor vehicle." That part of this statutory provision relating to intoxicating liquor is not involved in this case.

In *Siesseger v. Puth,* 213 Ia. 164, 182, 239 N. W. 46, 54, "Recklessness" under the guest statute is defined as " 'proceeding without heed of or concern for consequences.' To be 'reckless,' one must be more than 'negligent.' Recklessness may include 'wilfulness' or 'wantonness,' but if the conduct is more than negligent, it may be 'reckless' with-

out being 'wilful' or 'wanton,' but to be reckless in contemplation of the statute under consideration, one must be more than negligent. Recklessness implies 'no care, coupled with disregard for consequences.'" The above case has been approved in *Neessen v. Armstrong*, 213 Ia. 378, 239 N. W. 56; *McQuillen v. Meyers*, 213 Ia. 1366, 241 N. W. 442; *Wilde v. Griffel*, 214 Ia. 1177, 243 N. W. 159; *Levinson v. Hagerman*, 214 Ia. 1296, 244 N. W. 307; and in every Iowa decision touching upon the guest statute, wherein the word "reckless" was necessary to be defined.

In *Mescher v. Brogan*, 272 N. W. (Ia.) 645, it was held: "'Recklessness' is conduct amounting to more than negligence and surrounding circumstances in each particular case must be considered in determining the question;" that, "In Iowa, there are no degrees of negligence;" and that the "Rule that 'recklessness,' within automobile guest statute, is more than negligence, means that recklessness is more than want of ordinary care, and does not necessarily mean that recklessness is conduct which transcends or goes beyond what is considered gross negligence in states recognizing degrees of negligence."

In the instant case there is no evidence of excessive speed on the part of defendant in driving his Studebaker sedan. The car coming from the north, 75 to 100 feet in front of the Ford car, or approximately the same distance in front of the Studebaker car, required the driver of the Studebaker to use that degree of care in an emergency as would be required of an ordinarily prudent man, under the circumstances, to avoid the accident. This the evidence discloses defendant sought to do, and elected to turn his car to the right in front of the Ford car. As a consequence, the car coming from the north went on, apparently untouched. The Ford car was jarred slightly. The defendant was probably guilty of negligence. At most, he might have been guilty of exercising poor judgment under the circumstances.

In the case of *McQuillen v. Meyers, supra*, it was said (p. 1368): "The court defined negligence, but charged that

the term 'recklessness' is a stronger one than negligence or want of reasonable care; that it indicates an indifference to consequences, a willingness to take a chance when there is present a perception of danger, and in the operation of an automobile signifies the driving of the car in heedless disregard of consequences; that it does not mean momentary thoughtlessness, inadvertence, or error in judgment." And in the case of *Wilde v. Griffel,* 214 Ia. 1177, 243 N. W. 159, the court, speaking of the guest statute, said (p. 1180):

"The evidence must disclose something from which recklessness could be legitimately inferred, and as the trial court said in his finding:

" 'If the only thing you can infer from the evidence is negligence, then the court should not submit the question to the jury. * * * It seems to me as if this statute, if it means what it says, means that the plaintiff must show some act as would be pronounced by every person as an utter indifference to the safety of the guest in his car.' "

Defendant cites the case of *Brown v. Martin,* 216 Ia. 1272, 248 N. W. 368. In that case three railroad men were on a hunting trip, riding in a Studebaker sedan. The plaintiff was in the seat next to the driver, and one man was in the rear seat. They left the paved highway, went onto a graveled road; the car immediately began to swerve, finally landing in a ditch. In the opinion the case of *Siesseger v. Puth, supra,* was quoted with approval, the court adding (p. 1276): "In this opinion it was also held that recklessness, within the meaning of the statute, was not a degree of negligence, but was something entirely beyond and distinct from negligence." And at page 1286 it was said: "Even if it may be said that the defendant should have reduced the speed of his car more than he did before going upon the graveled highway, there is nothing to show his failure to do so amounted to anything more than an error in judgment, and, regardless of the consequences, a mere error in judgment amounts to no more than negligence and is not recklessness."

We believe that the facts and circumstances in the case

at bar show that the defendant was not guilty of reckless driving, within the contemplation of the Iowa guest statute (Iowa Code 1935, sec. 5026-b1), and as determined by the decisions of the Iowa supreme court herein cited.

Plaintiff cites the case of *White v. Center*, 218 Ia. 1027, 254 N. W. 90, on the proposition: "Where a motorist collides on a paved highway with a wagon moving in the same direction in which he is going and which was plainly visible for a quarter of a mile, he may be held liable for reckless operation for injuries sustained by one riding with him as a guest;" and on the further proposition: "Where a motorist drives his automobile into an object upon the highway, which is visible for at least a quarter of a mile, he is guilty of reckless operation" of his automobile.

In the above-cited case the driver was on a straight, level stretch of a paved road on the right-hand side thereof, and could see in the road ahead of him, for at least a quarter of a mile, a team and wagon with a load of corn. He operated his car at a speed of 70 miles an hour and crashed into the rear of the wagon. The circumstances of this case presented a question for the jury of reckless driving and show a different situation than exists in the case at bar. There was no emergency in the *White* case as was presented in the instant case.

The case of *Bowermaster v. Universal Producing Co.*, 221 Ia. 831, 266 N. W. 503, wherein a judgment was reversed and the reason for reversal was testimony tending to establish recklessness, when tested in the light of the admitted physical facts and verities revealed in the record as not being true, conceding the plaintiff's right to the benefit of the most favorable view of the evidence rule, is of no assistance to the plaintiff in this case. The facts in the case of *Hart v. Hinkley*, 215 Ia. 915, 247 N. W. 258, are not analogous to the facts in the instant case; nor was the situation in any degree the same, which is also true of *Szetela v. Abramowicz*, 118 Conn. 697, 172 Atl. 852.

Plaintiff cites *Sanford v. Grady*, 1 Cal. App. (2d) 365, 36 Pac. (2d) 652, and *Goss v. Overton*, 266 Mich. 62, 253

N. W. 217, on the proposition of law: "A motorist may be guilty of reckless operation where he attempts to pass a car ahead when a third one is approaching from the opposite direction at close proximity."

In *Sanford v. Grady, supra,* the facts and circumstances disclose a determined effort on the part of the driver, who was passing a truck, traveling at the rate of 45 miles an hour, sounding his horn, and increasing his speed, to cut in quickly and run parallel with the truck, knowing that there would be an accident, and stating that it would be easier for the other car to pull out on the dirt than it would be for him to go around the rear of the truck, and not giving ground, and knowing that another car might possibly be coming up the hill, and plunging directly into the approaching car. This case presents a distinctly different state of facts than those in the case at bar.

In *Goss v. Overton, supra,* it was held: "Motorist is guilty of wilful and wanton misconduct where he drove car at speed of approximately 60 miles per hour over road with which he was very familiar and knew had been recently covered with loose gravel and struck telephone pole at curve he was unable to negotiate in his effort to avoid road scraper raising dense cloud of dust beyond which he could not see, and therefore trial court did not err in denying motion for judgment *non obstante veredicto* for guest passenger." We believe that a further statement of the case is unnecessary, in view of the circumstances presented in the case at bar.

The trial court was right in not submitting the proposition of a joint enterprise to the jury. There is some evidence that the deceased purchased seven gallons of gasoline at LeMars, and some evidence that the three men were to pay their equal shares of the expenses on the fishing trip. There is no further evidence as to a joint enterprise. The deceased was a guest of the defendant at the time of the accident, within the meaning and contemplation of the guest law of the state of Iowa. See *Clendenning v. Simerman,* 220 Ia. 739, 263 N. W. 248; *Park v. National Casualty*

Co., 222 Ia. 861, 270 N. W. 23; *Sullivan v. Harris*, 276 N. W. (Ia.) 88; *Askowith v. Massell*, 260 Mass. 202, 156 N. E. 875; *Reed v. Bloom*, 15 Fed. Supp. 600.

In the case of *Wion v. Hayes*, 220 Ia. 156, 261 N. W. 531, the court said (p. 161): "At the same time it was the duty of the district court to apply the doctrine adopted by this court, that a scintilla of evidence is insufficient to call for the submission of a case to the jury. *In re Estate of Work*, 212 Ia. 31, 233 N. W. 28. In *Schmidt v. Hayden*, 205 Ia. 1369, 219 N. W. 399, this court said: 'The direction of a verdict, in its last analysis, is always a question of the sufficiency of the evidence.'"

The trial court should have directed a verdict in favor of the defendant at the conclusion of all the evidence. The judgment is therefore reversed, and the cause dismissed.

REVERSED AND DISMISSED.

JOHN PRICHARD V. STATE OF NEBRASKA.
282 N. W. 529

FILED DECEMBER 9, 1938. No. 30478.

1. **Rape.** To warrant a conviction of assault with intent to commit rape, the circumstances, when taken together, must be of so conclusive a nature as to show the intent beyond a reasonable doubt, as required by the law of this state. *Krum v. State*, 19 Neb. 728, 28 N. W. 278.
2. **Criminal Law.** "While we recognize the rule that the jury are the judges of questions of fact, we do not hesitate to set aside a verdict where the evidence is clearly insufficient to sustain it. And this is of particular importance in a case involving the question of liberty." *Larson v. State*, 110 Neb. 620, 194 N. W. 684.
3. **Evidence** examined, and *held* insufficient to support the verdict.

ERROR to the district court for Dakota county: MARK J. RYAN, JUDGE. *Reversed and dismissed.*

Joseph E. Marsh and *George W. Leamer*, for plaintiff in error.

Richard C. Hunter, Attorney General, and *Harry S. Grimminger, contra.*

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

MESSMORE, J.

Plaintiff in error (hereinafter designated as defendant) was informed against under section 28-409, Comp. St. 1929, on two counts, for assault with intent to commit rape, found guilty on both counts by the verdict of a jury, and sentenced to the state penitentiary for a period of two years on each count, the sentences to run concurrently. He brings error to this court for a review of his conviction.

The prosecutrix, Thelma Babcock, 13 years of age, who had reached the fourth grade in the public schools, living with her father in South Sioux City, Nebraska, had known the defendant, John Prichard, for some years, he having been an occasional visitor in her home. On July 4, 1937, the defendant, a blacksmith of Hornick, Iowa, and a man 69 years of age, came to South Sioux City to pay the Babcocks a visit. During the course of the morning he had gone with Thelma to the park in town, where some ice cream and popcorn had been purchased and where he had given her 50 cents. She testified that at about the noon hour, in her home, the defendant made advances towards her, removed a part of her clothing, laid her on a mattress on the floor in the southwest corner of the room, and sought to consummate the act of intercourse. The purported corroborating testimony of the prosecutrix was that of the witness, Annie Perkins, who stated that she passed the front door of Thelma's home at about noon, not stopping, and saw the defendant with Thelma on a bed; that she was a foot from the front door which was open, or three steps from the door. She testified specifically that she saw the defendant and the prosecutrix together on the bed. Thelma testified that the bed was in the southeast corner of the room. Annie Perkins further testified that she went over to the home of a neighbor, passing Thelma's home, at

8 or 9 o'clock in the morning, and again testified that it was early in the morning. She told some one at the neighbor's house to inform Thelma's father. He came home immediately, but nothing was said by him about the matter; nor was he called as a witness. The foregoing constitutes the pertinent facts relating to the first count, as charged in the information.

The second offense was alleged to have taken place on December 27, 1937, in the Babcock home, at or about the noon hour, and at that time defendant had made arrangements to board and room at the Babcock home, paying one-third of the household expenses and giving Thelma's father the use of his automobile. Mildred Davenport, a girl 16 to 18 years of age, had come to the Babcock home one week before Christmas and remained for about a week thereafter. She was the housekeeper and prepared the meals, and did the housework, receiving therefor a wage of $2 a week. On the day in question, she testified, the defendant unrolled a mattress, placed it on the floor, directed Thelma to lie down, removed a certain portion of her clothing, and sought to perform the act of intercourse; they stayed on the mattress for 20 minutes. There is a discrepancy in the evidence as to just what Mildred was doing at the time, Thelma stating that she was reading and was told by the defendant not to look that way, and the witness stating that she was eating when it started and later when it was finished she was washing the dishes. She further testified that on several occasions she had seen defendant do the same thing; that she hesitated to tell Thelma's father about the matter, and about two weeks later told the facts to a neighbor, who was a friend of the Babcock family, and also told Thelma's father. The charge against the defendant was filed January 15, 1938.

There is in the record the testimony of a physician, Dr. C. W. Neill, a witness for the state, not called in the state's behalf, but called by the defense. He testified for defendant, stating that he examined Thelma on February 11, 1938. His testimony follows: "Q. Just state to the jury what your

examination revealed. A. External examination showed the external genital parts of a child about twelve years old, perfectly normal in appearance; and, on examination, with an intact hymen. Microscopically the examination showed the normal germs that appear in the vagina, with no diseased condition. Q. In other words, it showed it had not been penetrated? A. I think so; yes." On cross-examination he testified: "Q. In other words, similar to the organ of a normal child of about that age? A. Yes. Q. And you from your examination couldn't tell whether there had been any attempt to insert such an organ? A. Apparently not, because there would have been some tear there if there had been much of an attempt. The hymen is a very fine, thin, friable membrane, and wouldn't take much to rupture. Q. You wouldn't know from your examination whether there could have been some attempt? A. I don't think so."

In the case of *Larson v. State,* 110 Neb. 620, 194 N. W. 684, the court said: "If complainant was abused, as charged in the information, it is reasonable to believe that a physical examination, of a person of her age, would have afforded some corroborative evidence of the charge of mistreatment, though it would not, of course, be conclusive against the person charged without other corroboration."

In view of the testimony of the physician, as above set out, and evidence that defendant had laid hands on the prosecutrix, and that she had resisted him, and considering the numerous times, according to the testimony, that defendant assaulted prosecutrix with the intent to commit rape, if such acts had been committed, there would have been some instances of torn clothing or some marks on the body of the prosecutrix.

An analysis of the evidence shows that the prosecutrix was of limited mentality, and by leading questions she was permitted to testify to the offenses as charged against the defendant. Her testimony contained many discrepancies and inconsistencies and was far from being stated with that degree of continuity that might be expected in cases of this nature, in view of the leniency in the admissibility

of evidence, as shown by the record. The testimony of Annie Perkins as a corroborating witness to the first offense, as charged, on July 4, has been hereinbefore set out and analyzed. The testimony of Mildred Davenport, relating to the offense, as charged, on December 27, is not entitled to serious consideration, in view of all the other circumstances, and especially in view of the testimony of Doctor Neill and the indefinite testimony of the prosecutrix. The witness Davenport made no attempt to protect this child, when the mattress was being unrolled and placed on the floor so that the defendant might assault Thelma, with intent to rape her. This witness was in charge as the housekeeper. On the several occasions on which the defendant, the witness stated, acted in the same manner towards Thelma, not one word of complaint came from her lips. There is nothing in the record to show that she was in fear, nor was she threatened, and there was, apparently, no reason or excuse, if the defendant did so conduct himself in the manner as charged, why this witness should have remained silent. There had been trouble between Thelma's father and the defendant over a board bill. This witness knew the exact amount of the bill and of the trouble between the two men. Her evidence, in its entirety, is insufficient in corroborating the evidence of the prosecutrix, as proof, beyond a reasonable doubt, that the defendant assaulted Thelma with intent to rape her.

At the conclusion of the evidence, the defendant moved to dismiss counts 1 and 2 of the information, on the ground that the offense was not proved beyond a reasonable doubt, and for the further reason that there was no corroboration of the prosecutrix. This motion was overruled, which necessarily requires a review and an analysis of the evidence which we have heretofore set out.

The state relies on the case of *Fager v. State*, 22 Neb. 332, 35 N. W. 195, wherein it was held: "In a prosecution for rape, it is not essential to a conviction that the prosecutrix should be corroborated by the testimony of other witnesses as to the particular act constituting the offense.

It is sufficient if she be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principal fact, the inference of guilt may be drawn."

The above statement of the law has been indorsed by this court consistently in other decisions, and is cited with approval in the case of *Beer v. State,* 129 Neb. 366, 261 N. W. 824. In the latter case, in the body of the opinion, the court, at page 369, discussed an instruction, given by the trial court, "that, if one with the power of copulation 'touches or handles, or takes hold of the person of a female under the age of consent with the present intention of having sexual intercourse with her then and there, he commits the offense of assault with intent to rape.' " The foregoing is a proper pronouncement of the law in this respect.

In 52 C. J. 1104, it is said that the word "corroboration" means "testimony of some substantial fact or circumstance independent of the statement of the prosecutrix." "The corroborative evidence must be something more than a mere colorable support. It is sufficient if the corroborating evidence tends to strengthen and corroborate the prosecutrix in connecting defendant with the commission of the offense, and there is a failure to corroborate the prosecutrix if there is no evidence legitimately having that effect."

In *Boling v. State,* 91 Neb. 599, 136 N. W. 1078, this court held: " 'In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction.' *Mott v. State,* 83 Neb. 226."

In the early case of *Krum v. State,* 19 Neb. 728, 28 N. W. 278, this court held: "To warrant a conviction in such case (of assault with intent to commit rape), the circumstances when taken together must be of so conclusive a nature as to show the intent beyond a reasonable doubt."

In the case at bar, the evidence is not of such a conclusive nature as to show the intent, on the part of this defendant, beyond a reasonable doubt, as required by the law of this state.

Public sentiment seems inclined to believe a man guilty of any illicit sexual offense with which he may be charged, and it seems to matter little what his previous reputation has been. This natural tendency may be due to the fact that, where a female child is involved and a man is charged with unlawful interference with her, by necessity, it casts odium upon the child, as well as charging the defendant with a felony. Be this as it may, where an assault with intent to commit rape is charged, the law requires that the testimony of the prosecutrix must be corroborated by facts and circumstances established by other competent evidence, in order to constitute conviction. See *Roberts v. State,* 106 Neb. 362, 183 N. W. 555. We do not believe that Thelma Babcock's testimony has been corroborated in this instance.

In *Larson v. State, supra,* this court held:

"Opportunity alone, to commit the crime of rape, is not corroboration of the evidence of the complainant.

"While we recognize the rule that the jury are the judges of questions of fact, we do not hesitate to set aside a verdict where the evidence is clearly insufficient to sustain it. And this is of particular importance in a case involving the question of liberty."

Upon a review of the entire record, we conclude that the verdict is not supported by the evidence, and that the motion of defendant made at the conclusion of the evidence should have been sustained.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

ROSE, J., dissenting.

The prosecution in this case wherein defendant, an unmarried man 69 years of age, was convicted of assault with intent to commit rape upon prosecutrix, a female child 13

years of age, is not triable *de novo* in the proceeding in error to review the conviction.

There was direct and positive evidence of defendant's guilt. The jurors composed the tribunal appointed by law to determine whether the witnesses for the state told the truth. The credibility of the witnesses was a question for the jury. They found that the witnesses for the state told the truth and they disbelieved the witnesses who testified to a different story. The trial court sustained the verdict. The jury and the trial court heard the witnesses and observed them as they testified. They had better opportunities than the reviewing court for determining credibility. If the signatures of falsehoods were written in the countenances of witnesses who testified for defendant, the appellate court is not thus enlightened by the record. The circumstances do not convince me that the state failed to prove the guilt of defendant beyond a reasonable doubt. In my opinion the province of the jury is invaded by the decision which gives credence to the testimony of witnesses for defendant and rejects as false evidence of guilt.

My understanding of the law is that, in absence of legislation, the adoption of the rule that corroboration of prosecutrix is necessary to a conviction for assault with intent to commit rape is a usurpation of power exercised only in Nebraska and New Mexico. The power to review criminal prosecutions and convictions comes from three sources—Constitution, legislation and common law. In no one of these is a Nebraska court empowered to make corroboration of prosecutrix necessary to a conviction for assault with intent to commit rape. On this subject I adhere to my dissent in *Gammel v. State,* 101 Neb. 532, 540, 163 N. W. 854. If corroboration could lawfully be required, however, it is abundant in the record as I view it.

WILLIAM R. LINCH, APPELLANT, V. JOE F. BERGGREN, EXECUTOR, APPELLEE.
282 N. W. 528

FILED DECEMBER 9, 1938. No. 30369.

1. **Appeal.** When a law action is tried to the court, findings of fact have the same effect as findings of a jury and will not be set aside unless clearly wrong.
2. **Evidence.** Trier of facts is judge of credibility of witnesses and may give greater weight to testimony of one witness than to that of a greater number of witnesses, if such testimony is deemed entitled thereto.

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

J. Jay Marx and *C. J. Campbell,* for appellant.

Peterson & Devoe and *Jack Devoe, contra.*

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

KROGER, District Judge.

Appellant, hereinafter referred to as plaintiff, commenced this action in the municipal court of the city of Lincoln against the appellee, hereinafter referred to as defendant, and from an adverse judgment in municipal court took an appeal to the district court for Lancaster county, Nebraska. A jury was waived and trial had to the court. The only issue presented to the trial court was whether there had been an account stated.

The testimony of the plaintiff, which was corroborated by his brother, was to the effect that on May 6, 1932, the parties met at a bank in Lincoln at which time it was mutually agreed that there was a balance of $517.42 due the plaintiff. The defendant denied that he had agreed upon a balance due, and testified that on May 6, 1932, he indorsed and delivered to plaintiff a certain hail loss check and at that time informed plaintiff that the payment then made constituted an overpayment of the amount due.

Upon this conflicting testimony, the trial court found

that plaintiff had failed to sustain the burden of proof and rendered judgment in favor of the defendant. From this finding and judgment this appeal is prosecuted.

The plaintiff's principal assignment of error is that the judgment is not sustained by the evidence.

It has been the uniform holding of this court that, where a jury is waived in an action at law, the court's findings have the same effect as a verdict of the jury and will not be set aside on appeal unless clearly wrong. *Bank of Roca v. Meyer, ante,* p. 128, 280 N. W. 449; *Hole v. Hamp,* 134 Neb. 259, 278 N. W. 480; *Nelson v. Nelson,* 133 Neb. 458, 275 N. W. 829.

The most that can be said for plaintiff's position in this case is that he produced two witnesses to support his theory of the case and the defendant produced but one. However, it has always been the rule in this state that the trier of facts may give to the testimony of one witness greater weight than that of a greater number of witnesses, if such testimony is deemed entitled thereto. In this case, the trial court observed the witnesses and evidently believed the testimony of the defendant.

There being no error in the record, the judgment is

AFFIRMED.

GATE CITY COMPANY, APPELLEE, V. DOUGLAS COUNTY, APPELLANT.

282 N. W. 532

FILED DECEMBER 9, 1938. No. 30429.

1. New Trial. "In order to obtain a new trial on the ground of newly discovered evidence, the evidence alleged to have been newly discovered must be such that the party applying for the new trial could not with reasonable diligence have discovered and produced it at the trial." *Van Horn v. Cooper & Cole Bros.,* 88 Neb. 687, 130 N. W. 567.
2. Courts. "The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction, and in the exercise of that discretion they are governed not alone by their

solicitude for the rights of litigants, but also by considerations of justice to themselves as instruments provided for the impartial administration of the law." *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35.

3. ———. Where, during the term at which a judgment was rendered, the court is informed and convinced that the judgment is unjust due to fraud practiced by the prevailing party, the court has inherent power, and it is its duty, to set such judgment aside and grant a new trial.

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

James T. English and *Thomas C. Quinlan*, for appellant.

Leigh & Krajicek, contra.

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

KROGER, District Judge.

On September 28, 1937, the board of county commissioners of Douglas county, Nebraska, passed its resolution disallowing the claim of the Gate City Company, hereinafter referred to as plaintiff, on account of coal furnished by said company to the county, hereinafter referred to as defendant, between January 1, 1937, and September 16, 1937, the reason given being that the funds levied for such purpose had been exhausted. Notice of appeal was duly given, and on October 4, 1937, the plaintiff filed its transcript on appeal in the district court for Douglas county, and in its petition alleged that between the dates stated it had furnished coal for the use of the defendant, and that the reasonable market value of said coal was $15,305.35, no part of which had been paid. The county attorney of Douglas county, under instructions of the county board, filed an answer on behalf of the county in which he admitted delivery and acceptance of the coal in question, and further admitted that the amount of the claim was the reasonable market value of the coal furnished. On October 21, 1937, a hearing was had resulting in a judgment in favor of the plaintiff in the sum of $15,859.47. On De-

cember 13, 1937, a motion for new trial was filed by the defendant on the ground of newly discovered evidence, supported by numerous affidavits. The term of court at which said judgment had been rendered had not adjourned *sine die* at the time the motion for new trial was filed and was not adjourned until February 5, 1938. The affidavits in support of the motion for new trial are substantially alike and consist of statements by various coal dealers operating in Douglas county, Nebraska, to the effect that between January 1, 1937, and September 16, 1937, the fair market value of coal such as was delivered by plaintiff to the defendant was from a minimum of $1 to a maximum of $2.45 a ton, whereas the plaintiff had made a charge of from $3.54 to $4.14 a ton. On February 5, 1938, the district court for Douglas county entered an order overruling defendant's motion for new trial and it is from this order that this appeal is prosecuted.

It is the contention of the defendant that the court erred in overruling its motion for a new trial based upon newly discovered evidence which it could not, with reasonable diligence, have discovered and produced at the trial; and the contention of the plaintiff is that the defendant has wholly failed to show that it exercised reasonable diligence in endeavoring to obtain the evidence and, in addition, that, having admitted in its answer that the fair market value of the coal was as claimed by the plaintiff, the evidence would have been incompetent had it been offered.

With these contentions of the plaintiff, we are agreed. This court has repeatedly held that, in order to obtain a new trial on the ground of newly discovered evidence, the evidence alleged to have been discovered must be such that it could not with reasonable diligence have been discovered and produced at the trial. *Wiegand v. Lincoln Traction Co.*, 123 Neb. 766, 244 N. W. 298; *Buzzello v. Sramek*, 110 Neb. 262, 193 N. W. 743.

In this case, there is no such a showing. On the contrary, the most obvious source of information as to the fair market value of coal in Douglas county would be the

dealers in that commodity. There is no showing that an effort was made to obtain this information from any of the dealers in Douglas county or from any other source, and the newly discovered evidence set out by defendant consists almost exclusively of information furnished by such other coal dealers. In addition, the defendant in its answer admitted that the amount claimed by plaintiff was the fair market value of the coal in question, so that, under the pleadings as they then stood, the evidence would have been incompetent had it been produced and offered. It follows that the ruling of the trial court was correct in denying a new trial on the ground of newly discovered evidence.

However, the showing made in support of defendant's motion for new trial was such as to apprise the court of the fact that, instead of representing the fair market value of the coal delivered, the claim of the plaintiff was excessive and, in one transaction, represented a profit to the plaintiff of 254 per cent.

While courts will not ordinarily interfere after judgment has been entered against a party upon its own admission, nevertheless, there is an exception to this rule, and that is where such party is a corporation or public body and, of necessity, is represented by agents. If, in such case, due to fraud practiced by the prevailing party, a judgment is entered that is unjust, the courts have inherent power to set such judgment aside upon such facts being made known. 15 R. C. L. 706, sec. 158.

In this case, information was brought to the court during the term at which the judgment was rendered of such a nature as to inform the court that one of the parties had practiced a fraud upon the other. Under those circumstances, the court had the inherent power, and it was its duty, on its own motion, to set the judgment aside and to grant a new trial.

As was said by this court in the case of *Weber v. Kirkendall,* 44 Neb. 766, 63 N. W. 35: "The rule thus recognized has not only the sanction of authority, but rests upon the soundest and most satisfactory reasons. The power is in-

herent in all courts of general jurisdiction to correct errors committed by them which are clearly prejudicial to the parties, and their power in that respect is exercised not alone on account of their solicitude for the rights of litigants, but also in justice to themselves as instruments provided for the impartial administration of the law."

We conclude that, although counsel for defendant designated the proceeding as a motion for new trial on account of newly discovered evidence, in substance and effect, it was a motion to set aside the judgment on the ground of fraud practiced by the successful party and, as such, it should have been sustained.

For the error herein pointed out, the judgment of the trial court is

REVERSED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1939

WALTER H. JURGENSEN v. STATE OF NEBRASKA.

283 N. W. 228

FILED JANUARY 4, 1939. No. 30388.

1. **Criminal Law.** Harmless error in a criminal prosecution is not a ground for the reversal of a conviction.
2. ———: INSTRUCTIONS. Embezzlement is a felony which may be defined in an instruction to the jury in language equivalent to the language of the statute.
3. ———: ———. The reviewing court should consider all the instructions given to the jury in determining whether a particular instruction is prejudicially erroneous.
4. **Embezzlement.** A principal's money, received and fraudulently appropriated by his agent to his own use in violation of the terms of the Nebraska statute on embezzlement, includes money "which shall have come into his or her possession or care, in any manner whatsoever." Comp. St. 1929, sec. 28-544.
5. **Criminal Law.** Where the trial court has instructed generally on, and stated fully, all the issues in a criminal prosecution, error cannot be predicated on failure to give an instruction on a particular phase of the case unless a proper instruction thereon was requested.
6. **Embezzlement:** INTENT: PROOF. In a prosecution against an agent for embezzlement of his principal's money, intent to defraud is an element of the felony charged and may be proved by circumstances, including methods of business and transactions of the agent in perpetrating the fraud and similar transactions with others at or near the time of the felonious act charged.
7. **Criminal Law.** Where the trial court strikes testimony of wit-

nesses from the record during the trial, directs the jury to disregard it and gives an instruction that it cannot be considered, its admission is not reversible error unless the record for review shows that the complaining party was prejudiced.

8. ———: VENUE. In a prosecution for embezzlement, evidence summarized in opinion *held* sufficient to prove venue in the county where defendant was tried.

9. **Embezzlement.** The managing officer of a corporation by operating through it in committing a felony does not thus secure personal immunity from the statutory penalty therefor.

10. ———. Where a principal entrusts property to his agent for a particular purpose and the agent embezzles it, a subsequent intent, an offer or agreement to make restitution does not defeat a prosecution by the state for the embezzlement.

ERROR to the district court for Lancaster county: ELLWOOD B. CHAPPELL, JUDGE. *Affirmed.*

Richard F. Stout and *Jay O. Rodgers*, for plaintiff in error.

Richard C. Hunter, Attorney General, Bert L. Overcash and *Max G. Towle, contra.*

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

ROSE, C. J.

In a prosecution by the state of Nebraska in the district court for Lancaster county, Walter H. Jurgensen and Jules H. Johnson, defendants, were charged with embezzlement in violation of the statute which provides:

"If any clerk, agent, attorney at law, servant, factor or commission agent of any private person or any co-partnership, except apprentices and persons within the age of eighteen years, or if any officer, attorney at law, agent, clerk, servant, factor or commission agent of any incorporated company or joint stock company, including all persons employed or commissioned by any employer, corporate or private, shall embezzle or convert to his own use, fraudulently take or make away with or secrete with intent to embezzle or fraudulently convert to his own use, without

the assent of his or her employer or employers, or the owner or owners thereof, any money, goods, rights in action or other valuable security or effects whatever, belonging to any other persons, body politic or corporate, or which is partly the property of any other persons, body politic or corporate, and partly the property of such officer, attorney at law, agent, clerk, servant, factor or commission agent of any incorporated company or joint stock company, including all persons employed or commissioned by any employer, corporate or private, which shall have come into his or her possession or care, in any manner whatsoever, or if any officer elected or appointed to any office of public trust in the state, or if any executor, administrator, guardian or assignee for the benefit of creditors shall embezzle or convert to his or her own use any money, property, rights in action or other valuable security or effects whatever belonging to any individual or company or association, that shall come into his or her possession by virtue or under color of his or her relation as officer, executor, administrator, guardian or assignee, every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled, taken or secreted or of the value of any sum of money payable or due upon any right in action so embezzled." Comp. St. 1929, sec. 28-544.

The county attorney of Lancaster county, acting for the state, presented the information which charged that defendants, on or about September 11, 1934, in the county of Lancaster and state of Nebraska, then and there—

"Not being apprentices or persons within the age of eighteen years, and then and there being the agents of one Chester C. Kaderli, of Potter, Nebraska, a private person, then and there, by virtue of their employment as such agents of said private person, did receive and take into their possession Nine Hundred Sixteen and no/100 Dollars ($916) in money, of the value of Nine Hundred Sixteen and no/100 Dollars ($916), the personal property of the said Chester C. Kaderli, and then and there unlawfully, feloni-

ously and with intent to defraud the said Chester C. Kaderli, did convert to their own use and embezzle said money, without the assent of the said Chester C. Kaderli, their principal and employer, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Nebraska."

Upon a separate trial of Walter H. Jurgensen, defendant, who had pleaded not guilty, the jury rendered a verdict against him in the following form:

"We, the jury, duly impaneled and sworn in the above entitled cause do find the defendant guilty as charged in the information and we do find the amount embezzled to be the sum of $549.71."

For that felony defendant was sentenced to serve in the penitentiary a term not less than two years nor more than five years.

As plaintiff in error, defendant presented to the supreme court for review the record of his conviction.

It is first argued on behalf of defendant that the conviction must be reversed on the ground that the trial court erred to his prejudice in giving instruction No. 9 to the jury, as follows:

"(1) That on or about September 11, 1934, one Chester C. Kaderli was the owner of certain shares of building and loan stock then having a fair and reasonable market value in money;

"(2) That on or about that date the defendant, then being a person of more than 18 years of age, together with one Jules H. Johnson, his employee, received such building and loan stock into their possession from said Kaderli for the purpose of exchanging it for municipal or government bonds or other securities satisfactory to him upon inspection thereof;

"(3) That defendant thereafter in Lancaster county, Nebraska, without Chester C. Kaderli's consent and with intent to defraud him, used some part or all of said building and loan stock, or the money received therefrom, for his own purposes, use or benefit, or for the purposes, use

or benefit of a corporation or some other agency of which he, the defendant, was then an officer.

"If the state has established each and all of these material allegations and elements by the evidence beyond a reasonable doubt, then you will find the defendant guilty as charged in the information. If the state has failed to establish by the evidence beyond a reasonable doubt any one or more of such material allegations and elements, then you must find the defendant not guilty."

The third paragraph or fragment of this ninth instruction is challenged as permitting the jury to find defendant guilty, if he embezzled "building and loan stock" under the information which charges alone the embezzlement of "money." The specific language condemned by defendant as prejudicially erroneous is: "Used some part or all of said building and loan stock, or the money received therefrom, for his own purposes." It is insisted that the jury were thus permitted to convict defendant of an offense with which he was not charged, in violation of his constitutional right to notice of the nature and cause of the accusation against him, to notice of the exact property involved in the charge of embezzlement, and to notice of the facts upon which the state relies for conviction. It is asserted that these rights were invaded by the instruction permitting a conviction for embezzlement of building and loan stock. The assigned error in this instruction was skillfully argued at the bar and in the brief and precedents in which accused defendants in other prosecutions were protected from convictions for offenses not charged were cited and analyzed by counsel for defendant.

Error may creep into the proceedings in criminal prosecutions in spite of impartiality, care, learning and vigilance of the trial judge. It is only error prejudicial to a right of accused or the denial of a substantial legal right that requires the reversal of his conviction. Harmless error does not require a second trial. The law recognizes the possibility of harmless imperfections in the proceedings of judicial tribunals and does not defeat itself by exacting ab-

solute perfection in bringing malefactors to justice. A statute relating to the review of criminal prosecutions reads thus:

"No judgment shall be set aside, or new trial granted, or judgment rendered, in any criminal case on the grounds of misdirection of the jury, or the improper admission, or rejection of evidence, or for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." Comp. St. 1929, sec. 29-2308.

An "examination of the entire cause" to determine whether there was a prejudicial misdirection of the jury in the case at bar required scrutiny and consideration of four large volumes of proceedings and evidence. Defendant was president of both the United Savings and Loan Association and the Western Union Life Insurance Company with offices in the city of Lincoln. Jules H. Johnson, when agent of the insurance company, September 11, 1934, knowing that Chester C. Kaderli, railroad station agent at Potter, Nebraska, had stock and deposits in the loan association, approached him in the railroad ticket office there and by false representations procured from him his loan association stock and the pass-book evidencing his deposits—valuable property. Kaderli accepted a receipt in the following form:

"Sept. 11, 1934.

"Received of Chester C. Kaderli, Cert. #733 to apply on the sum of Twelve Hundred Dollars on account of the Investment Bond described in the subscription to which the above name is signed. Bonds to be delivered personally and be satisfactory before B. & L. deposits transferred. (This receipt is valid only for payments made payable to the company.)

"The Western Union Life Insurance Company,
"By J. H. Johnson, Salesman."

On the margin of the receipt as it appears in the record are the following entries in ink: "Pass-book, $844.75; card, $870.50; received, $916.17."

Kaderli entrusted his loan association stock and deposits to Johnson, the insurance company and the defendant for the purpose of having them exchanged for government or municipal bonds or other securities satisfactory to Kaderli. The exchange was never made. What Johnson received was never returned to Kaderli. The latter never received in exchange any bonds or other securities satisfactory to him or other compensation or consideration of any kind for his loan association stock or deposits. After he parted with the property entrusted to his agents for the purpose stated, it was sold and part of the proceeds credited in dollars and cents to the "Western Union Agency" by its book entries, that name being one in which defendant transacted business. The bill of exceptions contains cogent evidence of facts thus summarized. The information charged that defendant embezzled $916 in money belonging to Kaderli. The trial court in the first instruction given directed the jury in language equivalent to the language of the statute that defendant was charged with the embezzlement of $916 of Kaderli's money. The instructions defined the statutory crime of embezzlement, including all the elements thereof, required proof of each element beyond a reasonable doubt, and directed the jury: "You must arrive at your verdict solely from the evidence adduced in open court."

It is well settled law that a felony may be defined in an instruction to the jury in the language of the statute. *Harrison v. State*, 133 Neb. 794, 277 N. W. 96. During a long trial the jury heard evidence that money was the subject of the embezzlement charged. Documents and oral testimony proved that Kaderli, for two years or more, had importuned defendant for money, making vehement demands for it repeatedly by letter, by telegram and by appeal in person. Before the examining magistrate, after the prosecution was commenced, defendant offered to make restitution by tendering Kaderli about $470 in money. The jury necessarily knew that money was the subject of the embezzlement charged. They did not find defendant guilty of embezzling building and loan stock or guilty of larceny

or guilty of obtaining money by false pretenses. They found him guilty of embezzling money as charged in the information. Their verdict already quoted herein so shows. The reviewing court should consider all the instructions given to the jury in determining whether a particular instruction is prejudicially erroneous. *Harrison v. State,* 133 Neb. 794, 277 N. W. 96. So considered, it is clear that defendant was not prejudiced or the jury misled to his injury by the language in paragraph three of the instruction under consideration.

Instruction No. 9 is also challenged as assuming to give directions on all the elements of embezzlement, while omitting to instruct the jury to acquit defendant unless he formed the intent to embezzle Kaderli's money after he received it. This position is untenable in a proper view of the entire record. Before the assailed instruction was given, the court had defined in other instructions all the elements of the crime charged under the Nebraska statute. It was apparently given to enlighten and caution the jury further on the transactions through which defendant procured money belonging to Kaderli. A principal's money, received and fraudulently appropriated by his agent to his own use in violation of the terms of the Nebraska statute on embezzlement, includes money "which shall have come into his or her possession or care, in any manner whatsoever." Comp. St. 1929, sec. 28-544. Since the instruction as a whole properly stated the law on all the material issues, the failure to instruct in addition that there could be no conviction, unless the criminal intent was formed after defendant received the money, is not a ground for reversal, a proper instruction to that effect not having been requested. The rule applicable has been stated as follows:

"Where the trial court has instructed generally as to the issues in a criminal prosecution, error cannot be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining." *Martin v. State,* 67 Neb. 36, 93 N. W. 161. Followed in *Frades v. State,* 131 Neb. 811, 270 N. W. 314.

The instructions as a whole made it clear to the jury there could be no conviction unless the state proved beyond a reasonable doubt that defendant received and with fraudulent intent embezzled or converted to his own use, without the assent of Kaderli, money belonging to him. The assignments of error directed to instruction No. 9 are therefore overruled.

It is confidently argued on behalf of defendant that there is no competent evidence to sustain the verdict, since, as contended, criminal intent essential to embezzlement is not proved beyond a reasonable doubt. On the witness-stand defendant admitted he was indebted to Kaderli as a result of the transactions between them; said in substance he did not intend to embezzle money belonging to Kaderli; still intends to pay him what he owes him. The theory of the transactions as explained by the testimony of defendant is that they created no more than a civil liability from one individual to another and did not make him answerable to the state for a felony. In this connection assignments of error are directed to testimony as to what defendant regards dissimilar transactions to prove criminal intent. In the enactment of the embezzlement statute, the lawmakers did not contemplate the defeat of the legislative purpose by technical refinements of evidence directed to criminal intent. The convolutions and fibers of a human brain in which a criminal intent is created do not give oral expression to the mental operation. Concealment is often necessary to the accomplishment of an evil design. The person who can testify directly to criminal intent in a criminal prosecution is generally the accused, who may decline to incriminate himself. The state may resort to circumstances for proof of intent. Deliberate acts of an accused agent may throw some light on the intent by which he was prompted to defraud his principal. An adult sane person may be presumed to intend the natural and probable consequences of his voluntary acts. *Ford v. State,* 46 Neb. 390, 64 N. W. 1082. Surrounding circumstances may disclose the truth. The difficult problem of proving criminal intent was explained in a recent embezzlement case as follows:

"It is further contended by the defendant that the evidence is insufficient to sustain a verdict of guilty. This argument is based on the proposition that the state has failed to show beyond a reasonable doubt the intent of the defendant to defraud the owner of the funds alleged to have been embezzled. It must be borne in mind that the intent with which an act is done is purely a mental process and hard to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant, viewed in the light of all the surrounding circumstances." *Buckley v. State,* 131 Neb. 752, 269 N. W. 892.

In a case wherein a banker was accused of embezzling money of the bank, a former opinion contains the following language in a proceeding in error:

"The record of the trial discloses that the state, over the defendant's objections, was allowed to introduce evidence of his manner of conducting the business of the bank, and of many of his transactions with that institution occurring at different times, many of them long prior to the time when the offense for which he was on trial is alleged to have been committed; and it is contended that this was reversible error. This contention cannot be sustained, for it has often been held, on principle and precedent, that the state in such cases may introduce evidence of separate and distinct acts or transactions, which may be embezzlement in themselves." *Chamberlain v. State,* 80 Neb. 812, 115 N. W. 555.

As tending to prove the intent necessary to guilt under the charge of embezzlement, the trial court admitted evidence of other transactions to the effect that the insurance company of which defendant was president, through its agents, or by defendant himself, fraudulently procured without adequate consideration and retained or sold valuable building and loan stock or other property of the owners. There were too many of these independent transactions in evidence for separate discussion in an opinion of reasonable length, but each has been examined with care in connection

with the entire record. In defendant's methods of transacting business and in respect to frauds committed, the similarity of the independent transactions on the issue of intent and the transactions in the case at bar were such as to make them admissible under the rules of evidence already stated. The purpose of evidence of this nature was limited by the trial court in an instruction as follows:

"The court permitted the state to introduce evidence of alleged similar acts at or about the same time that the act charged is alleged to have been committed, and all this evidence is to be considered by you only for the purpose of showing the intent of the accused in the particular act charged in the information and for no other purpose."

Evidence of independent transactions was not only properly admitted, but defendant's rights were protected by the limitation quoted.

Under a different assignment of error it is contended that unremovable prejudice in the minds of the jurors was created by testimony of still other witnesses on dissimilar acts of defendant. This testimony was not only stricken out at the trial, but the jury were told in a formal instruction: "You cannot consider any evidence which has been stricken out of the record by the court during the trial." There is no logical reason for assuming that the jury disregarded the instruction of the court and considered testimony not before them. The record contained proper and more convincing testimony of transactions similar to one in issue. The contention is without merit.

Defendant insists further that the conviction should be reversed and the prosecution dismissed on the ground that the state did not prove the felony charged was committed in Lancaster county where he was tried. The information and the instructions laid the venue in Lancaster county. The head offices of both corporations of which defendant was president were in Lincoln, Lancaster county. He transacted corporate and personal business there. Kaderli's bonds were transferred in Lancaster county and part of the proceeds were credited in money to the "Western Union Agency" on

its books in Lincoln and that agency, according to the evidence, was defendant. He had possession of the bonds and of proceeds of the bonds in Lincoln. Kaderli in person demanded his money from defendant in Lincoln and never received it. That the intent to embezzle was conceived in Lancaster county, where possession of the money was obtained and the felony perpetrated, was a proper deduction from the evidence.

The evidence was discussed at length by counsel for defendant and the conclusion reached that it was insufficient to sustain the verdict, but the opinion of the court to the contrary is unanimous. Nothing in the record or arguments has been overlooked. The evidence herein outlined in the discussions of the assignments of error shows substantial grounds for the verdict of the jury. The president of corporations by acting through them in committing a felony does not thus secure personal immunity from the penalty imposed by law for the felonious act. In this state the supreme court adopted from *Hamilton Ridge Lumber Sales Corporation v. Wilson,* 25 Fed. (2d) 592, the following principles:

"Although a corporation is considered a legal person in law, distinct from its stockholders, and is so recognized when there is no reason against it, yet it is just as well settled that this general doctrine should be disregarded, and the acts of the persons examined who constitute the corporation. A corporation has no thought or will of its own, and its every act is the act of the individuals who are running it, and where fraud is committed by the corporation, it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacity." *Ashby v. Peters,* 128 Neb. 338, 258 N. W. 639.

The evidence shows that defendant assumed personal responsibility for the transactions through which Kaderli lost his building and loan stock and the proceeds thereof in money; that defendant engaged agents and attorneys to solicit terms of settlement for the loss and was advised by them to discharge his civil obligation therefor; that de-

fendant gave Kaderli a personal note in settlement and never paid it; that a check was issued for the same purpose and payment thereof stopped; that defendant agreed in writing on terms of restitution and failed to comply with them. It is familiar law that, where a principal entrusts property to his agent for a particular purpose and the agent fraudulently converts the property to his own use without the assent of the owner, a subsequent purpose, an offer or agreement of the agent to make restitution does not defeat a prosecution by the state for embezzlement.

Throughout a long trial defendant had the vigilant services of eminent counsel. The rulings of the trial court indicate judicial fairness and impartiality. Every assignment of error has been considered in connection with all the evidence without finding an error prejudicial to defendant. It was the province of the jury to determine the issue of guilt. There being no substantial ground for interference with the verdict, the judgment below is

AFFIRMED.

SIMMONS, C. J., took no part in the decision of this case.

ARTHUR L. MILLER, APPELLANT, V. BANNER COUNTY, APPELLEE.

283 N. W. 206

FILED JANUARY 4, 1939. No. 30440.

1. **Paupers.** The county board of each county are overseers of the poor and are vested with entire and exclusive superintendence of the poor in such county, with authority to employ a county physician.
2. ———. Any person becoming chargeable as a poor person in this state shall be chargeable as such poor person in the county in which he or she has established a legal settlement.
3. ———: SERVICES OF PHYSICIAN: LIABILITY OF COUNTY. A physician, not hired by the county, may not recover from the county for services rendered to a poor person in an emergency, where there exists a duly appointed county physician to care for the poor, the latter physician being equally available, able, willing, and ready to serve but not consulted.

4. ———: ———: ———. Where the physician rendering services to a poor person is ignorant of the fact that the county board of the county in which such services are rendered and in which such poor person has established a legal settlement has employed a county physician, that fact is not an aid to recovery. The former is chargeable with notice of such appointment.

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

Rodman & Kuns, for appellant.

Glebe & Elliott and *William H. Heiss, contra.*

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

EBERLY, J.

This action was brought against the county of Banner, defendant, by plaintiff, Arthur L. Miller, while a duly licensed physician, for professional services personally performed for, and also for necessary hospital care rendered to, O. R. Roberts, a poor person or pauper, in Kimball county, Nebraska, on and subsequent to June 7, 1935. There was a trial to the district court for Banner county, a jury being waived, resulting in a finding and judgment for the defendant. From the order of the trial court overruling his motion for a new trial, the plaintiff appeals.

It will be remembered that Banner and Kimball counties are adjacent and contiguous.

The case was tried upon a stipulation of facts, preserved in the bill of exceptions. It appears from such stipulation, viz.:

That on June 7, 1935, one O. R. Roberts, then employed as a farm laborer by one Leonard Johnson on a farm situated in the southern part of Banner county, suffered a hemmorrhage in the brain, causing paralysis, which rendered him temporarily unconscious; that Roberts was then and there in need of immediate medical attention; that his employer, Leonard Johnson, knowing that Roberts claimed to have a legal settlement in Kimball county, without noti-

fying the county physician or any of the county board, or any other official of Banner county, Nebraska, immediately conveyed Roberts to the Kimball hospital, in Kimball county, Nebraska, of which plaintiff was the sole proprietor, and placed him in charge of plaintiff doctor; that during the two weeks following June 7, 1935, it would have been extremely dangerous to the life of Roberts to have removed him from the Kimball hospital, as he was delirious and maniacal at times, and it was necessary to forcibly restrain him and to administer opiates; that the services performed by plaintiff were, as follows:

(Commencing) June 7, 1935.

Hospital, 21 days, at $5.00 a day	$105.00
Medications and medicines	10.00
Special nurse's care	15.00
Dr. Miller's fee: 1 call a day, $3 a call	63.00
Total	$193.00

That the charges made were reasonable; that during all this time Kimball county, Nebraska, had a duly appointed, qualified, and acting county physician, who then resided in the city of Kimball, in that county, and in such county the Kimball hospital, in which Roberts was treated, is situated; that plaintiff, prior to or during the period of treatment of Roberts, "did not get in touch with said county physician of Kimball county, nor with any other officials of Kimball county," nor did he attempt "to arrange for the care and hospitalization of said O. R. Roberts" with the officials of that county, and that plaintiff was not on June 7, 1935, or at any time subsequent thereto, the county physician of Kimball county, Nebraska.

It is further stipulated, "That on June 7, 1935, and for something over 21 years prior thereto, said O. R. Roberts had a legal settlement in Kimball county, Nebraska, and was a resident and inhabitant of Kimball county, Nebraska; that from the year 1914 to the year 1922, said O. R. Roberts farmed in said Kimball county; that thereafter said O. R. Roberts moved to Kimball, in said Kimball county, and has at all times resided there since that time."

The stipulation further discloses that, although Roberts worked as an employee on various farms in Banner county for a number of years immediately preceding June 7, 1935, he maintained a legal residence in the city of Kimball from the year 1928 to June 7, 1935, and that he voted there at various elections including the general election immediately preceding that date.

It is further shown by the stipulation that there were ample sources of information at hand from which the truth as to the settlement of Roberts could have been ascertained upon inquiry. Such sources plaintiff must have wholly failed to employ, or take any advantage of whatever. It would seem that the slightest investigation would have disclosed the situation.

Under the facts enumerated, it is clear that the disposition made of this case by the district court was, in all respects, correct. The county board of each county are overseers of the poor and are vested with entire and exclusive superintendence of the poor in such county, with authority to employ a county physician. Comp. St. 1929, sec. 68-104.

"Any person becoming chargeable as a poor person in this state, shall be chargeable as such poor person in the county in which he or she has established a legal settlement as hereinafter defined." Comp. St. Supp. 1937, sec. 68-111.

"The term 'legal settlement,' mentioned in this chapter, shall be taken and considered to mean as follows: Every person, except those hereinafter mentioned, who has resided one year continuously in any county, shall be deemed to have a legal settlement therein." Comp. St. Supp. 1937, sec. 68-115.

The proper application of section 68-112, Comp. St. Supp. 1937, under the facts of this case, requires us to construe the words, viz., "If any person shall become chargeable in any county in which he or she has not established a legal settlement *at the time of applying for aid* he or she shall be duly taken care of by the proper authority of the county where he or she may be found" (Italics supplied), to the effect that the first application for aid was made in Kimball

county, and not in Banner county; that Kimball county was the county of the poor person's settlement, and relief must be administered on this basis. Kimball county had employed a county physician, who, under the facts stipulated, must be deemed competent. There is nothing in the stipulation from which it might be inferred that this county physician was not at all times ready, willing, and able to serve; but it is clear that he was not consulted, and no attempt to advise with or secure his services is shown. Manifestly the delivery of the sick man to the county physician would involve no additional risk or exposure when compared to a delivery of the same man to the Kimball hospital.

The case before us clearly falls within the rule frequently announced by this tribunal, viz.: "A physician, not hired by the county, may not recover from the county for services rendered to a poor person in an emergency where there exists a duly appointed county physician to care for the poor, the latter physician being able, willing, and ready to serve but not consulted." *Sayre v. Madison County,* 127 Neb. 200, 254 N. W. 874. See, also, *Newark Township v. Kearney County,* 99 Neb. 142, 155 N. W. 797; *Hamilton County v. Meyers,* 23 Neb. 718, 37 N. W. 623; *Burnham v. Lincoln County,* 128 Neb. 47, 257 N. W. 491.

It must be conceded that Roberts' legal settlement in Kimball county continuing uninterrupted for more than a score of years constituted that county the county of ultimate liability for his maintenance and care. In turn, Kimball county had provided its own exclusive agency to discharge that duty by the regular appointment of its county physician. In so doing it strictly limited its liability for medical services furnished to its poor within its boundaries to this agency so created. Ignorance of plaintiff (if such there was) of the fact that the county board of Kimball county had regularly employed a county physician, and thus provided for the exclusive medical treatment of the poor having a legal settlement therein, will avail him nothing. The rule appears to be that, where the physician rendering services is ignorant of the fact that the county board has employed

another physician, that situation is not an aid to recovery. The former is chargeable with notice of such fact. *Robbins v. Board of Commissioners,* 91 Ind. 537; *Woodruff v. Board of Commissioners,* 10 Ind. App. 179, 37 N. E. 732. This conclusion also necessarily follows from the fact that, by legislative enactment, the board of county commissioners are "vested with the entire and exclusive superintendence of the poor."

The judgment of the district court is, in all respects, correct, and is

AFFIRMED.

HARRY E. BOWMAN, RECEIVER, ET AL., APPELLEES, V. FRANK CALDWELL, APPELLANT.
283 N. W. 194

FILED JANUARY 4, 1939. No. 30455.

1. **Mortgages: FORECLOSURE: SALE: NOTICE.** When a notice of foreclosure sale stated that the sale would be held at the "east front door" of the courthouse, *held* that, where the officer conducted the sale inside the east front door, and at the top of a short flight of stairs leading from said door, there was a substantial compliance with the notice, and the sale was valid.
2. ———: ———: **STAY: ESTOPPEL.** Where defendants, in a suit to foreclose a mortgage, avail themselves of the statutory stay of execution, they are estopped from attacking such judgment in any manner.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Carrico & Carrico, for appellant.

Stiner, Boslaugh & Stiner, contra.

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

PAINE, J.

This is an action for the foreclosure of a real estate mortgage. Defendant appeals from the order of the trial court overruling the objections and confirming the sale.

The record discloses that a petition to foreclose 80 acres of land in Adams county was filed January 27, 1936, alleging default in payment of a mortgage note for $2,500 and interest.

On May 18, 1936, defendant filed motion to make the petition more specific and certain, and thereafter filed demurrer. On October 5, 1936, a decree of foreclosure was entered, in which appears this final paragraph:

"That upon stipulation of the plaintiffs, by their attorneys Stiner & Boslaugh of Hastings, Nebraska, and the defendant Frank Caldwell by his attorney F. L. Carrico of Hastings, Nebraska, made in open court;

"It is by the court ordered that a stay should be and is hereby granted herein to September 15, 1937, and that no order of sale shall issue herein until that date."

On October 13, 1937, an order of sale was issued and return duly made thereto, showing that the property sold for $3,000, the amount of the first and second liens being $3,192.13, the deficiency being $248.59.

On January 17, 1938, the defendant filed objections to the confirmation of sale. Among the six grounds was one setting out that there was no proper proof of the indebtedness, and another that the sale did not take place at the time and place advertised. The notice of the sale recited that the sale would be held "at the east front door" of the courthouse. All of the evidence of the witnesses in the bill of exceptions relates to this objection. Carroll Parker, the deputy sheriff, who conducted the sale, testified that he held this sale just where he conducts all of such sales.

It appears that, upon going in the said "east front door," steps immediately lead up to the level of the main hall, from which level doors open into the various offices. The evidence discloses that the deputy sheriff stood at the head of the stairs a part of the time, and a part of the time on the lower steps, all being inside the "east front door," and Mr. Boslaugh testified it was within 10 or 12 feet of the "east front door," while Mr. Carrico testified that the officer was as far as 30 feet from said door. The question arises,

if the officer stood up in the main hall, 30 feet from the door, at the time he conducted the sale, was it void?

In a note in 75 Am. Dec. 710, we find many interesting cases cited, and among them one setting out that a judicial sale in New York City was advertised to take place December 30, 1854, "at the city hall." By common usage all such sales were held in the rotunda of the city hall proper. Were it not for this usage, a notice of sale "at the city hall" would be too indefinite, as all the buildings within the park used for holding courts are by law deemed to be parts of the city hall. Description held not too vague. *Hornby v. Cramer,* 12 How. Pr. (N. Y.) 490.

A sale was held good when made within full view of the site of a courthouse which had burned down after a proclamation had been made at the exact site. 16 R. C. L. 47, sec. 33.

A case closely in point is that of *Trumbull v. Jefferson County,* 62 Wash. 503, 114 Pac. 186, in which it is said that the statute requires that land must be sold for taxes "at the front door of the courthouse." The sale was made from a stair landing 25 or 30 feet within the courthouse door, and any person near such door, or upon the street in front thereof, could see and hear what was going on. It was held that such sale was regular.

In a case released June 15, 1938, *Polson Logging Co. v. Martin,* 80 Pac. (2d) (Wash.) 767, it was held that sale of land was not invalid because conducted inside the courthouse doors rather than in front, as required by statute, where it was announced outside that the sale would be held inside because of the stormy weather. See, also, *Cherryhomes v. Board of Commissioners,* 160 Okla. 159, 16 Pac. (2d) 257.

In the case at bar, we find that there was a substantial compliance with the order of sale. The officer conducting the sale could be heard and seen by any one standing at the "east front door" of the Adams county courthouse. Furthermore, no showing is made of prejudice to the defendant.

The defendant also attacks the validity of the confirma-

tion on the ground that an extension agreement of the loan was not acknowledged. In the decree of foreclosure there was a finding that this extension agreement was duly executed, delivered, and signed.

This court has consistently held that, where defendants are personally served, they must set up all the defenses available, and if they avail themselves of the statutory stay of execution, they are estopped from attacking such judgment in any way. *Gilbert v. Provident Life & Trust Co.*, 1 Neb. (Unof.) 282, 95 N. W. 488; *Lackey v. Yekel*, 113 Neb. 382, 203 N. W. 542.

Finding no prejudicial error in the record, the decree entered by the district court is hereby

AFFIRMED.

CLARA M. OLSON, APPELLEE, V. FRANK CALDWELL, APPELLANT.
283 N. W. 195

FILED JANUARY 4, 1939. No. 30456.

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

Carrico & Carrico, for appellant.

Stiner, Boslaugh & Stiner, contra.

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

PAINE, J.

In this action for the foreclosure of a real estate mortgage, defendant appeals from the order of the trial court overruling the objections and confirming the sale.

A petition for a foreclosure in the usual form was filed, setting out that a default had occurred in the payment of the principal note of $2,000 and two interest coupons. A decree of foreclosure was entered October 6, 1936, which included a stipulation for a stay until September 15, 1937.

An order of sale was duly issued, and the return to the order of sale set out that the property had been sold for $2,600. Thereafter objections to the confirmation of sale were filed by defendant. These objections were in the same form as the objections in the companion case of *Bowman v. Caldwell, ante,* p. 554, 283 N. W. 194. As they are discussed at length in that opinion, it will not be necessary to discuss them here, and for the reasons therein set out, the record showing no prejudicial error, the decree is

AFFIRMED.

HEDWIG EFFENBERGER ET AL., APPELLEES, V. FRED P. MARCONNIT, APPELLANT: NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

283 N. W. 223

FILED JANUARY 4, 1939. NO. 30433.

1. **Automobiles:** ORDERS OF RAILWAY COMMISSION: REVIEW. "On an appeal to the supreme court from an order of the railway commission administrative or legislative in nature, the only questions to be determined are whether the railway commission acted within the scope of its authority and if the order complained of is reasonable and not arbitrarily made." *Publix Cars, Inc., v. Yellow Cab & Baggage Co.,* 130 Neb. 401, 265 N. W. 234.
2. ———: PUBLIC CONVEYANCES: REGULATION. A certificate of convenience and necessity issued by the railway commission is in the nature of a permit or license, personal in its nature, and is not property in any legal or constitutional sense.
3. ———: ———: ———. The requirement of a certificate of convenience and necessity, before one may operate a bus line, is purely a regulatory measure and the railway commission has the sole power to grant, amend, deny, revoke or transfer such a certificate.

APPEAL from the Nebraska State Railway Commission. *Affirmed.*

John J. Ledwith and *Ginsburg & Ginsburg,* for appellant.

Arthur C. Pancoast, contra.

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

CARTER, J.

This is an appeal from an order of the railway commission of this state finding that the respondent, Fred P. Marconnit, had no right to operate a bus line under a certificate of convenience and necessity issued on May 12, 1936, and further finding that complainants Hedwig Effenberger, Bernard Effenberger and Marie Schoenberg were the holders of such certificate and ordering that the respondent cease and desist from operating the bus line.

The record discloses that on January 4, 1936, the Safety Motor Lines made application to the railway commission for a certificate of convenience and necessity to operate a bus line between Fort Crook, Nebraska, and Twenty-fourth and N streets in the city of Omaha. On January 21, 1936, the railway commission entered its opinion and order, finding that the Safety Motor Lines was a copartnership consisting of Fred P. Marconnit, Bernard Effenberger, Hedwig Effenberger and William Longman, Jr., and granting the certificate of convenience and necessity subject to certain conditions. On May 12, 1936, the railway commission found that all the conditions imposed by its previous order had been complied with by the Safety Motor Lines, that the copartnership then consisted of Hedwig Effenberger, Bernard Effenberger and Marie Schoenberg, and ordered that the Safety Motor Lines might continue operating the bus line.

On September 18, 1936, Marie Schoenberg commenced a suit in the district court for Douglas county against the respondent, in which she alleged that the Safety Motor Lines was a copartnership composed of herself, Hedwig Effenberger and Bernard Effenberger and asking that the respondent, Fred P. Marconnit, be restrained from interfering with the Safety Motor Lines in any way. Hedwig Effenberger and Bernard Effenberger filed petitions in intervention joining in the petition of Marie Schoenberg. Respondent, in his answer, contended that he was at all

times the owner of Safety Motor Lines and that complainants had merely lent the use of their names to him. On April 23, 1937, the court found for the respondent and against the complainants, finding specifically that respondent was the owner of Safety Motor Lines, "together with its equipment, rights and privileges." From this decree no appeal was taken.

On June 11, 1937, the complainants herein filed their complaint with the railway commission, alleging that respondent was unlawfully operating a bus line without a certificate of convenience and necessity. On August 27, 1937, the railway commission, after a hearing, entered an order so holding, but finding further that an order to cease and desist could not be enforced without supplemental proceedings in the district court, and dismissed the complaint.

On January 25, 1938, complainants filed a motion for a modification of the order of August 27, 1937. The railway commission, on February 5, 1938, after another hearing, found that respondent had no right to operate the Safety Motor Lines and ordered him to cease and desist. The order also found that complainants were entitled to the rights and privileges conferred by the certificate of convenience and necessity issued to the Safety Motor Lines. From this order the respondent appeals.

It is not contended that the railway commission does not have the power to require a certificate of convenience and necessity before one may engage in the operation of a bus line between fixed termini. This court has held that the grant or denial of a certificate of convenience and necessity by the railway commission is the exercise of an administrative or legislative power. *Publix Cars, Inc., v. Yellow Cab & Baggage Co.*, 130 Neb. 401, 265 N. W. 234. In that case we also said: "An appeal to this court from such an order involves only the questions whether the railway commission acted within the scope of its authority and whether its order is supported by evidence showing that the order is not unreasonable or arbitrary. Where the action of the railway commission is not unreasonable or arbi-

trary and does not exceed its powers, this court will not interfere with its findings of fact, because they involve an administrative rather than a judicial question."

The question of primary interest in this case is whether the decree of the district court for Douglas county, adjudging that the property used by Safety Motor Lines, "together with its equipment, rights and privileges," was owned by the respondent, is a judicial determination that is binding upon the railway commission. It is apparent that the district court for Douglas county, by its decree, attempted to assign the certificate of convenience and necessity issued by the railway commission on January 21, 1936, as amended on May 12, 1936, and that it is upon this assignment that respondent must rely. A proper determination of this question requires an understanding of the nature of a certificate of convenience and necessity.

In *Pennsylvania R. Co. v. Public Utilities Commission*, 116 Ohio St. 80, 155 N. E. 694, the court, in discussing the nature of a certificate of convenience and necessity, said: "This court has repeatedly declared that a certificate of convenience and necessity, issued by the Public Utilities Commission to a motor transportation company, is not a franchise, and that the holder of such certificate does not thereby acquire a property right in the route covered by such certificate; that the issuing of such certificate is authorized only for the purpose of promoting the public convenience and necessity, and not for the purpose of conferring upon the holder of such certificate any proprietary interest or franchise in the public highways; that the purpose in limiting the number of certificates that may be granted over the same route is to promote the public convenience and necessity by restricting the number of busses to the needs of the public, and thus occasion as little inconvenience as possible to the public using the highway in the usual and ordinary way, and to insure to the holder of the certificate such immunity from competition as will enable him to serve the public convenience and necessity by regular and continuous public service; that a certificate of con-

venience and necessity is in the nature of a revocable personal permit, and has not the attributes of a property right." See, also, *Westhoven v. Public Utilities Commission,* 112 Ohio St. 411, 147 N. E. 759; *Scheible v. Hogan,* 113 Ohio St. 83, 148 N. E. 581; *Blackmore v. Public Utilities Commission,* 117 Ohio St. 554, 160 N. E. 27.

The distinction between a franchise and a certificate of convenience and necessity is aptly made in *Re St. Johns River Line Co.* (1935) 7 P. U. R. n. s. 268, as follows: "A certificate of public convenience and necessity, however, is distinctly different from the grant of a franchise to use and occupy streets. The franchise to use and occupy streets is a grant of a limited property right for the use of public streets, while a certificate of public convenience and necessity is strictly a regulatory measure, and the granting or withholding of a certificate is an exercise of the power of the state to determine whether the rights and interests of the general public will be advanced by the prosecution of the enterprise which it is proposed to carry on for the service of the public."

In the early case of *Martin v. State,* 23 Neb. 371, 36 N. W. 554, this court had occasion to discuss the effect of a license as distinguished from a franchise in the following language:

"In support of this contention, it is insisted that the license is a franchise, or public right, vested in the individual, and for which he has paid a consideration, and therefore it has all the necessary elements of property under the provisions of the Constitution that, 'No person shall be deprived of life, liberty, or property, without due process of law.' * * * There is no *vested* right in a license to sell intoxicating liquors, which the state may not take away at pleasure. *Pleuler v. State,* 11 Neb. 575. Such licenses are not contracts between the state or municipality issuing them and the licensee, but are mere temporary permits to do what otherwise would be unlawful. *Board of Excise v. Barrie,* 34 N. Y. 657. They are subject to the direction of the government, which may revoke them as it deems fit,

and may be abrogated by the adoption of a municipal ordinance prohibiting the sale of liquors. *Columbus v. Cutcomp,* 17 N. W. (Ia.) 47.

"The laws of 1881 (Comp. St., ch. 50), commonly known as the Slocumb law, absolutely prohibits the entire traffic in intoxicating liquors 'by the most expressive language,' giving only an exception where the license or permit is issued. *Pleuler v. State, supra,* 576. We therefore conclude that there is no such vested right or essential element of property in a license as to bring it within the provision of the Constitution above quoted."

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 convenience and necessity. An attempt on the part of the district court to so do is without legal sanction.

The record shows that the certificate of convenience and necessity was first issued to Safety Motor Lines, which was a copartnership composed of respondent, Bernard Effenberger, Hedwig Effenberger and William Longman, Jr. Subsequently, by an order of the commission, the certificate was continued in the name of Safety Motor Lines, a copartnership consisting of Hedwig Effenberger, Bernard Effenberger and Marie Schoenberg. From that time on, respondent did not have a certificate of convenience and necessity and the railway commission properly so held. Until such time as the respondent obtains a certificate of convenience and necessity to operate a bus line, he cannot lawfully so do. The order of the railway commission ordering the respondent to cease and desist from operating a bus line in the instant case was not arbitrarily made. It

was the only order that could properly be entered on the evidence adduced.

AFFIRMED.

FRED P. MARCONNIT, APPELLEE, V. BERNARD EFFENBERGER ET AL., APPELLANTS.
283 N. W. 226

FILED JANUARY 4, 1939. No. 30493.

1. Carriers: REGULATION. The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all common carriers engaged in the transportation of passengers within the state. Const. art. IV, sec. 20; Comp. St. 1929, sec. 75-201.
2. Automobiles: PUBLIC CONVEYANCES: REGULATION. The railway commission has the sole power to grant, deny, amend, transfer or revoke a certificate of convenience and necessity for the operation of a bus line. *Effenberger v. Marconnit, ante,* p. 558, 283 N. W. 223.
3. ———: ———: ———. The powers of the district courts of this state over certificates of convenience and necessity issued by the railway commission are limited to the enforcement of the orders of the commission as provided by section 75-509, Comp. St. 1929.

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

Arthur C. Pancoast, for appellants.

John J. Ledwith, Herman Ginsburg, B. S. Baker and *Edward Shafton, contra.*

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

CARTER, J.

This is a suit for an injunction in which the plaintiff, Fred P. Marconnit, asks that the defendants be enjoined from interfering in any manner with the operation of plaintiff's bus line and that said defendants also be enjoined from operating a competing bus line under a certificate of

convenience and necessity issued by the railway commission of this state, which plaintiff claims belongs to him exclusively. The trial court granted an injunction and defendants appeal.

The record discloses that on January 21, 1936, the railway commission granted a certificate of convenience and necessity to the Safety Motor Lines, a copartnership consisting of plaintiff, Bernard Effenberger, Hedwig Effenberger and William Longman, Jr., subject to certain conditions, for the operation of a bus line between Fort Crook, Nebraska, and Twenty-fourth and N streets in the city of Omaha. On May 12, 1936, the railway commission found that all conditions imposed had been complied with and ordered that the certificate of convenience and necessity should continue in the name of the Safety Motor Lines, a copartnership at that time consisting of Hedwig Effenberger, Bernard Effenberger and Marie Schoenberg. On September 18, 1936, Marie Schoenberg commenced a suit against the plaintiff herein, in which Hedwig Effenberger and Bernard Effenberger joined as interveners, in which suit Marie Schoenberg and the interveners claimed to be the sole owners of Safety Motor Lines and asked that Fred P. Marconnit be enjoined from interfering with their ownership thereof. In his answer, Fred P. Marconnit claimed to be the owner and alleged that the plaintiff and interveners had loaned the use of their names to him and that he was at all times the sole owner of Safety Motor Lines. A trial was had resulting in a decree finding that defendant therein, Fred P. Marconnit, was the sole owner of Safety Motor Lines, "together with its equipment, rights and privileges." From this decree no appeal was taken.

On February 5, 1938, after a hearing based upon a complaint supported by evidence, the railway commission found that plaintiff herein, Fred P. Marconnit, had no right to operate the Safety Motor Lines for the reason that he had no certificate of convenience and necessity and ordered him to cease and desist operation thereof. This order was appealed from and affirmed by this court in the companion

case of *Effenberger v. Marconnit, ante,* p. 558, 283 N. W. 223.

This suit was commenced on January 6, 1938, by plaintiff, Fred P. Marconnit, praying that the defendants, Hedwig Effenberger and Bernard Effenberger, be restrained from interfering with plaintiff's business and from operating a bus line under the rights and privileges which have been granted to plaintiff by virtue of the certificate of convenience and necessity which he purports to own. Service of process was not had upon Marie Schoenberg and she was not, therefore, a party to the suit. The trial court perpetually enjoined the defendants from operating any motor transportation or bus line under the certificate of convenience and necessity involved herein and also enjoined the defendants from interfering with plaintiff's business and operations under said certificate of convenience and necessity. The correctness of this decree is before the court on this appeal. A more extensive statement of the facts may be found in *Effenberger v. Marconnit, supra.*

The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all common carriers engaged in the transportation of passengers within the state. Const. art. IV, sec. 20; Comp. St. 1929, sec. 75-201. We have heretofore held that the requirement of a certificate of convenience and necessity by the railway commission is not an unreasonable regulation, and that the grant or denial of such a certificate requires the exercise of administrative and legislative powers. *Publix Cars, Inc., v. Yellow Cab & Baggage Co.,* 130 Neb. 401, 265 N. W. 234. We also have held that a certificate of convenience and necessity to operate a bus line is in the nature of a permit or license, personal in its nature, and is not property in any legal or constitutional sense. The same case also holds that the requirement of a certificate of convenience and necessity is purely a regulatory measure and the railway commission has the sole power to grant, deny, amend, transfer or revoke such a certificate. *Effenberger v. Marconnit, supra.*

We also hold that the judgment of the district court de-

creeing that Fred P. Marconnit was the owner of the Safety Motor Lines and the property used by it is a final determination of that question, no appeal having been taken therefrom. The trial court was without the power, however, to assign or transfer the certificate of convenience and necessity from the copartnership of Hedwig Effenberger, Bernard Effenberger and Marie Schoenberg, doing business as the Safety Motor Lines, or its subsequent trade-name of Fort Crook-Bellevue Boulevard Line, to Fred P. Marconnit. This was a function committed by law to the railway commission. The power of the court in such matters is limited to the enforcement of the orders of the railway commission as provided in section 75-509, Comp. St. 1929.

The power of the courts over the administrative and legislative orders of a public utilities commission, such as the railway commission of this state, is ably discussed in *State v. Public Service Commission*, 324 Mo. 270, 23 S. W. (2d) 115, wherein the court said:

"The power to grant, or to refuse to grant, to a public utility a certificate of convenience and necessity is committed to the discretion of the Public Service Commission, within defined limits, and not to the circuit court or to this court. Respondent seeks to justify the judgment of the circuit court reversing the commission's order and remanding the cause with instructions to grant the certificate applied for, on the ground that the action of the commission in making its finding and order was quasi-judicial, and that being true a court of equity upon review was bound to affirm the order, set it aside, modify it, or to make one of its own, according to what it deemed right and equitable under the facts found by it. It would be a work of supererogation at this late day to enter upon an analysis of governmental powers in order to point out the line of demarcation between those with which the Public Service Commission is invested by statute and those exercised by the courts. The constitutionality of the Public Service Commission Law has been considered by this court from every angle in that regard, and the chart it furnishes may now safely be followed.

"It is true that all orders of the commission are subject to judicial review, and that suits brought for such review must be 'tried and determined as suits in equity.' But after the chancellor has made his own finding of the facts the only application he can make of them is to determine from them whether the order under review is reasonable and lawful. If he finds it both reasonable and lawful, it is his duty to affirm it; if he finds it either unreasonable or unlawful, he must set it aside. He cannot modify it or entirely displace it with one of his own, as was done by the circuit court in this case. * * * When an order is set aside the court may remand the cause to the commission for such further action *as it may desire to take;* the court oversteps the boundaries of its jurisdiction when it attempts to tell the commission what the action should be. There seems to be one exception to this: When the commission has excluded evidence that it should have received, the cause may be remanded with directions that it hear such evidence and then make a new order."

The record clearly shows that the certificate of convenience and necessity involved in this suit is in the name of a copartnership consisting of Marie Schoenberg, Hedwig Effenberger and Bernard Effenberger. The district court does not have the power to transfer it to any one else, that power being exclusively lodged in the railway commission. The copartnership named, therefore, has a certificate of convenience and necessity to operate a bus line from Fort Crook, Nebraska, to Twenty-fourth and N streets in Omaha. The contention is made that it owns no busses or other property required by the commission to entitle it to operate. This may be true, and possibly, if complaint is made, the railway commission may come to a like conclusion, for aught we know, but this can avail the plaintiff nothing. Until such action be taken by the railway commission, the defendants clearly have the necessary authority to operate their line.

We necessarily conclude that the order of the trial court enjoining the defendants from in any manner operating

or attempting to operate any motor transportation or bus line or service, under the certificate of convenience and necessity involved in this suit, is erroneous. For the reasons herein stated, the decree of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

GEORGE E. CARLSON, APPELLEE, V. OLGA H. CARLSON, APPELLANT.
283 N. W. 214

FILED JANUARY 4, 1939. No. 30454.

1. Divorce: CUSTODY OF CHILDREN. "In divorce actions, in making disposition of the custody of a child of tender years, the policy of the law is to look to the welfare and best interests of the child." *Feather v. Feather*, 112 Neb. 315, 199 N. W. 533.
2. ———. Evidence examined, and *held* that the welfare and best interests of the minor child require that her custody be committed to the mother under the strict supervision of the court.

APPEAL from the district court for Clay county: FRANK J. MUNDAY, JUDGE. *Affirmed as modified.*

Ledwith & Ledwith and *August C. Krebs*, for appellant.

D. B. Massie, contra.

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

MESSMORE, J.

Plaintiff sued for a divorce, alleging extreme cruelty; further that two children were born as the result of the marriage—Norma, born November 12, 1933, and Walter, born February 18, 1937; and prayed for an absolute divorce, the care, custody and control of both minor children. The defendant answered, denying extreme cruelty to the plaintiff, and for her cross-petition alleged that she had been residing with her parents in Lincoln, Nebraska, since May 6, 1937, and that the two children of the marriage, since their respective births, have been in the custody and

control of the cross-petitioner; further alleged extreme cruelty on plaintiff's part towards her; and prayed that plaintiff's petition be dismissed, that she be awarded an absolute divorce, the care, custody and control of both minor children, and support money for herself and the minor children, and prayed for equitable relief.

April 5, 1938, the court entered its decree, finding that the plaintiff should be granted a divorce from the defendant, and awarded to the plaintiff the custody of the daughter Norma during the school year, and for the remaining three months of each year to the mother; further that the plaintiff was entitled to the child Norma, commencing April 8, 1938, and retaining custody of her until June 1, 1939, at which time the mother should have the custody of the child until September 1, 1939. The custody of the infant Walter was awarded to the defendant. The decree further provided for the payment of $10 a month for the support of the child Walter, and $10 a month for three months of the year that the daughter Norma would be in the custody of her mother; provided for property settlement and attorneys' fees. The defendant, cross-petitioner, appeals from the judgment and decree.

The evidence discloses that the parties were married April 14, 1931; that the plaintiff lives on a farm two miles west of Sutton, in Clay county, Nebraska, and by a previous marriage has a boy 13 years of age. The wife left the home May 6, 1937. Both the plaintiff and the defendant are persons bearing good reputations and are highly respected by their neighbors as hard-working, home-making and intelligent people. The only difficulty between the two is the deep-seated belief of each in their own faith or religion, which caused many controversies, disagreements and misunderstandings during the course of their married life; more particularly with reference to the children and the baptism of them. The plaintiff insisted that they be baptized by an ordained minister, denoting his belief and respect for the clergy. The infant Walter was so baptized. The defendant desired to have the children baptized by a

deacon of the church to which she belongs, where baptism by a minister is not necessary. Norma was so baptized, which displeased the plaintiff. The parties being adamant upon their religious beliefs and remaining constant in their position that true religion demanded certain ceremonial rites carried out in a prescribed way and by persons peculiarly qualified led to the court's decree.

This case presents a very unusual situation, and the record discloses an earnest effort on the part of counsel for both parties in an endeavor, by their examination of the principals involved, and subsequently by the court in arriving at a decision, to perfect a reconciliation. To cover the details of the disagreements as to the religious faith of the parties herein and their apparent inability to agree for the best interests of the children would unnecessarily lengthen this opinion. The defendant insisted on bringing up the children in her own faith, and apparently in one church where she would have to travel a distance, as shown by the record, of 90 to 100 miles when taking the children to church. The record is void of the existence of a church, of like or similar nature, in the vicinity of the residence of defendant's parents where she now lives, and apparently the church of her choice is the only one that she considers.

The differences between the husband and wife, concisely stated, is in the defendant's testimony, a part of which is quoted: "Q. You loved your faith and he loved his? A. Yes, sir. Q. And the babies suffered—is that it? A. Yes, sir. Q. You both pretended to be christians? A. Yes. Q. Do you think there is a possibility of you and your husband returning to the home, which was created for the purpose of these two children? A. No. Q. And being big enough and intelligent and christian enough to suppress your own feelings and emotions? A. No. Q. You don't think that could be done? A. No. * * * Q. And after the children have grown a little older, they may follow any creed that they select or desire? A. If they are old enough for themselves, when they become of age, they can take what they want."

The court made the following finding in the decree: "That both parties are responsible, competent and able physically and morally and in other ways to have the custody of the children." The principal issue before us is the decree of the district court in awarding the custody of the daughter Norma to the plaintiff during the school year, and to the defendant for three months constituting the summer vacation period of the year.

In the case of *Feather v. Feather,* 112 Neb. 315, 199 N. W. 533, this court held: "In divorce actions, in making disposition of the custody of a child of tender years, the policy of the law is to look to the welfare and best interests of the child." This is the very question with which we are concerned.

In *Swolec v. Swolec,* 122 Neb. 837, 241 N. W. 771, it was held: "In awarding the custody of minor children, the court looks only to the best interests of such children, and those of tender age are usually awarded to the mother. Other considerations being equal, it is usual to award the custody of children to the innocent spouse."

In the instant case, the court found both plaintiff and defendant responsible and competent, physically and morally, to have the custody of the children which was awarded to them. The record discloses the truth of such finding. Both the husband and wife are people of high moral character, hard-working, intelligent and respected. The plaintiff is a farmer and has been employed on the soil conservation committee for a period of four years. By such employment he is at times away from home and would be unable to devote sufficient time to the welfare of Norma. True, his aunt, a respected person, a nurse though not registered, who has raised four children, is keeping house for him; he has the necessary, proper and comfortable facilities for the welfare of the child, and is capable of supporting her. On the other hand, the mother, who is living with her parents, has the necessary facilities and a comfortable home in which to raise the child, and it must be generally conceded that the best interests and welfare of a child of

tender years will be best subserved by placing the child in the custody of the natural mother, especially so when she is a fit and proper person, and there is no allegation or proof to the contrary.

The trial court possibly had in mind that the mother had left the home first and was the wrong-doer, and in applying the principle of law, as announced in *Swolec v. Swolec, supra*: "Other considerations being equal, it is usual to award the custody of children to the innocent spouse."

In examining the record in this case, we recognize that it is seldom, if ever, that any other person can be found who can bestow upon a child of tender years such loving care and have its welfare so much at heart as its mother. The record does not disclose anything that would justify depriving this mother of the care and custody of her infant daughter.

The decree of the district court should be modified, as to place the care and custody of the child Norma in her mother, with the right of the plaintiff husband to visit the child at all reasonable and proper times and under proper conditions and circumstances, either at the mother's place of residence or at some place agreed upon by them, and that the plaintiff have the care, control and custody of the child Norma for and during the period of the summer vacation. It is also advisable in this case that the care and custody of the child be under the strict supervision of the court while in the mother's custody.

The decree should be further modified in awarding the mother an additional $10 a month during the period that the minor child Norma is with the mother; that is, during the school year. This amount of $10 a month is not to be paid during the period that she is with her father; that is, during the vacation period in the summer; all subject to further order of the court. For services rendered in this court by defendant's attorney a fee of $100 is allowed, to be paid by the plaintiff; plaintiff to pay the costs of this proceeding.

The decree of the court, in so far as the minor children are concerned, is never final in the sense that it cannot be changed. Section 42-312, Comp. St. 1929, provides: "If the circumstances of the parents shall change, or it shall be to the best interests of the children, the court may afterwards, from time to time, on its own motion, or on the petition of either parent, revise or alter to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." For this reason and because of the peculiar circumstances of this case, we believe that the custody of the child Norma should be in the mother, as stated in this opinion, under the strict supervision of the court.

AFFIRMED AS MODIFIED.

MINNIE DOROTHY KENFIELD, APPELLANT, V. ADOLPH DUDEK, EXECUTOR, ET AL., APPELLEES.
283 N. W. 209

FILED JANUARY 6, 1939. No. 30444.

1. Wills: CONSTRUCTION. "In determining the meaning of particular parts, the intention of the testator is to be determined from the will as a whole." 69 C. J. 104.
2. ———: CODICILS. "The general doctrine is well settled that a codicil executed with the formalities required by statute for the execution of wills operates as a republication of the will, so far as it is not altered or revoked by the codicil, * * * and the will and codicil are to be regarded as but one instrument, speaking from the date of the codicil." 68 C. J. 861.
3. ———: CONSTRUCTION. Provisions in a will for the benefit of the testator's widow should be construed liberally, and especially should receive a construction most favorable to her when made for her support, or accepted by her in lieu of her rights under the intestate laws.
4. ———: ———. "The provisions of a codicil may have the effect of removing an ambiguity which appears on the face of the will." 1 Jarman, Wills (7th ed.) p. 167.
5. ———: ———. Will and codicil construed as an entirety, and *held*, as to the existing residue of this estate, to clearly vest in defendant widow all rights specified in paragraph 3

thereof, as exclusive of, superior to, and wholly unaffected by, the provisions contained in said testamentary instruments in favor of plaintiff.

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

N. H. Cornell, for appellant.

Courtright, Sidner, Lee & Gunderson, contra.

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

EBERLY, J.

This is a suit in equity for the construction of the will of George W. Wertz, and for other relief. The petitioner is Minnie Dorothy Kenfield, a sister of the deceased, and Lottie V. Wertz, the widow of deceased, may be said to be the defendant.

The record discloses that George W. Wertz died on May 29, 1934, leaving his last will and testament, which had been executed by him on July 26, 1929, and a codicil thereto bearing date of October 19, 1932. On August 23, 1934, these instruments were duly admitted to probate. Administration has been had in said estate, and the final account of the executors approved. Lottie V. Wertz, appointed by the terms of the will as a trustee, has given bond and qualified as such. The value of the remaining property belonging to this estate is approximately $3,500, and the annual income arising therefrom amounts to approximately $400 *per annum.*

The will of George W. Wertz, as executed by him on July 26, 1929, contains seven paragraphs. Of these, five paragraphs relate to the controversy here presented, viz., the first, second, third, fourth and seventh of the original will, as modified by the provisions of the codicil of October 19, 1932.

The first paragraph provided that "all my just debts, funeral expenses and expenses of administering my estate be first paid."

The applicable provisions of the second paragraph of the original will are: "It is my will that * * * she (plaintiff) shall be paid the sum of $25 per month during the term of her natural life while living with her husband Marion Kenfield; and if she shall live apart from him then she shall be paid the sum of $50 per month during the term of her natural life, such sums to be paid monthly in advance," etc.

The third paragraph of the original will reads as follows:

"I give, devise and bequeath to my wife, Lottie V. Wertz, all the remainder of my estate wheresoever situated and of whatsoever nature, with the exception of the redwood bookcases and cabinet hereinafter mentioned, for her exclusive use during the term of her natural life, she to have the joint management thereof, and the entire income therefrom. In case she shall need any part of the principal to employ necessary care and to keep her in comfortable circumstances, she may use such part thereof as may be necessary for such purposes. I desire that she may not be held to any critical accounting in this respect, but may use sound discretion as to what constitutes necessity or comfort."

The fourth paragraph of the will directs, that, "after the death of my wife," the Wertz estate shall be reduced to money, and such money "divided into three equal parts," and two parts paid over to the children of two brothers of the deceased, and one part to the children of Minnie Dorothy Kenfield. This paragraph also sets forth: "These bequests are all at all times to be subject to the payment of the monthly allowances aforesaid to my sister (Minnie Dorothy Kenfield) during the term of her natural life, and a sufficient part of my estate shall always be preserved to insure such payments, and not divided until the death of my sister."

The seventh paragraph of the original will governs the distribution of this estate, "after the death of my wife and after the death of my sister above mentioned," and pro-

vides that, "until the death of my sister, Minnie Dorothy Kenfield, each and all of my trustees herein named or hereafter named or appointed, shall preserve in their hands enough of said estate to insure the payment of the monthly allowance to my sister as above set forth, during the term of her natural life."

The codicil to this will, duly executed, bearing date of October 19, 1932, contained the following provisions:

"In view of changing conditions which have much depreciated the value of my property, and whereby I have lost a good deal of money during the past two years, I hereby make, publish and declare this to be a codicil to my last will and testament of date July 26, 1929, which will is now in the hands of Adolf Dudek, of Clarkson, Nebraska.

"1. My wife shall pay to my sister, Mrs. Dorothy Kenfield, the sum of $15 per month as long as she remains with and lives with her husband; and in the event of a divorce or permanent separation from her husband, my sister shall receive from my widow $25 per month.

"2. In the event that my interest in helium gas bearing lands in Stanton county or in Colfax county shall yield enough to pay my wife therefrom $25,000 or more, she shall pay to my sister per month as set forth in my said will dated July 26, 1929, from the date of such receipt of money, or more if she shall feel able to do so, this being at her discretion. This property should pay my wife or my estate at least $100,000; and in that event she will have no difficulty in making the payments as stated in said will. She shall then also buy a suitable home for my sister, and keep the taxes paid on the same and the same in repair during the life of my sister, and buy her suitable furniture for living purposes and to keep her in comfort, regardless of whether she is married or living with her husband. The money for these purposes shall be taken from the principal coming from such interest in helium or other gas in Stanton or Colfax counties, and after the death of my sister the property constituting such home shall be the property of my sister's children.

"3. In all other respects the said will of July 26, 1929, shall remain in full force and effect."

The basic question presented by the issues in this case is whether, under the terms of this will, the sister, Mrs. Kenfield, is entitled to have her claim preferred over the rights of Mrs. Lottie V. Wertz, the wife and widow, to support, as provided in the third paragraph of the last will of the decedent, in the $400 income and the $3,500 principal, the entire residue now remaining in the George W. Wertz estate. The district court resolved this question in favor of the defendant. Plaintiff appeals.

It will of course be conceded that, "Where the language in a will is clear and unambiguous, there is no room for construction, and it becomes the duty of the executor to carry into effect the plain provisions of such a will." *In re Estate of Nelson,* 132 Neb. 376, 272 N. W. 219.

However, the quoted language of the testamentary instruments here involved, in view of the surrounding circumstances, may not be said to be clear and unambiguous, and clearly to ascertain the intent of the testator, questions of its proper construction must be rightfully determined. For, "In determining the meaning of particular parts, the intention of the testator is to be determined from the will as a whole." 69 C. J. 104. See, also, *In re Estate of Skinner,* 122 Neb. 438, 240 N. W. 549; *Seybert v. Seybert,* 118 Neb. 246, 224 N. W. 1; *In re Estate of Smith,* 117 Neb. 776, 223 N. W. 17; *Krause v. Krause,* 113 Neb. 22, 201 N. W. 670.

And, "The general doctrine is well settled that a codicil executed with the formalities required by statute for the execution of wills operates as a republication of the will, so far as it is not altered or revoked by the codicil, * * * and the will and codicil are to be regarded as but one instrument, speaking from the date of the codicil." 68 C. J. 861.

It may be noted that this is quite in harmony with provisions of the codicil as framed by the testator in the present case.

One of the real parties in interest here being the widow of the testator, the application of the following principle

is naturally invoked, viz.: "Provisions in a will for the benefit of the testator's widow should be construed liberally in her favor. It has been held that the fact that a testator owed his wife protection and support raises a presumption that he intended to make ample provision for her in his will, and an intention to leave his widow without means of support will be attributed to a testator only when clearly expressed." 69 C. J. 102.

This is particularly true where either expressly or by necessary implication the testamentary provisions for the widow are in lieu of statutory rights possessed by her which are beyond the power of the husband to limit and control. Thus, a provision in lieu of dower is to be construed most favorable to the widow. *Matter of Goetz,* 71 App. Div. 272, 75 N. Y. Supp. 750; *Matter of Gabler,* 140 Misc. Rep. 581, 251 N. Y. Supp. 211; *Matter of Smathers,* 133 Misc. Rep. 812, 234 N. Y. Supp. 99; *Tarter's Estate,* 291 Pa. St. 458, 140 Atl. 502. In the case last cited the supreme court of Pennsylvania announced that all doubts will be resolved in favor of a widow accepting provisions of a will in lieu of her rights under intestate laws.

In the authorities above cited, the New York courts hold that, where a gift is founded upon the exclusion of dower, such fact is also to be taken into consideration, and the provision thus made is to be regarded as the dominant provision, and all other clauses are to be made subordinate thereto, if the will as a whole can be supported. See, also, *Stimson v. Vroman,* 99 N. Y. 74, 1 N. E. 147; *Roseboom v. Roseboom,* 81 N. Y. 356.

But, in the instant case, it appears that the property owned by George W. Wertz consisted in part of personal property, and in large part of real estate having its situs within this state. It appears that neither George W. Wertz nor his wife were parents of living children. By sections 30-101 and 30-103, Comp. St. 1929, on the death of the testator, the widow, subject to the payment of his debts, etc., became entitled to one-half of the real estate in fee simple, and to an equal portion of the personal property

of which the testator died possessed. By sections 30-107 and 30-108, Comp. St. 1929, the widow possessed the right of election between her statutory rights and the provisions of the will. In effect, in the instant case, she surrendered, for the benefit of the estate, her statutory rights in consideration of the provisions of her husband's will made for her benefit. In so doing, as to such testamentary provisions, she was a purchaser for value. In this transaction the element of gratuity constitutes no part. So, the facts of the situation bring Mrs. Wertz squarely within the protection of the principles of construction already discussed herein, and entitle her to the most favorable construction of paragraph three of the will under consideration. But the defendant in this case is not only entitled to this favorable construction because of the actual contractual consideration which she furnished, but also because of the inherent nature of the provisions of paragraph three of this will. It evidences an exclusive purpose and intent on the part of the testator, and is wholly occupied in furnishing and providing an adequate support and maintenance for the testator's wife.

The unquestioned rule established by the authorities, is: "A provision in favor of the support of a wife should receive the most favorable construction." 69 C. J. 946. See, also, *McCallum's Estate,* 211 Pa. St. 205, 60 Atl. 903; *Pope v. Pope,* 209 Mass. 432, 95 N. E. 864; *Rhode Island Hospital Trust Co. v. Hail,* 47 R. I. 64, 129 Atl. 832; *Sherman v. Riley,* 43 R. I. 202, 110 Atl. 629; *Davis v. Davis,* 138 Va. 682, 123 S. E. 538; *Moore v. Alden,* 80 Me. 301, 14 Atl. 199; *Forepaugh's Estate,* 199 Pa. St. 484, 49 Atl. 236; *Merriam v. Merriam,* 80 Minn. 254, 83 N. W. 162.

The acceptance of these canons of construction is decisive in the disposition of this case. If the second paragraph of the original will may be deemed ambiguous because the origin or source of the legacy of $25 or $50 a month for the benefit of the plaintiff herein is not definitely indicated, the ambiguity is removed by the terms of the codicil. "The provisions of a codicil may have the effect

of removing an ambiguity which appears on the face of the will." 1 Jarman, Wills (7th ed.) p. 167. See, also, *In re Venn* (1904-1905) W. N. Part I, 94.

The effect of this is that the residuary legacy or devise created by the words of the will, viz., "all the remainder of my estate wheresoever situated and of whatsoever nature," manifestly included all property remaining after payment of testator's debts, funeral expenses and the costs of administration. The extent of the property and the nature of the gift created and vested in Lottie V. Wertz by paragraph three of this will was clear, definite, and certain, and wholly unlimited and unmodified. For this, she waived her statutory rights. In turn she received the residue of the property of the estate for her exclusive use during the term of her natural life. The actual and unqualified receipt of the physical properties of this estate by Mrs. Wertz is unquestioned.

"In the absence of a clear direction to the contrary in the will, the beneficiaries have the same interest in the income, rents, and profits of the property given to them as they have in the property itself." 69 C. J. 284.

But, in addition to this presumption, the words of the will are that she shall have "the entire income therefrom," and "in case she shall need any part of the principal to employ necessary care and to keep her in comfortable circumstances, she may use such part thereof as may be necessary for such purposes." By the terms of the codicil, an intention is fairly expressed by the testator that the exclusive source of payment of the legacy provided for plaintiff should be the moneys derived from "helium or other gas in Stanton or Colfax counties." The provisions of the fourth and seventh paragraphs of the will upon which plaintiff relies appear to be qualified by the words "after the death of my wife," and construed with the will and codicil as entireties confer on plaintiff no present right of action. The sole and exclusive right to, and employment of, the income of the estate during the life of the widow is clearly vested in such widow. These rights are not to be

impaired by the other provisions of the testamentary instruments here involved. So long as the widow survive, the clear provisions of the testator's will in her behalf may not be deemed to be limited, modified, or qualified by the mere precatory language providing for the payment of certain amounts by defendant to plaintiff as set forth in paragraph two of the original will, as corrected and explained by the terms of the codicil thereto.

It follows that the clear terms of paragraph three of the original will fully vested in defendant widow all the rights therein defined and given, and which are exclusive of, superior to, and wholly unaffected by, the provisions of these testamentary instruments in behalf of plaintiff Kenfield. Therefore, the exclusive right to the enjoyment of all income arising from the estate of George W. Wertz, deceased, as well as all other rights and privileges, vested in the defendant Lottie V. Wertz by the terms of the third paragraph of the last will of deceased, wholly undiminished, unqualified, and unmodified by any of the provisions thereof in favor of plaintiff Kenfield, is in said Lottie V. Wertz duly confirmed.

The judgment of the district court is, therefore,

AFFIRMED.

VICTOR N. HANSEN, APPELLANT, V. DAKOTA COUNTY ET AL., APPELLANTS: GEORGE W. LEAMER, INTERVENER, APPELLEE.
283 N. W. 217

FILED JANUARY 6, 1939. No. 30451.

1. **Statutes:** CONSTRUCTION. "In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will." *Hagenbuck v. Reed*, 3 Neb. 17.
2. ———: ———. In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act and give effect thereto.

3. ———: ———. When the legislative intent is left in doubt by failure to clearly express it in the act, resort may be had to the title as an aid to the discovery of such intent.
4. **Bridges.** Chapter 87, Laws 1935 (Comp. St. Supp. 1937, secs. 39-2101 to 39-2112), construed, and *held* that such act authorizes the purchase of interstate bridges by counties designated therein, by means and method stated in such act.

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

Clarence T. Spier, L. J. Te Poel, Kenneth S. Finlayson, Alexander McKie, Jr., and *Malcolm R. Smith*, for appellants.

George W. Leamer, W. V. Steuteville and *Joseph E. Marsh, contra.*

Fred H. Free, amicus curiæ.

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

CARTER, J.

This is an action for a declaratory judgment to determine whether the county commissioners of Dakota county are authorized to purchase an existing interstate bridge which spans the Missouri river between Sioux City, Iowa, and South Sioux City, Nebraska, under and by virtue of chapter 87, Laws 1935 (Comp. St. Supp. 1937, secs. 39-2101 to 39-2112). The trial court held that the defendant county was without authority to purchase the bridge, and all defendants appeal to this court.

There is only one question of substantive law involved in this case and that is: Does the county bridge act of 1935 (Laws 1935, ch. 87) authorize a border county merely to *build* a bridge across a boundary stream or does it authorize such county to either *build* a bridge or *purchase* one already built? In view of the fact that a determination of this question is decisive of the case, we will not discuss other alleged errors assigned in the briefs.

Section 1 of the act provides in part as follows: "Any

county in the state of Nebraska may build or construct or aid in the construction or complete construction of any highway, wagon, vehicle or automobile bridge within the state of Nebraska and any adjoining state across any river, navigable or nonnavigable stream, forming a boundary line between any county within the state of Nebraska and any other state of the United States."

Section 2 provides in part as follows: "Any county in the state of Nebraska may issue revenue bonds to construct or to aid in the construction, or complete the construction of any highway, wagon, vehicle or automobile bridge within the state of Nebraska and any adjoining state across any river, navigable or nonnavigable stream, forming a boundary line between any county within the state of Nebraska and any other state of the United States."

Section 5 states in part: "If any such county, prior to the passage of this act, has acquired, purchased, or received an assignment by gift or otherwise, any existing highway, wagon, vehicle or automobile bridge or viaduct * * * same shall be and is hereby declared legal and valid and the property of the county and of the same force and effect as if said property had been heretofore directly acquired by the county."

Section 7 also states in part: "No election and no vote of electors shall be required upon the question of acquiring or constructing any bridges or issuing revenue bonds as authorized by this act, for the acquisition or construction of any bridge, if the governing body of the county shall determine by a vote of a majority of its members to dispense with such election or vote of electors as to such question."

It will readily be observed that section 1 of the act states that a county "may build or construct or aid in the construction or complete construction" of a bridge and that nothing is said with reference to the purchase of a bridge. It will also be observed that section 2 provides for the issuance of "revenue bonds to construct or to aid in the construction, or complete the construction" of a bridge, and,

as in the previous section, nothing is stated with reference to the purchase of a bridge. In section 5 the statement is made that if a county "has acquired, purchased, or received an assignment by gift or otherwise," any existing bridge, the same is declared valid. This being a validating act of past transactions, it might well be said that it does not of itself empower a county to acquire, purchase or receive by assignment, a bridge in the future. The claimed authorization to purchase is found in section 7 wherein it is said: "No election and no vote of electors shall be required upon the question of acquiring or constructing any bridges or issuing revenue bonds as authorized by this act, for the acquisition or construction of any bridge." The issue to be determined resolves itself into a question whether this provision of section 7 of the act authorizes the purchase of the bridge involved in this case.

It is a fundamental rule of statutory construction that effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will. It is the duty of the court to discover, if possible, the legislative intent from the statute itself. It must be borne in mind that, in the legislative field, the legislature is supreme so long as it keeps within constitutional limits, and it is not the province of the court to read a meaning into a statute that the language used does not warrant. *State v. City of Lincoln,* 101 Neb. 57, 162 N. W. 138; *McCann v. McLennan,* 2 Neb. 286; *State v. Drexel,* 75 Neb. 614, 106 N. W. 791; *King of Trails Bridge Co. v. Plattsmouth Auto & Wagon Bridge Co.,* 114 Neb. 734, 209 N. W. 497; *State v. Thomas,* 127 Neb. 891, 257 N. W. 265.

If we give effect to the words used in section 7 of the act, in the sense in which they are ordinarily used, we must necessarily hold that it was the legislative intent that counties coming under the act might purchase as well as

build an interstate bridge. Unless the words "acquiring and constructing" and "acquisition or construction" contained in section 7 are held to be meaningless or superfluous, we can arrive at no other logical conclusion. Following the rules of statutory construction hereinbefore stated by giving the usual and ordinary meaning to every word, clause and sentence with a view of arriving at the legislative intent, we feel that the only conclusion that can be logically reached is that the legislature intended that counties coming within the act were to be empowered to purchase as well as construct, complete or aid in the construction of an interstate bridge. It might be pertinent to inquire, unless such authority was intended, how a county would become possessed of a partly completed bridge for the purpose of completing it except by purchase. Assuming, for the sake of argument, that the language used in section 7, when considered with other language in the act, results in ambiguity and uncertainty and casts doubt as to what the legislature intended, we may then resort to an examination of the title to the act as an aid to construction. In *State v. City of Lincoln, supra,* we said: "In case of doubt as to the meaning of a statute, resort may be had to the title as an aid to discover the legislative intent, but by no means to enlarge the scope of the statute so as to include a subject not fairly expressed in the body of the act."

The title to the act under consideration provides in part as follows: "An act relating to bridges; to define the terms 'county' or 'counties' wherever used in this act; to authorize counties in the state of Nebraska to build and construct a bridge or bridges; * * * to authorize any county to acquire by purchase, gift or otherwise any existing bridge, viaduct or right-of-way or approaches or appurtenances thereto and to validate any acquisition heretofore made of any thereof; to acquire all necessary real estate and personal property; to acquire real estate and personal property located in an adjoining state." Laws 1935, ch. 87.

Applying the rule announced to the title of the act before

us, we find the legislative intent expressly stated in the words "to authorize any county to acquire by purchase, gift or otherwise any existing bridge." By giving the entire statute the meaning that the legislature intended, we are driven to the conclusion that the act authorizes the purchase of interstate bridges by counties that fall within its provisions.

For the reasons stated, the judgment of the trial court is

REVERSED.

RUBEN O. CARLSON, APPELLEE, V. CONDON-KIEWIT COMPANY, APPELLANT.

283 N. W. 220

FILED JANUARY 6, 1939. No. 30558.

1. **Workmen's Compensation:** "Daily Wages." In construing subdivision (3) of section 48-121, Comp. St. 1929, the term "daily wages" should be taken to be the amount that could be earned by working the ordinary number of hours, irrespective of enforced idleness during working hours and overtime employment.
2. ———: INJURY: AWARD. Where, as in the instant case, the contract of hire fixes the maximum number of hours to work each day and the maximum number of days to work each week, they should be considered in reducing the hourly rate to a weekly rate as the basis for an award under subdivision (3), section 48-121, Comp. St. 1929, where the employment is neither continuous, seasonal, nor dependent upon the weather.
3. ———: ———: ———. The provisions of subdivision (3) of section 48-121, Comp. St. 1929, are exclusive, and an employee may not recover, in addition to the schedule therein set out for the loss of an eye, an additional amount for the loss of stereoscopic vision, it being incidental to the loss of an eye.
4. ———: PENALTY. When a reasonable controversy exists between an employer and employee as to the amount due under the workmen's compensation law, an employer is not liable for the penalty for waiting time during the time the cause is pending a final determination in the courts.

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

Hall, Cline & Williams and *E. W. Cahow*, for appellant.

H. D. Hunter and *Lowell L. Walker, contra.*

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

CARTER, J.

This is a suit to recover benefits under the workmen's compensation law. The main question presented is the method to be employed in determining the employee's wage for the purpose of fixing the amount of compensation.

The plaintiff was injured on June 23, 1937, while employed as a drag-line operator by the defendant who was engaged in carrying out a construction contract on the hydroelectric project of the Loup River Public Power District. At the time of the accident, plaintiff was assisting in placing the teeth on a drag-line bucket and was struck in the right eye by a piece of steel, resulting in the loss of the eye. The controversy over the weekly compensation rate arises out of the following factual situation: The employer was governed by regulations imposed by the federal Public Works Administration fixing a maximum week of 40 hours for employees on this project. Plaintiff did not work full time, but was employed off and on as needed during a period of nine and one-half weeks. He worked two days in each of the first two weeks, he did not work at all during the next four weeks, and worked two days, three days and two days, respectively, in the last three weeks preceding the injury. It is not disputed that plaintiff was paid 55 cents per hour for his work.

Defendant contends that the average weekly wage actually earned by the plaintiff during the five weeks he actually worked, amounting to $7.48 per week, is the sum upon which compensation should be based. Plaintiff contends that the wage to be used in determining the amount of compensation is $22 per 40-hour week.

The schedule of compensation for the loss of an eye under the workmen's compensation law is: "The following schedule of compensation is hereby established for injuries resulting in disability: * * * For the loss of an eye, sixty-six and two-thirds *per centum* of the daily wages during one

hundred and twenty-five weeks. * * * Provided, that, if at the time of injury, the employee receives wages of less than six dollars per week, then he shall receive the full amount of such wages per week as compensation." Comp. St. 1929, sec. 48-121.

The compensation law also provides: "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. * * * In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour or by the output of the employee, 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." Comp. St. 1929, sec. 48-126.

The record in this case shows that the plaintiff worked only eleven days in nine and one-half weeks. This is not continuous employment within the meaning of the quoted provisions of the act. While it is true that a maximum week of five days and forty hours was stipulated, yet the plaintiff worked only when needed by the defendant. It was in no sense continuous employment and was not intended so to be. Clearly, also, it was not seasonal or employment dependent upon the weather as defined therein. This being true, the case is governed by the first sentence of section 48-126, Comp. St. 1929, providing that the term "wages" as therein used "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." See *Davis v. Lincoln County,* 117 Neb. 148, 219 N. W. 899.

Compensation for the loss of an eye is provided for in subdivision (3) of section 48-121, Comp. St. 1929, which specifies the benefits to be paid for specific injuries. Under

this section plaintiff is entitled to receive 66⅔ *per centum* of the daily wages during 125 weeks. It is not disputed in the record that plaintiff received 55 cents per hour as wages and that the working day was eight hours in length. In other words, the plaintiff, for the purpose of this suit, was earning $4.40 per day. Plaintiff is therefore entitled to receive 66⅔ *per centum* of this wage for 125 weeks. In reducing the hourly rate to a weekly rate, the method ordinarily employed would be to multiply the daily wage by the number of working days composing a work week in the occupation in the community where the injury occurred. But, in the instant case, the employment was limited to five work days of eight hours each per week. This must be taken into consideration in determining the weekly rate which in the instant case amounts to $22 per week. *Drum v. Omaha Steel Works*, 129 Neb. 273, 261 N. W. 351; *Gorham v. Kiewit Sons Co.*, 129 Neb. 277, 261 N. W. 353.

The average weekly earnings are not material in this case for the reason that the employment was not continuous, seasonal, nor dependent upon the weather, within the meaning of the compensation law. Under this situation wages must be construed to be the money rate at which the services were recompensed. What is to be considered is not the wage in fact received, but the rate which the contract of hire fixed, whether that wage was in fact realized or not. See *Smolenski v. Eastern Coal Dock Co.*, 87 N. J. Law, 26, 93 Atl. 85.

It was clearly the intention of the legislature in establishing a schedule of benefits for the listed specific injuries to fix such benefits without regard to the extent of the subsequent disability of the injured employee. The period for payment of benefits is definitely fixed at 125 weeks. The rate of payment is clearly based upon the daily wage, not upon an average wage. The language is plain and unambiguous, and is not susceptible of other construction. In commenting on the same section of the statute, this court said: "Perhaps it was thought that the period

during which compensation was allowed would be sufficient to allow the injured workman to fit himself for some other kind of occupation, or that if a man lose the use of an eye, or hand, or arm, or leg, or foot, and is otherwise competent and in good health, this should not compel an employer, who perhaps has been guilty of no negligence, to bear the burden of his support indefinitely. The law seems intended to help the injured workman to help himself. Whatever the legislative motive or intent may have been, we cannot disregard the plain words of the statute." *Hull v. United States Fidelity & Guaranty Co.*, 102 Neb. 246, 166 N. W. 628.

We necessarily conclude that the plaintiff in this case is entitled to receive $14.67 per week for 125 weeks as compensation for the loss of his eye. The trial court therefore correctly awarded that amount.

Plaintiff claims that he is entitled to recover for loss of stereoscopic vision in the instant case. Stereoscopic vision may be defined as that function of the eyes which enables us to get the effect of solidity or depth. By its very nature, the vision of two eyes is required to give this effect. Naturally, the loss of one eye destroys stereoscopic vision. In the instant case, plaintiff suffered the loss of one eye, the other being uninjured. The compensation set forth in subdivision (3), section 48-121, Comp. St. 1929, is exclusive and includes all impairments that naturally follow the loss of an eye. We hold that plaintiff is not entitled to an award for loss of stereoscopic vision, it being included in the benefits awarded for the loss of an eye.

The plaintiff claims that he is entitled to a penalty for the delay of payments because there was no reasonable cause for controversy. This court has many times held: "Where a 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."

Claus v. DeVere, 120 Neb. 812, 235 N. W. 450. The case at bar does present a reasonable controversy between the employer and employee. In fact, it presents a situation that has never before been before this court. The trial court properly denied the penalty asked for.

In view of the conclusion reached, it is not necessary to consider other assignments of error set out in the briefs. We conclude that the judgment of the trial court was in all respects correct. An attorney fee of $100 is allowed plaintiff's attorneys for presenting the case in this court.

AFFIRMED.

IN RE ESTATE OF SOPHIA LEHMAN. RUTH PRESENT ET AL., APPELLEES, V. ARTHUR KOCHENTHAL ET AL., EXECUTORS, APPELLANTS.

283 N. W. 199

FILED JANUARY 6, 1939. NOS. 30430, 30431.

1. **Appeal.** Section 30-1601, Comp. St. 1929, provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby." *Held*, such orders made during the progress of probate proceedings, allowing fees for services, extraordinary or otherwise, to executors, and orders of partial distribution, even though notice by publication is given, as provided by section 30-1414, Comp. St. 1929, are interlocutory and intermediate and not final, and are not appealable.
2. **Executors and Administrators.** Section 30-1414, Comp. St. 1929, requiring notice by publication of administration accounts, contemplates final accounts of executors or administrators and final adjudication thereon.
3. ———: COMPENSATION. Section 30-1411, Comp. St. 1929, as amended by chapter 74, Laws 1937, fixes the schedule of fees for personal representatives of deceased persons, and provides for allowance of fees for extraordinary services rendered by such representatives.
4. ———: APPEAL. Section 30-1306, Comp. St. 1929, provides: "Any person aggrieved by any order, decree, or denial of a

court in pursuance of the provisions of this article, may appeal therefrom as provided for in other cases." This section of the statute is in article 13, of chapter 30, Comp. St. 1929, making provision for the administration of the estates of decedents, and pertains specifically to decrees and orders of the county court, assigning the estate to persons by law entitled thereto, and directing distribution of the estate to heirs, legatees and devisees of decedent. Said section contemplates appeals from such decrees and orders and from decrees and orders denying distribution.

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

Morsman & Maxwell, for appellants.

Webb, Beber, Klutznick & Kelley and *Loyal G. Kaplan, contra.*

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

MESSMORE, J.

On August 1, 1927, Sophia Lehman, a resident of Omaha, Nebraska, died, leaving a last will and testament, listing some 35 legatees, most of whom were nephews and nieces. The personal property of the estate amounted to $76,894.07 and the real estate to $119,000, the total estate amounting to $195,984.07. The estate, due perhaps to economic conditions, appears to have been overvalued in the inventory. The will provided for the appointment, as executors, of Jesse Kochenthal, Arthur Kochenthal, both of Rochester, New York, and Maurice Ollhouse of Omaha, nephews of the deceased. Maurice Ollhouse lived with and cared for the property of Sophia Lehman during a part of her lifetime, and the will provided that he be allowed $1,000 a year, to be paid in instalments of $250 a quarter, as long as he managed the property of the estate as one of the executors. The will further provided that the executors have complete charge of the property of the estate, to supervise, rent, repair, insure and sell and convey the real estate, and exercise their own best judgment in the

care, supervision and sale thereof to the best advantage to the estate. Maurice Ollhouse left for Germany in August, 1929, and has never returned. The two remaining executors were then charged with the full responsibility of managing the estate. The deceased, by her will, exhibited full confidence in the executors; she required no judicial order to be obtained for the sale of real estate, and required no bond to be given. The executors gave a nominal bond in the sum of $100.

Two cases are before us in these appeals by the executors, and, by agreement, have been consolidated for purposes of briefing and presentation. A large number of pleadings in the county and district courts were filed, which will be hereinafter concisely set out.

In November, 1935, appellees filed in the county court an application for an order modifying former orders entered therein, in which the court allowed compensation to the executors in sums aggregating $8,200, and asking that the amount be reduced to the sum of $1,200, which appellees contend are the statutory amounts to be allowed in such cases. On May 8, 1936, the county court denied the appellees' application of November, 1935. July 15, 1936, appellees filed their application in the district court, setting forth the same allegations as by their application set forth in the county court, and praying for a modification of the decree of the county court accordingly. November 12, 1936, the executors filed their motion to dismiss the appeal, for the reason that the county court's order of May 8, 1936, was not a final order and was not, therefore, an appealable order. January 7, 1937, this motion was overruled. March 15, 1937, the executors demurred to appellees' application, challenging the sufficiency thereof. March 31, 1937, the demurrer was overruled. April 10, 1937, the executors filed their answer, challenging the sufficiency of the appellees' pleading, and, in addition thereto, giving the history of the proceedings and their acts as such executors, setting forth a history of the reports filed by them and the extraordinary services they claim

to have rendered the estate; further, that the decree of the county court entered June 6, 1928, was entered after due publication of notice to all parties in interest, as provided by law, from which no appeal was taken. The answer pleaded the account of the executors, covering their acts as such executors from April 30, 1928, to October 31, 1931, and the decree of the county court allowing $1,400 each to the three executors, pursuant to the decree of June 6, 1928; that in the decree of the county court of December 24, 1931, from which no appeal was taken, the court specifically found that appellants were entitled to compensation for their services in addition to the amount allowed them by the decree of June 6, 1928, but, owing to the small amount then in their hands for distribution among the residuary legatees on the account filed December 1, 1931, they had consented that the matter of the allowance to them therefor and the amount thereof be postponed; that on August 21, 1934, appellants filed their petition for the administration proceedings, setting forth that they had received no compensation for their services as executors subsequent to June 6, 1928; that the gross amount coming into their hands subsequent to April 30, 1928, from rentals and other income, was approximately $51,000; they asked for an allowance of $5,000; that on August 21, 1934, the court allowed $4,000 for services and directed that the amount be divided equally; that, pursuant to such order, $2,000 was paid to each of these executors, and such disbursements were shown in the account filed by the executors in the county court November 12, 1935, covering their acts for the period from October 31, 1931, to October 31, 1935, which amount was allowed by the county court December 9, 1935.

April 21, 1937, appellees filed a motion to strike all of the executors' answer, except their appointment and qualification as executors. May 24, 1937, the motion was sustained. February 5, 1938, judgment in the district court was entered in favor of appellees, finding: On June 6, 1928, the county court allowed $4,200 to appellants and

Maurice Ollhouse for services as executors, each executor to receive $1,400; on August 21, 1934, the county court allowed an additional sum of $4,000, divided between the two remaining executors, each receiving $2,000. The district court found that the reasonable value of the services rendered by appellants as executors of the estate, on account of which they were allowed $6,800, was not to exceed $2,400, and that the county court abused its discretion when it allowed the appellants any amount in excess of $2,400; modified the order, requiring the executors to pay back to the estate the difference between $6,800 and the sum of $2,400.

This appeal involves the allowances made by the county court to the executors, and the evidence in the county court is of a documentary character. An examination of the reports filed by the executors shows an accounting in detail of the amounts collected for rents from real estate and from personal property and disbursements made. One report discloses an adjudication of the claim of Maurice Ollhouse, filed in the estate proceedings, in the amount of $79,000, and the participation of the executors in the adjudication of such claim, resulting in special benefits to the estate, by settlement had thereon, in the sum of $8,500. The reports further disclose the requests for fees for services rendered by the executors, extraordinary and otherwise, and are sufficient in this respect, and show amounts on hand and requests for partial distribution. The reports also show that the executors requested continuance on payment of fees in their behalf, due to lack of sufficient funds at the time to pay both their fees and partial distribution as prayed.

The principal question is whether or not the order of the district court, overruling the motion to dismiss the appeal, determined that the order of the county court of May 8, 1936, appealed from, was a final order, subject to review on appeal, and whether or not the judgment of the district court determined that the order of the county court of August 21, 1934, awarding compensation to executors, was

a final order and subject to review on the appeal from the county court's order of May 8, 1936.

Section 30-1601, Comp. St. 1929, provides: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county to the district court by any person against whom any such order, judgment or decree may be made or who may be affected thereby." This provision of the statute appears under article 16, "Appeals in Probate Matters."

In the case of *In re Estate of Creighton,* 91 Neb. 654, 136 N. W. 1001, this court held:

"The county court has exclusive, original jurisdiction of the probate of wills and the settlement of estates, and its final orders within its jurisdiction are binding upon all parties. * * *

"An order of the county court in the settlement of an estate, by which distribution is made of the assets, is appealable to the district court."

In *Bachelor v. Schmela,* 49 Neb. 37, 68 N. W. 378, it was held: "The law recognizes a substantial difference between the final settlement of the accounts of an executor or administrator and those made annually or at any stated periods during the course of the administration. A final settlement made pursuant to notice to persons interested in the estate is in the nature of a judgment and conclusive as to all matters included therein until reversed or set aside by means of a direct proceeding, or impeached on account of fraud, while an interlocutory (meaning intermediate and not final) *ex parte* accounting is but *prima facie* correct and subject to reexamination so long as the administration account remains unsettled." The case of *Boales v. Ferguson,* 55 Neb. 565, 76 N. W. 18, follows the rule as stated in *Bachelor v. Schmela, supra.*

In the case of *In re Estate of Wilson,* 97 Neb. 780, 151 N. W. 316, it was said: "It will be observed that the controversy relates entirely to the accounts of the administrator and is between the administrator and the estate. We have observed no final order of the court discharging

the administrator, and while he was serving as administrator orders of the court upon his accounts as such administrator were interlocutory only, and not final orders," —citing *Bachelor v. Schmela, supra.* The accounts filed by the executors in the instant case and allowed by the county court were allowed, as shown by the record, on statutory notice to all parties in interest. None of the accounts were final accounts. The notice was published by order of the court on each of the accounts.

Section 30-1414, Comp. St. 1929, in part provides: "Before the administration accounts of any executor or administrator shall be allowed, notice thereof shall be given to all persons interested, of the time and place of examining and allowing the same, and such notice shall be given by publication three (3) successive weeks in a legal newspaper published within the county, or if no legal newspaper is published within the county, then in a legal newspaper published in an adjoining county."

In *Thompson v. Pope,* 77 Neb. 338, 109 N. W. 498, we find this language at page 342: "Our statutes with reference to the collection and administration of the estates of deceased persons derive their origin in the first place from Massachusetts. It has been said that they have come to us by way of New Hampshire, Michigan and Wisconsin." The Massachusetts probate law is comprehensive but contains no provisions on notice, as shown by section 30-1414 of the Nebraska statute, but the Michigan statute, in substance, provides for notice and is similar to our provision of the statute in this respect, with the exception that oral notice may also be given.

In *Morton v. Johnston,* 124 Mich. 561, 83 N. W. 369, the Michigan statute was held to be applicable to all accounts of executors and administrators, whether final or intermediate. The court held that the case of *Musick v. Beebe,* 17 Kan. 47, did not apply in view of the Michigan statutes. The *Musick* case was referred to in *Bachelor v. Schmela, supra,* as authority for the court's decision.

In *Schinz v. Schinz,* 90 Wis. 236, 63 N. W. 162, there

was an order settling an intermediate account of the executor on notice to the parties in interest. The court said (p. 247): "The appellants now claim that this settlement was not final and conclusive upon the matters embraced in it. * * * We have no doubt of the right of the county court to settle and allow an executor's or administrator's account at any time before the rendition of his final account, upon notice as provided in the statute (R. S. sec. 3931), and that when thus settled and allowed it will be final and conclusive as to all matters embraced in it, and can be impeached and reopened only for fraud or mistake."

Thus, we have the appellants' contention and query as to whether or not the county court's orders in the instant case were final, or, if intermediate or interlocutory, were appealable as final when notice is given, as provided by section 30-1414, Comp. St. 1929. Our court has not decided the question, and it is here on first impression. The county court has exclusive, original jurisdiction over the probate of estates and settlement of accounts. In the instant case, upon showing made to the county court for services rendered by the executors and partial distribution made by such executors to the parties entitled thereto, the county court made several orders; due and proper notice was given as provided by section 30-1414, *supra,* in the settlement of administration accounts of the executors. Section 30-1601, Comp. St. 1929, provides for appeals from final order, judgment or decree. Our court is committed to the rule that such orders, as made by the county court in the instant case, are intermediate or interlocutory orders and very often are made *ex parte.* There is no decision in this state holding that statutory notice, as required by section 30-1414, *supra,* would make such order a final order.

We see no particular reason why the rule should be changed at this time. There may be criticism in that large estates, consisting of some considerable real estate, might be kept open indefinitely, to the loss of those interested in

the estate, and the estate might be divested of its assets, to the damage of the interested persons. This position is not well taken. Many protective remedies exist by virtue of statute and are entirely adequate to protect all parties in interest. Ordinarily, an adequate bond is required in large estates, regardless of the provision in the will to the contrary, as a means of protection both to the court and the parties interested, and the will is not conclusive in this respect. To permit appeals on many separate orders, as in the instant case, would lead to a multiplicity of suits and additional expense, and would result in appeals pending in different courts all at one time, thus unnecessarily delaying the progress of administering the estate. The heirs might, in situations as presented by the instant cases, especially where they charge negligence on the part of the executors, having authority under the will, in refusing to sell real estate, resort to an application for an order to show cause; then an application to remove the executors might be resorted to, and, on an adverse ruling thereon, appeal may be had. *In re Estate of Pope*, 75 Neb. 550, 106 N. W. 659; *In re Estate of Vohland, ante*, p. 77, 280 N. W. 241. Such application was filed in the instant case and no appeal taken.

In *In re Estate of Wilson*, 83 Neb. 252, 119 N. W. 522, this court held: "For services rendered by H. in a business way, such as collecting rents of real estate, paying taxes thereon, insuring property, and attending to repairs, it was within the discretion of the court, if the evidence established that such services were extraordinary, to allow H. a reasonable compensation." See, also, *In re Estate of Wilson*, 86 Neb. 175, 125 N. W. 158.

Section 30-1411, Comp. St. 1929, provides for the commissions, schedule allowed, and for extraordinary services. So we have sufficient authority for the allowance to the executors of a reasonable fee for extraordinary services.

Appellees cite section 30-1306, Comp. St. 1929, which provides: "Any person aggrieved by any order, decree, or denial of a court in pursuance of the provisions of this

article, may appeal therefrom as provided for in other cases." Appellees state that the appeal in the instant case is based on an order of distribution and the heirs are aggrieved. This section of the statute appears under article 13, entitled "Distribution of Estate." The reports of the executors request the right to make partial distribution; such distribution is in no sense final, is and at all times should be subject to review by the court having original and exclusive jurisdiction in such matters. Section 30-1306, *supra,* pertains specifically to decrees and orders of the county court, assigning the estate to persons by law entitled thereto, and directing distribution of the estate to heirs, legatees and devisees of the decedent. This section contemplates appeals from such decrees and orders, and from decrees and orders denying distribution. We believe that section 30-1601, Comp. St. 1929, is the provision governing appeals in probate and administration of estates.

The district court did not have jurisdiction to entertain the appeals, in the instant cases, from such orders sought to be appealed from, made by the county court for partial distribution and allowances of executors' fees. Such orders, under the law of this state, were interlocutory orders and not final orders, within the meaning of section 30-1601, Comp. St. 1929.

The executors rendered an account of their services from October 31, 1935, to February 15, 1937, including certain items of expense charged by the executors while in attendance on probate proceedings in the county court. April 5, 1937, appellees filed objections to the account, alleging that the executors had not filed an itemized statement as to their services and had performed no extraordinary services; alleging further that an appeal was pending in the district court by the appellees to have the executors refund certain fees. The county court made an allowance of additional fees to the executors for services rendered from August 21, 1934, to date, in the amount of $1,650. Subsequently, the appellees filed additional objections in the county court,

setting forth certain specific objections and, in addition thereto, alleging negligence on the part of the executors in handling the real estate, particularly in refusing to accept offers of purchase of the real estate. The county court overruled all of the objections filed by the appellees; hence the appeals. In the district court the executors filed a motion to dismiss the appeals from such orders of the county court. The motion to dismiss the appeals in the district court should have been sustained for the reasons given in this opinion.

The judgments of the district court are hereby

REVERSED.

IN RE ESTATE OF JACOB JENSEN. DANNEBROG LODGE NO. 216, I. O. O. F., APPELLEE, V. DANIA OLD PEOPLE'S HOME, APPELLANT.

283 N. W. 196

FILED JANUARY 6, 1939. No. 30435.

1. **Courts.** County courts have equity jurisdiction incidental to powers properly conferred by statute.
2. **Judgment: VACATION: PLEADING.** A petition filed more than two years after judgment was entered, seeking to set aside judgment for fraud, which shows on its face that fraud was discovered within two-year period, does not state a cause of action.
3. **Wills.** Specific legatee and residuary legatee, being the only persons interested, may agree upon a disposition of legacy different from that provided for in the will.
4. **Executors and Administrators.** Evidence examined, and *held* insufficient to sustain allegations of fraud.

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

John M. Berger, for appellant.

T. Victor Jorgensen and *Raymond T. Coffee, contra.*

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

KROGER, District Judge.

On May 25, 1926, one Jacob Jensen, a resident of Douglas county, died testate. His will was duly admitted to probate, and the only provisions thereof that are involved in this proceeding are paragraphs 15 and 16, which are as follows:

"Fifteenth: One (1) year after my death, pay to Dania Old People's Home, Omaha, Nebraska, if established or operating at that time, One Thousand and Five Hundred Dollars ($1,500.00). If the said Home is not in working order, hold that money for ten (10) years. After that time, pay it to Dannebrog Lodge No. 216, I. O. O. F. Omaha, Nebraska.

"Sixteenth: All the rest and residue of my estate, real, personal, or mixed, of which I shall die seised and possessed, or to which I shall be entitled at the time of my decease, and remaining after the satisfaction of the above bequest and devise and any devise and bequest which may fail for any cause whatsoever, I give, devise and bequeath to Dannebrog Lodge No. 216, I. O. O. F. Omaha, Nebraska."

Frank V. Lawson was appointed administrator with the will annexed and on February 26, 1932, filed his final account and application for discharge. Due notice of this application was given and on March 22, 1932, an order was entered discharging said administrator and directing distribution.

Thereafter and on October 13, 1936, a petition was filed in the county court of Douglas county, Nebraska, in the Jacob Jensen estate by Dannebrog Lodge No. 216, I. O. O. F., the residuary legatee, seeking to have the order of March 22, 1932, set aside and an order entered that the $1,500 mentioned in said paragraph 15 of the will be declared and determined to be the property of said Dannebrog Lodge No. 216, I. O. O. F., alleging that said order was obtained by fraud which was not discovered by the petitioner until May, 1936.

To this petition the administrator and the Dania Old People's Home filed their demurrer, challenging the juris-

diction of the court and the sufficiency of the petition. This demurrer was overruled, and thereupon answers were filed by the administrator and Dania Old People's Home, and on November 17, 1936, the county court of Douglas county entered an order setting aside the order of March 22, 1932, and on November 24, 1936, entered a decree construing paragraph 15 of said will and directing the administrator to deliver and pay to Dannebrog Lodge No. 216, I. O. O. F., the money therein mentioned.

From the action of the county court, an appeal was taken to the district court for Douglas county by the Dania Old People's Home. The petition of appellee was attacked by what was designated a motion for judgment on the pleadings, which was, in effect, a demurrer, and again raised the question of the jurisdiction of the probate court and the sufficiency of the petition, which motion was overruled, and appellant and the administrator filed their answers.

For some reason not disclosed by the record, the case was treated as a law action, a jury was impaneled, trial had, and, at the close of all of the evidence, the court sustained a motion of the appellee to dismiss the appeal. Motion for new trial was filed and, from an order overruling this motion, this appeal is prosecuted.

Numerous errors are assigned, but the contention of appellant may be briefly summarized, as follows:

First, that the jurisdiction of the county court to vacate its decree of March 22, 1932, was limited to a period of two years by section 20-2008, Comp. St. 1929;

Second, that appellee's petition did not state facts sufficient to constitute a cause of action; and

Third, that the evidence of appellee was not sufficient to sustain the allegations of its petition.

The argument that the county court had no jurisdiction to vacate its decree in this case is based on the contention that the county court has only such powers as are given it by statute; that section 20-2001, Comp. St. 1929, provides for the vacation or modification of judgments at a sub-

sequent term upon certain grounds, among which is "Fourth. For fraud practiced by the successful party in obtaining the judgment or order;" that section 20-2008, Comp. St. 1929, provides that proceedings to vacate or modify a judgment or order on account of fraud must be commenced within two years after the judgment was rendered, with certain exceptions not applicable to this case; and that section 20-2009, Comp. St. 1929, makes these provisions applicable to supreme and county courts.

This court has, however, held that the statute enumerating grounds upon which a judgment may be vacated after term does not provide an exclusive remedy, but such grounds are concurrent with independent equity jurisdiction. *Pavlik v. Burns,* 134 Neb. 175, 278 N. W. 149; *Howard Stove & Furnace Co. v. Rudolf,* 128 Neb. 665, 260 N. W. 189.

In the case of *In re Estate of Kelly,* 103 Neb. 524, 175 N. W. 653, this court held that, since the county court has exclusive original jurisdiction in probate matters, it has ample power to set aside probate decrees procured by fraud, independent of statute, citing *Genau v. Abbott,* 68 Neb. 117, 93 N. W. 942, and *Youngson v. Bond,* 69 Neb. 356, 95 N. W. 700. Again, in *Gainsforth v. Peterson,* 114 Neb. 442, 207 N. W. 935, it was held that county courts have equity jurisdiction incidental to powers properly conferred by statute.

Since the decree attacked in this case was entered in a probate matter, the county court had jurisdiction to entertain an action to vacate said decree even though such proceedings were equitable in their nature and not brought within the time fixed by statute.

Appellant's second contention is that the petition of appellee did not state facts sufficient to constitute a cause of action. In the petition it is alleged that fraud had been practiced upon one William Jorgensen, purporting to represent the appellee, as a result of which Jorgensen was induced to approve the decree. The specific fraud alleged is that the administrator, by filing with the court a receipt therefor, represented to the probate court that he had turned over to the Dania Old People's Home the legacy

provided for in paragraph 15 of said will, whereas, in truth and in fact, he had not done so, but had entered into an agreement with said William Jorgensen, by the terms of which he agreed to hold said money for a period of ten years and, at the end of that time, turn it over to the Dannebrog Lodge No. 216, I. O. O. F., if the Dania Old People's Home was not at that time completed and in working order.

While the petition alleges that the fraud was practiced on William Jorgensen, the only fraud pleaded is fraud upon the court, and the petition, on its face, shows that Jorgensen at all times knew the true facts, and there is no showing in the petition why the action was not brought within the statutory period of two years. Under the circumstances, the petition did not state a cause of action and the demurrer should have been sustained. See *Brandeen v. Beale,* 117 Neb. 291, 220 N. W. 298.

When, in connection with the third assignment of error, we examine the record to ascertain what the evidence on behalf of petitioner discloses, we find that the only evidence bearing on fraud offered by appellee was the testimony of William Jorgensen, and his testimony is that, at the time the decree of March, 1932, was entered, he knew all of the facts in connection therewith, knew that the administrator had not paid the money to the Dania Old People's Home, and knew that the administrator had entered into an agreement with representatives of the Dania Old People's Home and William Jorgensen, as representative of Dannebrog Lodge No. 216, I. O. O. F., to close the estate at that time in order to save the premium on the administrator's bond. According to this agreement, the administrator was to hold the money until the expiration of ten years from the death of testator, at which time the money was to be turned into court to be disposed of as the court should direct. The receipt obtained from the Dania Old People's Home was for the purpose of closing the estate, and the interested parties all knew that the money had not actually been paid over to said home.

That William Jorgensen had the authority to represent the petitioner is clearly shown by power of attorney given him by Dannebrog Lodge No. 216, I.O.O.F., under date of March 20, 1931, and any agreement entered into by said William Jorgensen would be binding on the appellee.

The evidence falls far short of supporting the allegations of appellee's petition. There was no fraud practiced on any one. On the contrary, all of the parties seem to have acted in good faith with a desire to avoid unnecessary expense. The Dania Old People's Home and the residuary legatee were the only parties interested in the $1,500 legacy. They had a perfect right to agree between themselves for a disposition of the legacy other than that stipulated in the will. 69 C. J. 1274; *In re Murphy's Estate,* 217 Ia. 1291, 252 N. W. 523. So far as the evidence in this case discloses, they did not go that far. According to the evidence, they agreed that, instead of holding this money as administrator, Frank V. Lawson was to hold the money as trustee for the stipulated period and at the end of that time, if the parties could not agree upon its disposition, it was to be paid out as the court might direct.

An examination of the entire record discloses that there was no fraud committed by any one, hence there was no occasion for invoking the equity powers of the county court.

The judgment of the district court is reversed and the cause remanded, with directions to enter a judgment reversing the judgment of the county court and directing that the action be dismissed.

REVERSED.

IRVIN E. WATENPAUGH, APPELLEE, V. L. L. CORYELL & SON ET AL., APPELLANTS.
283 N. W. 204

FILED JANUARY 6, 1939. No. 30397.

1. **Negligence.** In an action for damages by fire alleged to have started from a stove on premises occupied by defendant, it was

not enough in order to entitle plaintiff to recover merely to show that a fire actually occurred and that plaintiff's personal property was injured thereby, but plaintiff was required to go further and show that the proximate cause of the happening of the fire and the consequent damages to plaintiff's property was the negligence of defendant in one or more of the particulars claimed.

2. ———. The gist of an action for damages from a fire is negligence, and by negligence is meant the doing of some act under the circumstances surrounding the fire involved which a man of ordinary prudence would not have done, or the failure to do some act or to take some precaution which a man of ordinary prudence would have done or taken.
3. ———. The term negligence is merely a convenient term under which to group a failure to conform to standards of conduct insisted on by society.
4. ———: BURDEN OF PROOF. In an action for damages by fire alleged to have started from a stove on premises occupied by defendant, the burden was on plaintiff to prove that the negligence charged was the proximate cause of his damages.
5. ———. In an action for damages by fire alleged to have started from a stove on premises occupied by defendant, evidence of plaintiff which failed to show the cause of the fire was insufficient to justify the submission of the case to the jury.

APPEAL from the district court for Thayer county: ROBERT M. PROUDFIT, JUDGE. *Reversed and dismissed.*

Walter C. Weiss, Tunison & Joyner and *Richard B. Travis,* for appellants.

Baldwin & Baldwin, contra.

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

LANDIS, District Judge.

The principal question for decision is whether the judgment on the verdict rendered in the court below for plaintiff, Irvin E. Watenpaugh, against the defendants L. L. Coryell & Son, a corporation, and its employee Emil A. Hebel, for damages to personal property, situated on adjacent premises, destroyed by fire alleged to have been

caused by negligence, is sustained by sufficient evidence.

Defendants joined issue by general denial to plaintiff's claim of negligence set out in his petition as:

"That on the premises occupied by the defendants * * * was a certain room, about seven feet by seven feet, which was used by said defendants as an office; that in said room defendants had erected or caused to be erected a heating stove; that on the night of January 2, 1937, the defendant, Emil A. Hebel, carelessly and negligently allowed oily coats, jackets, blankets and other combustible materials to be hung up and accumulated in said room; that at said time and on said date said defendant, Emil A. Hebel, carelessly and negligently kindled and built up a large and extremely hot fire in said stove, and carelessly and negligently left said office room with no one to watch and regulate said fire; and that in a few moments thereafter said stove became overheated and as a result of the carelessness and negligence of said defendant the buildings located on said premises were damaged and destroyed by fire."

Plaintiff's evidence to sustain his claim of negligence showed that there was an office room 7 foot square in the northeast corner of the transport shed which contained on the night of the fire a cast-iron heating stove 35 inches high, with a 14-inch fire bowl, with a fire in it, a coal bucket containing nut size soft coal, a shelf table, above this pigeonholes for filing reports, with paper reports on the table and in the pigeonholes, a box on the floor, 10 or 11 unionalls hanging on the walls, some of these within 18 or 24 inches of the stove. These unionalls were used by the men in servicing the trucks and were greasy. Also on the floor were three quart tin cans with screw tops, used to take samples of kerosene out of the trucks to send to the state; that it was cold and windy at the time of the fire; that it started around 10 p. m., January 2, 1937, and when seen the fire was coming out of the roof above, and ceiling of the office.

Between 11 and 11:30, after the fire started, one witness testified as to defendant Hebel: "He said that he had put

in some coal into the stove to build up a fire and had then left the room to go to the lunch room for a cup of coffee." Another witness testified to this same conversation: "He said that he put a little coal, or put coal in the fire, and had went out to get some coffee, and the fire had started while he was out." This same witness testified to a conversation on the day after the fire: "I said, 'then, the fire was attributed to the over-heated stove?' " And he answered "Yes."

On the afternoon of the day after the fire another witness testified to a conversation: "He told me that he built a hot fire in there and then went to the lunch room, and said for me not to mention it to anybody because he didn't want to let it out."

The gist of this action is negligence. It is not enough merely to show that a fire actually occurred and that plaintiff's personal property was injured thereby, but plaintiff must go further and show that the proximate cause of the happening of the fire and the consequent damages to plaintiff's property was the negligence of the defendant in one or more of the particulars claimed.

No presumption of negligence either in the kindling or management of the fire is raised by the destruction of property by it.

"In action for damage by fire, alleged to have spread from defective stove in adjoining building, judgment for plaintiff could not be sustained, where there was no proof that defect in stove caused fire." *Lezotte v. Lindquist*, 51 S. Dak. 97, 212 N. W. 503.

In an action for personal injuries sustained as a result of fire allegedly caused by gas-pipe leak existing by reason of gas company's negligence, we have held in *Mischnick v. Iowa-Nebraska Light & Power Co.*, 125 Neb. 598, 251 N. W. 258, that directed verdict for defendant company was proper in absence of proof showing exact cause of fire.

By negligence is meant the doing of some act, under the circumstances surrounding the fire involved, which a man of ordinary prudence would not have done, or the

failure to do some act or take some precaution which a man of ordinary prudence would have done or taken. It is merely a convenient term under which to group a failure to conform to standards of conduct insisted on by society. We should consider whether probable harm to plaintiff's property could have been reasonably anticipated as within the range of defendant's conduct.

The evidence of the plaintiff fails to show the cause of the fire. There was no defect in the stove, stovepipe or chimney; there is no proof that any of the articles in the office room caused the fire. When first discovered it was in the ceiling of the office and the roof above. The tin quart cans with screw tops on the floor, the unionalls hanging on the wall, the paper forms on the table and in the pigeonholes in the wall, the box on the floor, none of these is shown as connected with the fire or the cause of it.

Assuming that the statements of defendant Hebel were competent, which we do not decide, they amount to admitting that he put some coal on the fire and went out for a cup of coffee; expressed an opinion the day after the fire to a question as to what the fire was attributed to, and that he had built a hot fire and went to the lunch room, and asked not to be quoted.

On a cold night, the ordinary use of a stove is to place coal in it and build a hot fire. There is nothing to show that the stove was overheated the night of the fire, nor that an overheated stove caused the fire. There could be many different causes for this fire. We cannot say it is unusual for Hebel to leave the office for a cup of coffee. The burden is on the plaintiff to prove that the negligence charged was the proximate cause of the damages, which this record shows was not sustained.

The evidence introduced by plaintiff was insufficient to submit the case to the jury, and the separate motions of the defendants for a directed verdict made at the end of plaintiff's case in chief should each have been sustained.

The trial court committed error in overruling the motions for directed verdict, and this cause is

REVERSED AND DISMISSED.

GLEN H. GOODMAN, APPELLANT, V. JOSEPH O'GRADY, SR., APPELLEE.

283 N. W. 213

FILED JANUARY 6, 1939. No. 30464.

1. Habeas Corpus: RETURN TO WRIT. In a habeas corpus proceeding against the warden of the state penitentiary, seeking the release of relator from such institution, the return to the writ is *prima facie* evidence of the cause of detention as provided by section 29-2819, Comp. St. 1929.
2. ———. In such a proceeding, when the warden's return to the writ sets out that the relator escaped and remained away from prison for a period of time, and relator, at the hearing, offered no evidence in denial of the return, the return will be considered as true; and where, upon such consideration, it appears that relator's sentence would not be completed until some date in the future, relator is entitled to no relief.
3. Criminal Law. One who escapes and remains away from prison during the period of his sentence is not entitled to have the time that he was absent deducted from the term of his original sentence.

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

J. A. Hayward, for appellant.

Richard C. Hunter, Attorney General, and *George W. Ayres, contra.*

Heard before ROSE, C. J., PAINE, CARTER and MESSMORE, JJ., and LANDIS and KROGER, District Judges.

LANDIS, District Judge.

Glen H. Goodman sentenced for ten years from Douglas county for manslaughter, now confined in the Nebraska state penitentiary, obtained a writ of habeas corpus against the warden, seeking his release from that institution. Upon hearing the writ was denied by the district court and relator has appealed the case to this court.

The gist of relator's complaint is that his sentence has expired, his contention being that it had not been properly

and sufficiently established, as contended by the respondent, that he had escaped from the Douglas county jail while awaiting transfer to the state penitentiary after the imposition of a penitentiary sentence and had remained away for one year, three months and twelve days before his apprehension.

His attorney in argument admitted his client had been in escape, the return to the writ by the warden sets it out fully, and at the hearing below the only witness was the warden, called by the relator, who testified to it, and relator never denied it.

The return to the writ is *prima facie* evidence of the cause of detention as provided by section 29-2819, Comp. St. 1929.

In *Sanclaer v. State*, 111 Neb. 473, 196 N. W. 686, we have held that the return to the writ is evidence and *prima facie* proof of the things recited therein. Relator at the hearing offered no evidence in denial of the return showing the escape. The warden, as relator's witness, in response to the question, "When has this man's time expired as of record?" answered, "According to my records, this man is subject for release, with the time earned to date, January 24, 1939."

Relator is not entitled to have the time he is out of prison, because of his own fault, deducted from the time he will be required to serve when he is finally captured and delivered to the prison authorities to serve out the time of his original sentence.

The district court properly denied the writ, and the case is

AFFIRMED.

HARLAN H. HENDERSON, APPELLANT, V. JOHN F. GETTMAN, APPELLEE.

283 N. W. 372

FILED JANUARY 13, 1939. No. 30457.

Courts. In a county having a population of less than 50,000, the

county court has jurisdiction to hear and determine a complaint against a child for delinquency, though a judge of the district court may be in the county at the time. Laws 1925, ch. 56; Comp. St. 1929, sec. 43-222.

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

Carrico & Carrico, for appellant.

Richard C. Hunter, Attorney General, and *Francis V. Robinson, contra.*

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

ROSE, C. J.

In the district court for Buffalo county in a petition on behalf of Harold Henderson, a minor 14 years of age, it is alleged he is unlawfully deprived of his liberty by John F. Gettman, superintendent of the state industrial school for boys at Kearney. The petition contains a prayer for Henderson's release on habeas corpus. Under a writ directed to Gettman, Henderson, hereinafter called "minor," was produced in court. There was a hearing upon the petition, the return to the writ of habeas corpus and the evidence, and there was a resulting order remanding the minor to the custody of the superintendent of the industrial school. The minor appealed.

A chronology of the proceedings showing the cause of the detention, as disclosed by the return of the writ of habeas corpus and the evidence, follows: October 21, 1936, on complaint of the county attorney of Adams county, minor found by the county court of Adams county to be a delinquent and as such he was paroled to Karl D. Beghtol; November 22, 1937, parol revoked by county court of Adams county for violation of its terms, and order committing the minor as a delinquent to the Nebraska home for dependent children at Lincoln; November 29, 1937, minor delivered to Nebraska home for dependent children; November 30, 1937, resolution by Nebraska state board of control directing

transfer of minor as a delinquent to the state industrial school for boys at Kearney, where he was subsequently detained.

On appeal it is contended on behalf of the minor that his detention is unlawful on the ground that the county court of Adams county was without jurisdiction to hear or determine any complaint of delinquency against him, because a judge of the district court having jurisdiction was in Adams county at the time. This contention is based on a statute which provides:

"The district courts of the several counties in this state and the judges thereof in vacation, shall have original jurisdiction in all cases coming within the terms of this article; the county court in each county shall have concurrent jurisdiction with the district court, but such jurisdiction shall not be exercised by the county court except in the absence of the judge or judges of the district court from the county." Comp. St. 1929, sec. 43-202.

The position of the minor is that the county court is one of limited and inferior jurisdiction in respect to decisions affecting the custody and care of delinquent or dependent children and that its orders in such a capacity are void unless its record shows absence of district judges from the county at the time, citing Constitution, article V, section 16; *Martin v. Sanford,* 129 Neb. 212, 261 N. W. 136; *Foote v. Chittenden,* 106 Neb. 704, 184 N. W. 167; *Murphy v. Lyons,* 19 Neb. 689, 28 N. W. 328. The record of the county court does not show that the judges of the district court were absent from the county in this instance. The habeas corpus record contains a stipulation that a district judge was then in Adams county.

Gettman, as superintendent, defends his custody under the resolution of the state board of control and county court orders made pursuant to the statute providing:

"The district and county courts in the several counties shall have concurrent jurisdiction over all cases coming within the provisions of this article. In counties having a population of more than fifty thousand, county courts shall

not exercise such jurisdiction, except in the absence from the county of the district judge or judges." Comp. St. 1929, sec. 43-222.

If this section is controlling in the case at bar, the minor is not entitled to release from his present custody, because the population of Adams county was less than 50,000, and the jurisdiction of the county court did not depend on absence of district judges. These two sections were enacted in separate bills by the legislature of 1905 and did not then conflict in any respect. The first was part of an act passed March 8, 1905, under the title "An act to regulate the treatment and control of dependent, neglected and delinquent children." Laws 1905, ch. 59. Under that title the act of March 8, 1905, contained the following provisions on jurisdiction:

"The district court of the several counties in this state and the judges thereof in vacation shall have original jurisdiction in all cases coming within the terms of this act. The county court in each county shall have concurrent jurisdiction with the district court, but such jurisdiction shall not be exercised by the county court except in the absence of the judge or judges of the district court from the county." Laws 1905, ch. 59, sec. 2.

That legislation appeared in the 1913 compilation of statutes, as follows:

"The district courts of the several counties in this state and the judges thereof in vacation, shall have original jurisdiction in all cases coming within the terms of this article; the county court in each county shall have concurrent jurisdiction with the district court, but such jurisdiction shall not be exercised by the county court except in the absence of the judge or judges of the district court from the county." Rev. St. 1913, sec. 1245.

The title of the act of March 21, 1905, was "An act to provide for the punishment of persons responsible for, or contributing to, the dependency or delinquency of children." Laws 1905, ch. 195. Under this title, the provision on jurisdiction reads thus:

"The district and county courts in the several counties shall have concurrent jurisdiction over all cases coming within the provisions of this act. In counties having a population of more than 50,000 county courts shall not exercise such jurisdiction, except in the absence from the county of the district judge or judges." Laws 1905, ch. 195, sec. 2.

This legislation appeared in the compilation of 1913, as follows:

"The district and county courts in the several counties shall have concurrent jurisdiction over all cases coming within the provisions of this article. In counties having a population of more than fifty thousand, county courts shall not exercise such jurisdiction, except in the absence from the county of the district judge or judges." Rev. St. 1913, sec. 1264.

The changing of the word "act" as used in the legislation of March 21, 1905, to the word "article" in the Revised Statutes of 1913, appeared to extend the jurisdiction of the county court in all counties having less than 50,000 inhabitants to "dependent, neglected and delinquent children," thus extending the legislation beyond its original import and creating a conflict of jurisdiction, the subject-matter quoted being included in "article" VII of the revision. Rev. St. 1913, ch. 16, art. VII, secs. 1263, 1264. The changes from the original enactments appeared in the compilation of 1922. Comp. St. 1922, sec. 1194. In this condition of the legislation, the legislature of 1925, under a title broad enough to cover jurisdiction of the county court over dependent, neglected and delinquent children, reenacted section 1194, Compiled Statutes of 1922, part of the "article" in which it was inserted, as already quoted from section 43-222, Compiled Statutes of 1929. Laws 1925, ch. 56.

The reenactment of 1925 conferred on the county court of Adams county the jurisdiction exercised in committing the minor to the Nebraska home for dependent children. It is the last expression of the legislative will on the subject

and its validity is not questioned in this proceeding. In view of the conclusion reached on the question of jurisdiction, the judgment of the district court is

AFFIRMED.

HOME OWNERS' LOAN CORPORATION, APPELLEE, V. EDITH IRENE SMITH ET AL., APPELLANTS.
283 N. W. 371

FILED JANUARY 13, 1939. No. 30459.

Mortgages: FORECLOSURE: SALE: CONFIRMATION. "Inadequacy of price will not prevent confirmation of a sheriff's sale of land under a decree foreclosing a mortgage thereon unless the price is so low as to shock the conscience of the court or to evidence fraud." *Conservative Savings & Loan Ass'n v. Mancuso*, 134 Neb. 779, 279 N. W. 725.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Affirmed.*

Floyd E. Wright, for appellants.

William Morrow, contra.

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

ROSE, J.

This is a suit in equity to foreclose a 7,175-dollar mortgage on lots 9 and 10, block 2, Shumway Place Addition to Scottsbluff. Home Owners' Loan Corporation, mortgagee, is plaintiff and Edith Irene Smith and Alvin C. Smith, her husband, mortgagors, are defendants. For defaults in payments, the district court decreed a foreclosure of the mortgage February 4, 1937, for an unpaid debt of $8,478.93. Under the decree the sheriff sold the mortgaged property March 7, 1938, to plaintiff for $9,089.75. Urging inadequacy of price, defendants objected to confirmation of the sheriff's sale. The objections were overruled and the sale confirmed. Defendants appealed.

The question for determination on appeal is adequacy of

the price for which the sheriff sold the property to plaintiff, defendants contending it was far below value. The trial court heard objections to confirmation on affidavits. Three affiants gave estimates of value respectively: $13,800; $14,000; $14,200. The estimates of four other affiants were respectively: $8,000; $8,400; $9,000; $9,000. There was no evidence that there would be a better bid at a resale, if ordered. There was no direct evidence of fraud. The sale price was not so low as to imply fraud or as to shock the conscience of the court. Following is the controlling rule:

"Inadequacy of price will not prevent confirmation of a sheriff's sale of land under a decree foreclosing a mortgage thereon unless the price is so low as to shock the conscience of the court or to evidence fraud." *Conservative Savings & Loan Ass'n v. Mancuso,* 134 Neb. 779, 279 N. W. 725.

The judgment below therefore will be affirmed, with permission of defendants, in district court, to redeem the mortgaged land from the foreclosure sale within 30 days from the filing of the mandate of the supreme court therein.

AFFIRMED.

ALBERT D. CHILEN, APPELLEE, V. COMMERCIAL CASUALTY INSURANCE COMPANY, APPELLANT.
283 N. W. 366

FILED JANUARY 13, 1939. No. 30450.

1. **Statutes:** CONSTRUCTION. "In determining the intention of the legislature, all provisions of the statute bearing upon the point in dispute should be taken into consideration and given due weight." *City of Lincoln v. Janesch,* 63 Neb. 707, 89 N. W. 280.
2. ———: ———. "All statutes *in pari materia* must be taken together and construed as if they were one law." *Hendrix v. Rieman,* 6 Neb. 516.
3. ———: ———. "In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails." 59 C. J. 999.
4. **Workmen's Compensation:** APPEAL: DISMISSAL. From a considera-

tion of the terms of the Nebraska workmen's compensation act, and statutes *in pari materia*, it appears that where a civil action, equitable in nature, is established by statute, and jurisdiction to try the same *de novo* on appeal is vested in the district courts, such courts possess the power, upon motion of the plaintiff, to enter a dismissal of such action, then pending before them, without prejudice.

5. ———: AWARD: CONCLUSIVENESS. Under the terms of the Nebraska workmen's compensation act, then in force, the award of April 12, 1933, here in suit, had the force and effect of a judgment between the parties in interest. It was binding likewise on the insurance carrier and not subject to collateral attack.
6. Appeal. In the absence of a bill of exceptions, a ruling upon a motion, based upon evidence, will be presumed to be supported thereby.

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

C. L. Clark and *H. A. Ronin*, for appellant.

J. W. Kinsinger, contra.

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

EBERLY, J.

This is an action by plaintiff upon an award of compensation against the defendant who was the insurance carrier for plaintiff's employer, Krause Cornice & Roofing Company, at the time plaintiff's injuries were sustained. The action seeks to enforce the insurance contract issued by this defendant, which contained the agreement of the insurer, that "it will promptly pay to the person entitled to same all benefits conferred by this act (the Nebraska workmen's compensation act), and all instalments of the compensation that may be awarded or agreed upon. * * * Such agreement shall be construed to be a direct promise by the insurer to the person entitled to compensation enforceable in his name." Trial to the district court, a jury being waived, resulted in a finding that plaintiff was entitled to have and recover "the forty weekly instalments of compensation awarded to plaintiff in the award entered

April 12, 1933, which are now unpaid and delinquent," and a judgment was entered therefor in the sum of $624.45, with interest, and costs, and attorney fees ultimately taxed at $200. From the order of the trial court overruling its motion for a new trial, defendant insurance company appeals.

The course of events preceding this judgment appealed from include the following, viz.: The plaintiff, an employee of the Krause Cornice & Roofing Company, suffered an accident on March 10, 1930, arising out of and in the course of his employment. In September, 1930, his employer filed a petition before the compensation commissioner of the state of Nebraska for the determination as to the amount of permanent disability of Chilen. This petition alleges that injuries suffered by plaintiff consisted of "a communite fracture of the right os calcis," and that at the time of his accident he was receiving $36 a week. The award made upon hearing of this petition was that Chilen was "temporarily totally disabled from and after the 10th day of March, 1930, and to and until the 16th day of July, 1930," and thereafter partially disabled until the 20th day of October, 1930; that Chilen has been paid compensation at the rate of $15 for each week during the period of temporary total disability and at the rate of $5 a week from and including the 16th day of July, 1930, to and including the 30th day of August, 1930, and that Chilen was entitled to seven weeks additional payments of compensation at $5 a week from August 30 to October 20, 1930, on account of temporary partial disability. There is a further finding that Chilen had sustained a partial permanent loss of use of his right foot to the extent of 20 per cent. thereof, for which he was awarded additional payments of $15 a week for a period of 30 weeks from and after the 20th day of October, 1930.

On September 4, 1931, plaintiff Chilen filed a second petition for compensation with the compensation commissioner of the state of Nebraska, based on the accident of March 10, 1930. In this pleading the Krause Cornice &

Roofing Company and the Commercial Casualty Insurance Company are named as defendants. It alleges in part: "Nature and extent of injury: Injury to both feet, including fracture of bones of right heel, injury to back and to lumbar vertebræ. Extent and nature of injury, except to right heel, unknown to claimant until August 20, 1931. Injury progressive, culminating in total disability about August 1, 1931."

Upon a hearing on this petition, at which evidence was introduced, on April 12, 1933, an award was entered and made by the chief deputy compensation commissioner whereby it was determined that plaintiff at the time of his injury was employed by G. C. Krause and W. A. Krause, doing business as Krause Cornice & Roofing Company, only, and it was further "ordered, adjudged, and decreed that plaintiff shall have and recover from the defendants, jointly and severally, compensation at the rate of $14.40 each week from and after the 27th day of February, 1933, for a period of 300 weeks, less the number of weeks for which plaintiff has been compensated for total disability, as and for a 60 per cent. partial permanent disability to plaintiff." This award was not appealed from.

Under the terms of the compensation act then in force, between the parties this order so entered is to be regarded as having the force and effect of a judgment except so far as expressly modified by the terms of the act itself. *Gray v. Burdin*, 125 Neb. 547, 250 N. W. 907.

In the construction of this order, however, it is to be noted that there is no allegation in this second petition, nor finding in the award thus entered thereon, that the Commercial Casualty Insurance Company was the insurance carrier of the Krause Cornice & Roofing Company when plaintiff's injuries were received. Against the insurance company no liability whatever is pleaded, nor in the award are there any findings of fact on which such liability may be based. The award refers to the insurance company, if at all, only in the use of the words "the defendants," without other description or designation. The insurance com-

pany was not a party to the first hearing of this cause, nor named in the award entered therein, nor is it a necessary party to the second award. Query: In this situation, can there be said to be a valid award against the insurance company entered on April 12, 1933, and has it any liability save and except the provisions of its bond in suit herein? *Sipple v. Haltom,* 86 Ind. App. 432, 158 N. E. 486; *Morsch v. Besack,* 52 Neb. 502, 72 N. W. 953; *Foster & Smith Lumber Co. v. Leisure,* 3 Neb. (Unof.) 237, 91 N. W. 556.

Still later, the record discloses that on September 30, 1936, Chilen filed in the workmen's compensation court of the state of Nebraska his petition against Krause Cornice & Roofing Company and the defendant insurance company, for "modification of award and for further compensation," based wholly on the injuries received by him in the accident of March 10, 1930, and set out at length their progressive development thus far. Plaintiff alleged therein that his disabilities have become, since the entry of the last award (April 12, 1933), and now are, total and permanent within the meaning of the workmen's compensation act of this state. The prayer of this petition is that the awards heretofore entered in his favor be modified as by statute provided, and that a further award be entered finding that plaintiff has become, and now is, totally and permanently disabled, etc. To this, the defendants named filed their joint answer, which, in addition to a general denial, and among other matters pleaded, expressly and specifically denied any increase of disability now suffered by the plaintiff as attributable to the injuries received by him in the accident of March 10, 1930; pleaded their full performance and payment of the conditions of the awards heretofore entered in plaintiff's favor; and prayed that plaintiff's petition for modification of award and for further compensation, filed September 30, 1936, be dismissed and that they go hence without day, but prayed for no affirmative relief. On May 10, 1937, after reception of evidence, and hearing on the merits before Frank M. Coffey, one of the

judges of the Nebraska compensation court, an order was entered sustaining the contentions of defendants and dismissing plaintiff's petition. On May 22, 1937, plaintiff filed in the compensation court in said cause his written waiver of rehearing in the above cause before the Nebraska workmen's compensation court, and of his election to appeal directly to the district court for Lancaster county, Nebraska. Thereupon, in the manner provided by law, such appeal was perfected and filed in the district court for Lancaster county, and issues joined therein by the parties thereto. On June 19, 1937, upon written motion of Chilen, this action and proceeding for modification and for further compensation instituted by plaintiff in the compensation court by petition filed September 30, 1936, now pending on appeal, was, by the district court for Lancaster county, Nebraska, dismissed without prejudice to any future action or proceeding by plaintiff for relief.

Under the terms of the insurance policy, first quoted herein, the theory of plaintiff set forth in his petition in the instant case is fully sustained, and his action properly instituted against the insurance carrier. It is, in effect, an action on the statutory bond executed by the insurance company.

Preliminary to the discussion of the specific assignments of error, it is to be noted that in the instant case there are presented injuries which are latent and progressive in character. As to such injuries, this court has announced the doctrine, viz.: "Where an employee is accidentally injured, and such injury is latent and of a progressive nature, and subsequently culminates in a compensatory disability, a claim for such injury under our employers' liability act may be filed with the compensation commissioner at any time within one year after the culmination thereof." *City of Hastings v. Saunders*, 114 Neb. 475, 208 N. W. 122. See, also, *Selders v. Cornhusker Oil Co.*, 111 Neb. 300, 196 N. W. 316; *McGuire v. Phelan-Shirley Co.*, 111 Neb. 609, 197 N. W. 615; *Collins v. Casualty Reciprocal Exchange*, 123 Neb. 227, 242 N. W. 457.

In the present case the effect of the accident of March 10, 1930, was to inflict on Chilen two independent, unconnected, and unrelated injuries,—an injured right foot which was discovered at once, and an injury to his back which was latent and progressive, and the existence of which was evidently unknown when the first award of compensation was made, and was not really discovered and determined until after the first award had been complied with. It is the last situation that we are exclusively concerned with in the instant proceeding.

Appellant contends that on the face of the record the order entered by the workmen's compensation court of May 10, 1937, has never been "reversed or modified upon appeal," and still remains "conclusive" on all parties to the litigation. This is founded on the provisions of section 48-174, Comp. St. Supp. 1937, which are, viz.: "4. * * * the court shall assign one of the judges of said court to hear the cause and make such findings, and such orders, awards or judgments as said court or judge is authorized by law to make, and such findings, orders, awards and judgments shall be signed by the judge before whom such proceedings were had. When proceedings are had before a judge of said court, his findings, orders, awards and judgments shall be conclusive upon all parties at interest unless reversed or modified upon appeal as hereinafter provided." In this connection appellant's contention is that a dismissal without prejudice entered in the district court on appeal is not a reversal or modification of this order contemplated by the terms of this enactment. The provisions quoted formed a part of section 13 of chapter 57 of the Session Laws of Nebraska for 1935. In consideration of the proposition here presented, we are committed to the view that, "In determining the intention of the legislature, all provisions of the statute bearing upon the point in dispute should be taken into consideration and given due weight." *City of Lincoln v. Janesch*, 63 Neb. 707, 89 N. W. 280. See, also, *State v. City of Lincoln*, 68 Neb. 597, 94 N. W. 719; *Follmer v. Nuckolls County*, 6 Neb. 204. In addition, we have

adopted as a principle of statutory construction, the following: "All statutes *in pari materia* must be taken together and construed as if they were one law." *Hendrix v. Rieman,* 6 Neb. 516. See, also, *State v. Babcock,* 21 Neb. 599, 33 N. W. 247; *State v. Omaha Elevator Co.,* 75 Neb. 637, 106 N. W. 979; *Downey v. Coykendall,* 81 Neb. 648, 116 N. W. 503.

With these principles in mind, we find in section 48-157, Comp. St. Supp. 1935, originally enacted as section 36 of chapter 57 of the Session Laws of Nebraska for 1935, the following, viz.: "Every order and award of the compensation court *shall be binding upon each party* at interest unless notice of intention to appeal to the district court has been filed with the compensation court within fourteen days following the date of rendition of the order or award: Provided, that the order or award shall be binding and final, notwithstanding notice of intention to appeal has been filed within the time limit, until the appeal has been perfected and service had upon the opposite party or parties." (Italics supplied.)

We appreciate the requirement that the two provisions last quoted are to be harmonized and each enforced if possible. But, if an irreconcilable conflict exists, the accepted rule in this jurisdiction is: "Where different parts of the same statute are in irreconcilable conflict, the last words stand, and those in conflict therewith are disregarded." *Van Horn v. State,* 46 Neb. 62, 64 N. W. 365. See, also, *Albertson v. State,* 9 Neb. 429, 2 N. W. 892; *Omaha Real Estate & Trust Co. v. Kragscow,* 47 Neb. 592, 66 N. W. 658.

"In accordance with the principle that the last expression of the legislative will is the law, in case of conflicting provisions in the same statute, or in different statutes, the last in point of time or order of arrangement prevails." 59 C. J. 999.

But the following also forms a part of section 48-174, Comp. St. Supp. 1937, as applicable after hearing and determination of a cause in the compensation court before a single judge or commissioner, viz.: "Provided, however,

that in any case the employer or the injured employee or his dependents, as the case may be, may waive rehearing before the compensation court and in such case any appeal shall be directly to the district court of the county in which the accident occurred; * * * which court shall have the authority to hear and determine the cause as in equity, when the same *for all purposes* shall be tried as one in equity; and that said appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court, and in such cases the trial in the district court shall be a trial *de novo*." (Italics supplied.)

Our Civil Code provides: "Where, by general or special statute, a civil action, legal or equitable, is given and the mode of proceeding therein is prescribed, this Code shall not affect the proceedings under such statute, until the legislature shall otherwise provide; but in all such cases, as far as it may be consistent with the statute giving such action, and practicable under this Code, the proceedings shall be conducted in conformity thereto. Where the statute designates by name or otherwise the kind of action, but does not prescribe the mode of proceedings therein, such action shall be commenced and prosecuted in conformity to this Code; where the statute gives an action, but does not designate the kind of action, or prescribe the mode of proceeding therein, such action shall be held to be the civil action of this Code and proceeded in accordingly." Comp. St. 1929, sec. 20-2226.

Here, by the terms of the compensation law, a civil action equitable in nature is established and jurisdiction to try the same *de novo* on appeal is vested in district courts. The statute designates the nature of the action in the district court and is silent as to procedure therein except to prescribe that it shall be a trial *de novo,* and as in equity. All of the provisions of our Civil Code are applicable and controlling, as they are in any other civil action equitable in nature. This includes the right of the plaintiff during the pendency of the proceeding to dismiss his action without

prejudice before final submission to the court. Comp. St. 1929, sec. 20-601.

Indeed, this seems to be the effect on the decree appealed from, apart from statute: "As to the force and effect of a judgment pending proceedings for review, aside from controlling influence of positive statute, this distinction is to be observed; where the proceeding is one in which the cause is retried as upon original process, the judgment is vacated, but if the proceeding is in the nature of an ancient writ of error, merely requiring a review of errors and an affirmance of the judgment, or a reversal and remanding for further trial, the judgment of the lower court is not vacated, but merely suspended. Hence, if a statutory remedy by appeal provides for a complete trial *de novo* in the appellate court, or it expressly so provides, the perfection of the proceeding usually operates to vacate the judgment of the court below." 4 C. J. S. sec. 611. See, also, *Stalbird v. Beattie,* 36 N. H. 455; *Fort v. Fort,* 118 Tenn. 103, 101 S. W. 433.

The conclusion, so far as express legislative intent is indicated, is in harmony with the form of the statute here involved. The right of direct appeal to the district court, as provided in our compensation act, is embraced in a proviso, of which the language first quoted above, upon which appellee relies, constitutes no part. The accepted rule of construction is: "A proviso is a clause engrafted on a preceding enactment for the purpose of restraining or modifying the enacting clause, or of excepting something from its operation which otherwise would have been within it." 59 C. J. 1087. Therefore, a proviso prescribing a trial *de novo* in equity, and thus necessarily implying the right of dismissal without prejudice *pendente lite,* as an exception to the statute, would manifestly be controlling as here applied. *Ford v. Boyd County,* 111 Neb. 834, 197 N. W. 953.

It follows that the dismissal without prejudice entered in the district court for Lancaster county on motion of the plaintiff was proper and did not operate to reinstate the order or award appealed from, and that the award of April

12, 1933, so far as unperformed, remains in full force and effect. *Eden Musee Co. v. Yohe,* 37 Neb. 452, 55 N. W. 866; *Bancroft Drainage District v. Chicago, St. P., M. & O. R. Co.,* 102 Neb. 455, 167 N. W. 731; *Blue River Power Co. v. Hronik,* 116 Neb. 405, 217 N. W. 604.

On the merits of the present action, defendant claims the award upon which plaintiff's present action is based is erroneous and excessive, in that appellant was not credited with the payments for partial disability made prior to the entry of the award here in suit. Whether payment made of partial temporary disability occasioned by the injured foot before the latent injuries in the back had been discovered are required to be credited on an award for permanent disability of the latter is certainly, under the facts in this case, a serious question which we are not called upon to determine. The terms of the award here in suit embraced a period of 300 weeks, less the number of weeks for which plaintiff had been compensated for total disability as and for 60 per cent. permanent disability. It is not questioned that the district court gave due credit as required and limited by the express terms of this award in suit. After such credit had been given there remained 40 payments of $14.40 each unpaid, for which judgment was rendered. Appellant's claims of error all arise prior to the entry of the award and existed when it was made. Under the terms of the statute, the award here in suit had the force and effect of a judgment between the parties in interest. *Gray v. Burdin,* 125 Neb. 547, 250 N. W. 907; Comp. St. 1929, sec. 48-157. It is expressly by statute made binding upon the insurance carrier and may not be by it collaterally assailed. Comp. St. Supp. 1937, sec. 48-147; *Beadle v. Harmon,* 130 Neb. 389, 265 N. W. 18; *Heald v. Polk County,* 46 Neb. 28, 64 N. W. 376.

As to plaintiff's claim that the order of the district court retaxing the attorney fees and allowing the same in the sum of $200 constituted an excessive allowance, the transcript discloses that evidence was submitted to the trial court at this hearing, which is not embodied in the bill of

exceptions as allowed and settled by that court. Under these circumstances, the question of fact involved is not for our consideration. "In the absence of a bill of exceptions, a finding of fact, or ruling upon a motion, based upon evidence, will be presumed to be supported thereby." *Travelers Ins. Co. v. Sawicki,* 122 Neb. 108, 239 N. W. 726. See, also, *State v. State Bank of Ravenna,* 127 Neb. 338, 255 N. W. 549.

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

AFFIRMED.

KANSAS CITY LIFE INSURANCE COMPANY, APPELLEE, V. CHARLES NEVERVE ET AL: GROTSIE NEVERVE, APPELLANT.
283 N. W. 378

FILED JANUARY 13, 1939. No. 30465.

Appeal: PARTIES. "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114.

APPEAL from the district court for Hayes county: CHARLES E. ELDRED, JUDGE. *Appeal dismissed.*

Charles M. Bosley, for appellant.

E. H. Evans, Urban Simon and *Francis V. Robinson, contra.*

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

EBERLY, J.

This is an appeal from an order confirming a sale of certain premises made pursuant to a mortgage foreclosure, which order was entered on March 21, 1938. Two questions are presented, viz.: (1) A motion filed by appellee, and noticed for hearing on December 5, 1938, for a dismissal

of the appeal for lack of necessary parties in this court; and (2) the alleged error of the trial court in overruling defendant Grotsie Neverve's motion to vacate the public sale had because of insufficiency of purchase price.

The decree of foreclosure was entered on March 23, 1936, adjudging the lien of the Kansas City Life Insurance Company, a corporation, which lien included taxes assessed against the premises paid by it as mortgagee for the years 1929 to 1932, both inclusive, to be a first and senior lien; that the mechanic's lien pleaded by the Cowles-White Lumber Company was a second lien on the mortgaged premises, but further determined that such lumber company lien "was concurrent" with mechanics' liens foreclosed on parts of said premises in favor of Oscar Jenkins and also Smiley Dawson. Personal service of summons appears to have been made upon the defendants Charles Neverve and Grotsie Neverve in the district court, and the foregoing decree finds that they, together with their wives, jointly executed and delivered certain of the notes and real estate mortgages securing the same, in suit in this proceeding, and each of the defendants last named were, by the express terms of the decree, "given exceptions" thereto.

On November 13, 1937, an order of sale was issued on the decree of foreclosure to satisfy the same in favor of Kansas City Life Insurance Company, Cowles-White Lumber Company, a corporation, Oscar Jenkins, and Smiley Dawson. The public sale was had on the 20th day of December, 1937, and the mortgaged premises sold to the Cowles-White Lumber Company, defendant and cross-petitioner, for the sum of $14,400. The amount due on the decree at the time of sale was $17,063.52 and $214.31 costs of suit. The defendant Grotsie Neverve alone filed objections to this sale, and he alone introduced evidence to support the objections thus tendered. At the close of this proceeding, the court confirmed the sale. The decree of confirmation in terms recites: "To all of which said findings in order defendant (Grotsie Neverve) excepts and gives notice of intention to appeal in open court." The only

statutory provision for notice of appeal to be given in the district court is the following: "It shall be sufficient notice of such appeal to file in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within ninety days after the rendition thereof, a notice of intention to prosecute such appeal signed by the appellant or appellants or his or their attorney of record, but if such notice is not given, the supreme court may provide by rule for notice after the appeal is lodged in that court." Comp. St. 1929, sec. 20-1914. The transcript on appeal, which contains no such "notice of intention" whatever as contemplated by such statute, was filed in this court on June 16, 1938. On the same day the appellant filed his præcipe in this court, which states, in part, "that Grotsie Neverve is the only party appealing, and that the Kansas City Life Insurance Company, a corporation, is the appellee herein." Accordingly, the appellant on the 16th day of June, 1938, also caused a "notice of appeal" to issue from this court, directed to, and to be served upon, the Kansas City Life Insurance Company only, as sole appellee. The record contains a bill of exceptions purporting to contain all the evidence offered and given by each of the parties, etc. The record further discloses that the proposed bill of exceptions, previous to its allowance and settlement by the trial judge, had been served upon the attorney for the Kansas City Life Insurance Company only. It is obvious that this bill is not binding upon any one save the party served, and upon proper motion filed by parties to the cause not served will be suppressed. *Fitzgerald v. Brandt,* 36 Neb. 683, 54 N. W. 992. The record also discloses that appellant's brief in this court was served upon the Kansas City Life Insurance Company only. The effect of the appellate proceeding, if successful, will be to set aside and annul the sale had in which all parties to the proceeding have a direct financial interest and will be substantially affected by the disposition of the case made in this court. On December 1, 1938, and before this cause was reached in this court for submission on the merits,

the Kansas City Life Insurance Company filed its motion to dismiss the appeal because of lack of necessary parties, it appearing from the transcript that Cowles-White Lumber Company, although a defendant and cross-petitioner in the proceedings in the district court and a purchaser of the premises at the judicial sale, the confirmation of which was appealed from, had not been, by appellant, made a party on appeal. This motion to dismiss had been duly noticed for hearing on December 5, 1938, at the hour of 9 o'clock a. m., at the then sitting of the court, and for convenience of counsel, and of this court, was argued and submitted December 8, 1938, on the same day the case was argued on the merits.

We are committed to the view that the purchaser at a judicial sale, by reason of his purchase alone, becomes a party to the proceedings on appeal, and is entitled to enforce the rights secured by his purchase. *State v. Denton State Bank,* 126 Neb. 486, 253 N. W. 670; *Penn Mutual Life Ins. Co. v. Creighton Theatre Bldg. Co.,* 51 Neb. 659, 71 N. W. 279; *Dawson County v. Whaley,* 134 Neb. 509, 279 N. W. 164.

We have long been committed to this rule, viz.: "All parties to a cause tried in the district court who may be affected by the modification or reversal of the judgment must be made parties in the proceedings to review the said cause in the supreme court." *Barkley v. Schaaf,* 110 Neb. 223, 193 N. W. 267. See, also, *Donisthorpe v. Vavra,* 134 Neb. 157, 278 N. W. 151; *Bliss v. Farmers Grain & Stock Co.,* 127 Neb. 147, 254 N. W. 725; *Castek v. Tully,* 127 Neb. 657, 256 N. W. 506; *Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114.

This is not a mere technical rule. An eminent text-writer has well said, viz.: "The rule requiring parties having an interest that may be materially affected by the judgment to be brought before the appellate tribunal is in no sense a technical one; on the contrary, it is a rule of great importance and is required in order to secure a litigant 'his day in court.' It is, when justly understood, a salutary

rule, and one required by the constitutional principle that the rights of a party cannot be adjudicated without notice. The right of a party to notice is, indeed, fundamental, for without notice it cannot be truly said that there is due process of law." Elliott, Appellate Procedure, sec. 143.

In *Castek v. Tully,* 127 Neb. 657, 256 N. W. 506, this court announced the rule, viz.: "The failure to have all the affected parties before the appellate court may alone be sufficient to prevent a determination of the issues raised by appeal." And, likewise, this rule, in effect, was applied by this court, on its own motion, in *Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114.

The facts hereinbefore recited, suggesting the manifest inability of this court to administer any relief without substantially affecting the rights of necessary parties not now before it, would apparently impose on this tribunal the duty of applying the principle announced in the cases last above cited. In view of the motion presented by appellee, the adoption of this course may not be necessary and we may not be required to decide the question suggested.

The appellant contends that the lack of necessary parties has been waived by appellee in not seasonably objecting thereto. This doctrine of waiver must be considered in the light of the obvious fact that, in legal proceedings, one party cannot by consent, actual or implied, confer jurisdiction over some other person. A person by waiver may of course confer authority over himself and his own rights, but he cannot confer authority over another person or his rights.

The appellant cites but two cases to sustain his contention, viz.: *Olsen v. Marquis,* 88 Neb. 610, 130 N. W. 267, and *Bates-Smith Investment Co. v. Scott,* 56 Neb. 475, 76 N. W. 1063.

From the *Olsen* case we quote: "There is nothing in the transcript to advise us whether W. P. Marquis answered in the district court; notice of appeal was not served upon him, and he has not appeared in this court. The plaintiff argues that there is a defect of parties and that we should

not consider the case upon its merits. The objection is not otherwise presented than by an argument in the brief, and was not brought to our attention until John A. Marquis had submitted the case upon the merits. Upon the authority of *Bates-Smith Investment Co. v. Scott,* 56 Neb. 475, the objection will be held to have been presented too late for consideration." And, in the first paragraph of the syllabus in the *Olsen* case, we find the following: "A nonjoinder of parties in an appeal to this court will be waived by not objecting until the case is submitted upon the merits."

In the *Bates-Smith Investment Company* case we quote from the opinion, where, after discussing the rule as to the presence of all necessary parties on appeal, the opinion states: "But it has also been held that such defect is waived if the objection is not made before the submission of the cause on its merits. In the case at bar no motion has been made for the dismissal of the proceedings on the ground of defect of parties. The first mention of it appears in the brief for defendant in error on the merits, and is too late to be of any avail. The defect of parties, if any, must be treated as waived." The rule is announced in the first paragraphs of the syllabus of this *Bates-Smith* case, in the following form: "All parties to a joint judgment must be joined in error proceedings therefrom, and a nonjoinder is a fatal defect in the proceedings; but if the objection is delayed until the final submission of the cause on its merits, the defect is waived."

In *Consaul v. Sheldon,* 35 Neb. 247, 52 N. W. 1104, not cited by appellant, the rule of "waiver" is stated as follows: "Where the cause is submitted to this court on its merits, and no objection is interposed that there is a defect of parties until after such submission, it will be taken to constitute a waiver of the absence of proper parties."

On the other hand, in *Farney v. Hamilton County,* 54 Neb. 797, 75 N. W. 44, Norval, J., says: "It is also insisted that the county has waived its right to object to a hearing on the merits by accepting service of the briefs of the

opposing party without then raising the point that there was a defect of parties. The doctrine has been more than once asserted that the submission of a cause on the merits in the appellate court, without objection that all the parties to a joint judgment had not been brought in by the petition in error, is a waiver of such defect. *Consaul v. Sheldon,* 35 Neb. 247; *Curtin v. Atkinson,* 36 Neb. 110. But in no case has this court held that the acceptance of service of briefs is a waiver of a defect of parties. It certainly could not have that effect. A defendant to a petition in error has the right to insist, on his first appearance in the appellate court, *before the final submission is there taken on the merits of the cause,* that all parties interested in either sustaining or reversing the judgment brought up for review must be made parties to the error proceeding, either as plaintiff or defendants." (Italics supplied.)

In the instant case the motion to dismiss was filed on December 1, 1938, and under rules of the court it was for presentation before the submission of the cause on the merits. The fact that, for the convenience of the court, the submission of both the motion and the cause on the merits were taken at the same sitting may not impair the rights of the litigants, it plainly appearing that the question of the absence of necessary parties was raised by the appellee prior to the final submission of the cause on the merits.

It follows that the motion to dismiss must be sustained. This necessarily prevents the consideration of the appeal on the merits.

APPEAL DISMISSED.

CITY OF SCOTTSBLUFF, APPELLEE, V. JAMES W. ACTON, APPELLANT: PIONEER REALTY & INVESTMENT COMPANY ET AL., APPELLEES.

283 N. W. 374

FILED JANUARY 13, 1939. No. 30448.

1. **Municipal Corporations: SEWERS: SPECIAL ASSESSMENTS. Section**

16-651, Comp. St. 1929, provides in part: "Special taxes may be levied by the mayor and council for the purpose of paying the cost of constructing sewers or drains within the city, such tax to be levied on the real estate lying and being within the sewerage district in which such sewers or drains may be situated to the extent of benefits to such property by reason of such improvement."

2. ———: ———: ———. "All taxes for such improvements must be levied on property specially benefited by the improvement, but no taxes for the improvement can be levied on property outside of the improvement district." *McCaffrey v. City of Omaha*, 91 Neb. 184, 135 N. W. 552.

3. ———: ———: ———. Where a city properly levies a special assessment against certain real estate and tax sale certificates are foreclosed to collect the special and general assessments against an entire tract of land, the greater portion of which is not benefited by the special assessment, and a judgment in foreclosure is entered against the owner, and the real estate ordered sold; *held*, decree of foreclosure thereon is subject to collateral attack, and the tax sale certificates foreclosed and judgment in foreclosure thereon are void proceedings.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Reversed and dismissed.*

Morrow & Morrow, for appellant.

Floyd E. Wright and *Straight Townsend, contra.*

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

MESSMORE, J.

This is an action to foreclose a tax sale certificate, issued by the county treasurer of Scotts Bluff county to the county of Scotts Bluff, duly assigned to the city of Scottsbluff, on tax lot 12, in section 23, township 22 north, range 55 west of the 6th P. M. Tax lot 12 contains approximately 17 acres and is a triangular piece of land abutting on the right of way of the Chicago, Burlington & Quincy Railway Company. The city of Scottsbluff laid a sewer along the south side of this tract of land and levied a special assessment against the south 150 feet of the same, comprising three to four acres, to pay the cost of construction

of the sewer. The county treasurer issued a tax sale certificate covering the entire tax lot 12, which included the land against which no special assessment was levied, and which was a greater portion of lot 12 than the land against which the assessment was levied.

On March 3, 1937, plaintiff filed a petition in foreclosure against lot 12 on a tax sale certificate for general taxes and special assessments, setting forth the amount due as $3,035.41, and praying for foreclosure of the tax sale certificate and sale of the real estate, and for attorneys' fees and costs. Defendant Acton (appellant here) did not plead nor answer. On May 1, 1937, a default judgment was entered against defendant. No appeal was taken from this judgment. On July 12, 1937, prior to the sale of the land, defendant filed a petition in the district court in the same cause of action, alleging ownership of lot 12, and asking that the court divide the amount of the decree, setting forth the amount to be paid to redeem that part of lot 12 not within the sewer district, and against which the city of Scottsbluff had not levied a special assessment for improvements; that at the request of defendant, the county assessor had undertaken to divide, and had divided, taxes on lot 12, setting forth the amount to be paid to redeem that portion of lot 12 sought to be redeemed. On July 14, 1937, objections to the application of defendant for permission to redeem were filed in the district court by plaintiff, setting forth that the county assessor made no division of the tax levied against lot 12; that the division of the tax, alleged to have been made by the county assessor, was an unfair division, and that the county assessor was without authority to make a division of the tax; that lot 12 had never been divided, but was one lot and taxed as such; that after a decree is entered in a tax foreclosure suit there can be no partial distribution. The real estate was sold. Objections to confirmation, containing the same subject-matter as in the petition of defendant, were filed July 16, 1937; the sale was set aside and a new sale ordered, and objections to confirmation of the second sale

were filed by the defendant, containing the same subject-matter as in previous pleading. A journal entry by the court on March 7, 1938, among other findings, found that the question as to the validity of the tax sale certificate, issued by the county treasurer of Scotts Bluff county, had already been adjudicated and the certificate found to be valid by order of the court, entered in this action on July 27, 1937.

In the case before us we are concerned with the question whether or not the blanket tax sale certificate, issued by the county treasurer against tax lot 12, against a portion of which special assessments were levied by the city of Scottsbluff, is void, and, if void, did the district court have jurisdiction to enter a decree ordering said entire tax lot 12 to be sold to satisfy special assessments levied against a part thereof?

Section 16-651, Comp. St. 1929, reads in part: "Special taxes may be levied by the mayor and council for the purpose of paying the cost of constructing sewers or drains within the city, such tax to be levied on the real estate lying and being within the sewerage district in which such sewers or drains may be situated to the extent of benefits to such property by reason of such improvement."

In *McCaffrey v. City of Omaha,* 91 Neb. 184, 135 N. W. 552, this court held: "All taxes for such improvements must be levied on property specially benefited by the improvement, but no taxes for the improvement can be levied on property outside of the improvement district."

"The only foundation for special assessments rests in the special benefits conferred upon the property assessed." *Morse v. City of Omaha,* 67 Neb. 426, 93 N. W. 734.

In the case of *Hanscom v. City of Omaha,* 11 Neb. 37, 7 N. W. 739, it was held that special assessments could only be levied on property specially benefited, and only to the extent of the benefits. And in *Cain v. City of Omaha,* 42 Neb. 120, 60 N. W. 368, it was held: "The only foundation for a local assessment lies in the special benefits conferred upon the property assessed, by the improvement to pay

which the assessment is made, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation, and therefore illegal." In the opinion the case of *Hanscom v. City of Omaha, supra,* was cited.

This court is committed to the rule that all levies for special assessments must be made within the improvement district to the extent of the benefits to such property by reason of the improvement. The city of Scottsbluff properly levied the special assessments as shown by the ordinances.

The appellant cites section 77-2045, Comp. St. 1929, which in part reads: "No lot or parcel of land shall be sold for taxes due upon any other lot or parcel of land," and *Taylor v. Evans,* 106 Neb. 233, 183 N. W. 89, in which one Evans commenced a suit to foreclose tax liens, setting up each of the tax certificates as a separate lien upon the particular tract covered thereby. The owner of the land was made a defendant; he made no appearance, and a default decree was entered by the court against the owner. He failed to pay the amount of the lien as adjudged by the court against the owner. The clerk of the court combined the two amounts due upon both liens and directed the sheriff to sell both tracts for the aggregate sum, instead of keeping the two liens and the two tracts separate and distinct.

The owner of the land filed no objections to the sale, the sale was confirmed and deed ordered to the purchaser. Subsequently, the owner of the land commenced an action to cancel the deed and all proceedings leading up to it, and to be adjudged the right to redeem. Relief was granted him in the court below, and the sale was declared void. The decree was in conformity with the statute (Rev. St. 1913, sec. 6565, now Comp. St. 1929, sec. 77-2045). The violation by the sheriff of the terms of the decree undoubtedly would have entitled the owner to an order setting aside the sale, if he had filed timely objection before confirmation. The question was whether or not the action of the sheriff was a mere irregularity, which would be cured by confirmation, or was a mode of sale adopted by the

sheriff, in which the court was without jurisdiction either to order in the first instance, or afterwards, by confirmation, to ratify and approve. In the body of the opinion we find this language (p. 235): "If it was clearly beyond the limits of the court's jurisdiction, a sale of the two tracts for the combined amount of the liens would be void, and, therefore, subject to collateral attack. The court could not, by confirmation, make valid a procedure which it could not in the first instance have ordered." And at page 237 the opinion stated: "We can see no distinction between a case wherein two or more separate tax liens upon distinct tracts are involved and a case in which two or more separate mortgages upon distinct tracts owned by the same person are sought to be foreclosed. In the latter case it has been held that a sale of the tracts together for a gross sum is unauthorized and void, and will be set aside in a collateral suit. *Hull v. King,* 38 Minn. 349. * * * The district court was, in our opinion, without jurisdiction to order or by confirmation to approve a sale so conducted; it was void and therefore open to collateral attack."

The case of *Taylor v. Evans, supra,* is authority for the proposition that, where a sale is void and conducted in violation of the decree of the court, such sale is subject to collateral attack by an independent action, or at any time by proper objections to confirmation. Where the tax sale certificate disclosed special assessments against a part of real estate not subject thereto, the defendant, under the decision in *Taylor v. Evans, supra,* could, by collateral attack, raise the issue at any time during the proceeding.

Plaintiff cites *School District D v. School District No. 80,* 112 Neb. 867, 201 N. W. 964, wherein this court held:

"A party to a lawsuit in the district court, where such court has jurisdiction over the person and subject-matter, will be bound by the judgment rendered in such case when collaterally attacking it, even though such judgment was irregularly or erroneously entered.

"If the trial court properly acquires jurisdiction, 'it has the right to decide every question which arises in the case,

and its orders and judgments, however erroneous, cannot be collaterally assailed. Such errors can only be taken advantage of by the proceedings in error or appeal to this court.' *Fraaman v. Fraaman,* 64 Neb. 472.

"A judgment acts as an absolute bar to a subsequent action based upon the same contentions, not only as to every matter offered to sustain or defeat said contentions, but also as to any other admissible matter which might have been offered for that purpose."

A careful reading of the above case discloses a clear distinction between it and the case at bar. The school district case involves a section of the statute providing for redistricting school districts. There is nothing to disclose that this section of the statute was void. In the instant case, the tax sale certificates, upon which the foreclosure decree was entered, are void.

The case of *Schobert-Zimmerman Drainage District v. Soll,* 132 Neb. 629, 272 N. W. 775, is cited by plaintiff, relative to special assessments had on two pieces of land owned by the same party and sold together on a tax sale certificate. The tracts were contiguous, and what the court did was to find the amount due against each tract of land separately, and if the sale of one was sufficient to take care of the amount due against both tracts, the surplus from the sale of one tract was to be applied in payment of the amount due against the other. The case is not analogous to the situation in the case at bar.

The tax sale certificates in this action are void. They cover real estate outside of the created sewer district and do burden all of lot 12 with the payment of special assessments, when, in fact, the greater portion of lot 12 is exempt therefrom. The district court was without jurisdiction to enter a decree of foreclosure on a void tax sale certificate.

In 61 C. J. 1127, it is stated: "The decisions generally recognize the following fundamental rules: (1) That a tax sale is invalid for every purpose unless the property was at the time liable for all the taxes for which it was sold. (2) That in the absence of a statute to the contrary each

parcel of a person's land separately assessed is liable to sale only for its own specific tax. (3) That where land is sold to pay the taxes due upon it, together with the taxes due upon other lands, whether such lands belong to the same or a different owner the sale is invalid."

Reference is here made to section 77-1602, Comp. St. 1929, relating to assessment books, how made by the county clerk, which is authority for the proper county official to segregate the special assessments in the instant case on the assessment books, as provided. Reference is also here made to section 77-1006, Comp. St. 1929.

For the reasons herein given, the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

WALTER WOLSKI, APPELLANT, V. NATIONAL LIFE & ACCIDENT INSURANCE COMPANY, APPELLEE.
283 N. W. 381

FILED JANUARY 13, 1939. No. 30466.

1. Insurance: POLICY: DEFAULT: REINSTATEMENT. Where industrial life insurance policy contains a clause that the policy shall be incontestable after the policy has been in force during the lifetime of the insured two full years from date thereof, except for nonpayment of premiums, or fraud, parties intend that there shall be a similar period to contest reinstatement, beginning when reinstatement occurs, instead of at date of policy.
2. ———: ———: ———: ———. A provision in an application for revival of an industrial life insurance policy that the applicant certifies that "I am now in good health, that I am suffering from no disease, either acute or chronic," means that good health is necessary to warrant reinstatement, and it is a condition precedent without which there is no liability on the policy.
3. ———: ———: ———: ———: PRESUMPTION. Where industrial life insurance policies are indorsed for reinstatement, premiums in arrears accepted, and subsequent premiums collected, the presumption is that the policies are valid, subsisting contracts, and that the insured is in good health. However, where the insurer proves that at the time insured

sought to reinstate the policies by making revival applications the insured was not in good health, and, in addition thereto, proves a tender of the paid-up life insurance, as evidenced by the policies, from date of lapse, and all premiums collected from date of lapse of the policies, and refusal to accept further premiums as soon as insurer obtained knowledge of the nature of insured's illness, as being such as to have antedated his reinstatement, then the presumption is rebutted.

4. ———: ———: ———: ———. Where an insurance company accepts delinquent premiums on lapsed policies and reinstates, without an application for revival, on a previous occasion, such action does not establish such a course of dealing or custom as would estop the company from asserting that the applicant for reinstatement was not in good health at the time he sought to revive the policies.
5. Witnesses: PRIVILEGED COMMUNICATIONS: WAIVER. Where industrial life insurance policy provides: "The company shall have the right at its option to make such investigation into matters upon which any claim may be based or the subject thereof as it may deem necessary in order to determine its liability hereunder," such provision constitutes a waiver by the insured of a privileged communication, within the meaning of section 20-1207, Comp. St. 1929, and such waiver is valid and binding upon those claiming any interest in the policy.
6. ———: ———: ———. A provision in an industrial life insurance policy which reads: "Proofs of death under this policy shall be made upon blanks to be furnished by the company and shall contain answers to each question propounded to" the physicians, constitutes a waiver by the insured of a privileged communication, within the meaning of section 20-1207, Comp. St. 1929, and such waiver is valid and binding upon those claiming any interest in the policy.
7. Evidence. "Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable." *City of Ord v. Nash*, 50 Neb. 335, 69 N. W. 964.

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

Friedman & Higgins, for appellant.

King & Haggart, contra.

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

MESSMORE, J.

This is an action brought by the beneficiary on two industrial insurance policies of the face value of $740 and $96, respectively, issued by the defendant company to Paul Wolski October 6, 1930. The premiums were paid on the policies until December 21, 1936, at which time the weekly premiums became delinquent. An agent of the company usually called at the insured's home weekly to collect the premiums, but did not call after said date. February 23, 1937, the insured paid premiums in arrears and signed applications to revive the policies. Other evidence will be discussed in the opinion. At the conclusion of all the testimony, on motion made by defendant, the trial judge directed a verdict for the defendant, and from this ruling the plaintiff appeals.

Plaintiff contends that the incontestable clause in the policies applies as well on a reinstatement as on the original issuance of the policies, and that the policies are incontestable except for fraud, or nonpayment of premiums. We have under consideration applications for revival of the two policies, and with reference to the incontestable clauses appearing in the policies, and the effect of such clauses in favor of the insured and the rights of the insurer thereunder, the following pertinent authorities are applicable:

In the case of *Lanier v. New York Life Ins. Co.*, 88 Fed. (2d) 196, it was held:

"Reinstatement of life policy, under agreement to present satisfactory evidence of insurability at home office and to pay overdue premiums with interest, was not automatic but required meeting of the minds, and to that extent had elements of a new contract, but old contract went back into force with premium rates and dates and general provisions unchanged, and, pursuant to promise in policy, default was wiped out as though it had not occurred. * * *

"Where life policy contains clause that policy shall be incontestable after two years from its date of issue except for nonpayment of premium, parties intend that there shall be a similar period to contest reinstatement, beginning

when reinstatement occurs instead of at date of issue of policy." See *State Life Ins. Co. v. Spencer*, 62 Fed. (2d) 640; *Pacific Mutual Life Ins. Co. v. Galbraith*, 115 Tenn. 471, 91 S. W. 204; *Teeter v. United Life Ins. Ass'n*, 159 N. Y. 411, 54 N. E. 72.

When the insured signed the applications for revival of the two policies, the old contracts were void, and if revived, as provided for by complying with the conditions for reinstatement, the heretofore existing insurance contracts, with all of their provisions, would again come into being.

Plaintiff further contends that the courts of Nebraska, by statute and precedent, are committed to the view that the language in the applications, in the medical examinations and in the policies upon which the defendant relies amount to no more than representations and do not constitute warranties, citing *Pollard v. Royal Highlanders*, 128 Neb. 790, 260 N. W. 399. The defense in that case was based upon statements made in the application for reinstatement upon which the company relied, and was not predicated upon a condition precedent. The policies in the instant case, among other things, provide that "there shall be no liability whatever under this contract for any disability or death resulting from an accident occurring or illness contracted or commencing prior to the date of the revival indorsement hereon as aforesaid."

It will be noted that the policies specifically provide that there shall be no liability if the applicant is not then in good health, and no medical examination by or certificate from a physician is required. The premiums on the two policies lapsed December 21, 1936, for a period of nine weeks. On February 23, 1937, the insured, calling at the office of the defendant, signed two applications for revival of the two policies. Each application contained the following provision:

"I hereby declare that I am the person who was formerly insured under the above named policy, and that having allowed it to become lapsed, I wish to revive it. I certify

that I am now in good health, that I am suffering from no disease, either acute or chronic, nor from the result of any accident or injury. * * * I ask a revival of my policy with the understanding that it will not be in force (although I now pay arrears) until the company shall have approved this application and evidenced same by indorsement on my policy, and that my policy, if revived, will only be in such benefit as provided by the rules of the company."

The reinstatements of the policies were indorsed thereon March 8, 1937. At the time that the applications for revival were entered into and the indorsements made on the policies, the insured was suffering from a serious disease, a cancer. The testimony of the operating surgeon is positive and absolute that the condition had existed for 8 months prior to the operation, or more, probably from 12 to 14 months. Therefore, the insured was not in sound health at the time he signed the applications for revival of the policies. The condition required by the company in reviving policies, requiring good health on the part of the insured, is, in no sense, unreasonable.

In the case of *Weddle v. Prudential Ins. Co.*, 130 Neb. 744, 266 N. W. 624, this court held: "A provision that a policy shall not take effect unless the insured is in good health upon the date of issuance is a condition precedent without which there is no liability under the policy." In the above case an action was brought on an industrial policy. In the body of the opinion we find this language (p. 749): "Where a policy of life insurance provides that it shall not take effect if on the date thereof the insured be not in sound health, but the premiums shall be returned, the insurer, to defend under this provision, must allege and prove a return or a tender of the premiums,"—citing *Metropolitan Life Ins. Co. v. Moore*, 117 Ky. 651, 79 S. W. 219. In the instant case, the defendant tendered the paid-up insurance, as evidenced by the policies, at the time they lapsed, plus all premiums paid for reinstatement and subsequent thereto.

In the case of *Van Dahl v. Sovereign Camp, W. O. W.*,

130 Neb. 181, 264 N. W. 454, an action was brought against a fraternal benefit association, where the constitution and by-laws of the association provided that a member, suspended for nonpayment of assessments, may, within three months from the date of his suspension, again become a member by paying all delinquent premiums to date, and that such payments will be held as a warranty that he was in good health and would remain so for 30 days thereafter; that there is no liability on the part of the association where it appears from the evidence that the holder of the certificate died within 30 days from the payment of the delinquent assessments. In the body of the opinion *Pickens v. Security Benefit Ass'n,* 117 Kan. 475, 231 Pac. 1016, was cited, in which case, in discussing by-laws of a fraternal beneficiary society, permitting reinstatement, providing the member was in good health, constituted a warranty of good health, it was "*held,* good health in fact was required, and the requirement was not satisfied by appearance of good health or reasonable belief that the member was in good health." *Pickens v. Security Benefit Ass'n, supra,* first paragraph of syllabus.

In the case of *Supreme Lodge v. Grijalva,* 28 Ariz. 77, 235 Pac. 397, also cited and quoted from in the *Van Dahl* case, it was said (p. 84): "The warranty of good health, and actual good health on the part of the insured, are expressly made conditions precedent to the reinstatement of the already automatically forfeited certificate in this case." See *Richards v. Maine Benefit Ass'n,* 85 Me. 99, 26 Atl. 1050.

We have further expression by this court, where an industrial policy was involved, as in the instant case, in *Hinnenkamp v. Metropolitan Life Ins. Co.,* 134 Neb. 846, 279 N. W. 784, wherein this court quoted from the case of *Weddle v. Prudential Ins. Co., supra,* holding: "A provision that a policy shall not take effect unless the insured is in good health upon the date of issuance is a condition precedent without which there is no liability under the policy."

This court recognizes and enforces a condition precedent, which is separate and distinct from the general rule with respect to representations of fact, where the defense is based upon fraud. In the *Hinnenkamp* case, none of the medical men testified that the insured had a cancer in September or October, 1935, or expressed their opinion to that effect. The company's physician gave the insured a superficial examination at the time that he applied for the policy. This physician was called as a witness for the defense and testified that, in his opinion, the insured was of unsound health at the date of the application and delivery of the policy. He had passed the insured by his examination of him. This presented a controverted issue of fact on the question of sound health, and this controverted question of fact developed on the testimony of the defendant company's own witnesses. In the instant case the evidence of Doctor Best is not controverted. After an extensive operation he removed the cancer and stated he would say that the cancer was at least 8 months old, and probably closer to 12 or 14 months. There is no controverted question. The insured was not in sound health at the time he signed the applications for revival of the policies. He did not meet the condition precedent. The *Hinnenkamp* case is distinguished from the case at bar.

Plaintiff contends that the indorsement of March 8, 1937, on the policies, in conformity with the revival applications, and the acceptance of subsequent premiums reinstated the policies and raised a presumption that the insured was in sound health and that the policies were valid and subsisting contracts, citing *Ruggiro v. Prudential Ins. Co.*, 113 N. J. Law, 561, 174 Atl. 882; *Life Insurance Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N. W. 862; *Weddle v. Prudential Ins. Co., supra.* This presumption is sufficient to sustain the burden of proof resting upon the plaintiff until the insurer introduces evidence to rebut it. *Weddle v. Prudential Ins. Co., supra*; 1 Cooley, Briefs on Insurance (2d ed.) 668; *Ruggiro v. Prudential Ins. Co., supra.* In the instant case the evidence of insurer did rebut the presumption.

Plaintiff further contends that the company is now estopped to insist upon its defense of a condition precedent, or to assert that the insured was not in sound health at the time of signing the revival applications; that such condition is waived by collection of the premiums after knowledge by the agent of the company of the illness of the insured, and that the agent recommended the reinstatement of the policies, as shown by the revival applications. Plaintiff cites 37 C. J. 405, which reads: "A waiver of, or estoppel to insist upon, a provision of the policy that no obligation is assumed by the company unless the insured is in sound health on the date of the policy may arise from a delivery of the policy or collection of premiums by an authorized agent possessing knowledge of the illness or unsound health of insured on the date of the policy."

Under the foregoing contention the defendant company would waive the nonliability provision by collecting premiums from February 22, 1937, to April 12, 1937. The defendant claims that it obtained its first knowledge of the illness of the insured on March 26, 1937, when claim blanks were received by it for weekly disability. The insured's niece testified that she went to the company's local office about a week after March 1 and reported the insured as ill; that he became ill February 28, 1937. The record is void of evidence that the company, through or by its agents, knew, until April 12, 1937, when a report was made to the company, the nature or extent of the insured's illness as being such as to have antedated his reinstatement. The applications for revival contemplated payment of premiums in arrears and continued payment of premiums to keep policies in force. The evidence is insufficient to charge the defendant with knowledge.

In *Supreme Lodge v. Grijalva, supra,* cited in *Van Dahl v. Sovereign Camp, W. O. W., supra,* the Arizona court said (p. 85): "The doctrine of waiver is based on knowledge, and unless the statute clearly requires it, we should not hold that acceptance of past-due assessments on an insurance certificate which has automatically lapsed waives,

not only what the insurer already knows, to wit, that the payment is overdue, but also through *ex post facto* action (for that is the only way such result can be produced) reinstates the lapsed policy by a compulsory waiver of the very thing expressly stipulated as essential to reinstatement, and which the insured has agreed he warrants by the very offer of his money, and without which warranty it could not, and would not, have been accepted."

In the instant case there is evidence that the original policies had lapsed for nonpayment of premiums and were reinstated without an application for revival having been signed, and reinstatement was made on the books of the company. The one instance occurred on July 26, 1930, when six premiums in arrears were collected.

In *Koehler v. Modern Brotherhood of America,* 160 Mich. 180, 125 N. W. 49, cited in *Van Dahl v. Sovereign Camp, W. O. W., supra,* in speaking of proof of a custom of accepting delinquent premiums, the Michigan court stated that "this liberality should not be given the effect of waiving in advance subsequent delinquencies, thereby, in effect, abrogating the provisions of the contract and practically making a new one."

In the instant case the policies further provide that the failure of the collector to call for the premium will not be an excuse for nonpayment, as the insured will then be required to pay the premium at a branch office of the company, or remit the same direct to the home office. Under the evidence in this case, a finding of waiver or estoppel is not warranted.

Plaintiff objected to the testimony of Doctor Russell Best, the attending physician of the insured, as privileged. Section 20-1206, Comp. St. 1929, provides: "No practicing attorney, counselor, physician, surgeon, minister of the gospel or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of

practice or discipline." Section 20-1207, Comp. St. 1929, provides: "The prohibitions of the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted, waives the rights thereby conferred; and if a party to any action now pending, or hereafter brought, shall offer evidence with reference to his physical or mental condition, or the alleged cause thereof, * * * the right conferred" by section 20-1206, *supra*, "shall be deemed to have been waived as to any physician or surgeon who shall have attended said party or said deceased person."

In *Western Travelers Accident Ass'n v. Munson*, 73 Neb. 858, 103 N. W. 688, this court held: "A stipulation in a contract of life insurance to the effect that the proofs of death shall consist in part of the affidavit of the attending physician, which shall state the cause of death and such other information as may be required by the insurer, constitutes a waiver within the meaning of said sections, and renders the attending physician a competent witness as to the confidential disclosures made to him by the assured concerning his last sickness."

The policies in the instant case provide that proofs of death shall be accompanied by a physician's statement. Condition 5 of the smaller policy (exhibit 4) reads: "The insured shall not be entitled to any benefits for sickness or accident under this policy unless a certificate on the company's form by a regular licensed and practicing physician who is satisfactory to the company, showing the nature of the sickness or injury, shall first be furnished the company or its authorized agents. * * * The company shall have the right at its option to make such investigation into matters upon which any claim may be based or the subject thereof as it may deem necessary in order to determine its liability hereunder." The larger policy (exhibit 5) provides: "Proofs of death under this policy shall be made upon blanks to be furnished by the company and shall contain answers to each question propounded to the claimant, physicians and other persons, and shall contain the record, evidence and verdict of the coroner's inquest, if any be

held." The conditions contained in the policies, as herein stated, contemplate a waiver, on the part of the insured, of a privileged communication of his attending physician before his beneficiary can receive any benefits under the policies.

A competent annotator states: "Practically all the authorities—with exception of those from two jurisdictions, which are affected by the particular provisions of the statute on the point—recognize that the waiver by an applicant for an insurance policy, either in his application or in the policy itself, of the disqualification of his physician or surgeon to testify concerning confidential communications between them, is valid and binding upon those claiming any interest in the policy." 54 A. L. R. 412. See *Falkinburg v. Prudential Ins. Co.*, 132 Neb. 831, 273 N. W. 478.

Plaintiff contends that the court erroneously admitted the evidence of J. W. Zook, an agent of the company, who had previously testified in municipal court, by permitting his testimony to be read in the trial in the district court. This objection is without merit.

In *City of Ord v. Nash,* 50 Neb. 335, 69 N. W. 964, it was held: "Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable." See *In re Estate of O'Connor,* 101 Neb. 617, 164 N. W. 570; *Jerich v. Union P. R. Co.*, 97 Neb. 767, 151 N. W. 310.

The record discloses that Mr. Zook had been transferred to Kansas City, and did not intend to remain in Omaha.

Other assignments of error, not herein discussed, are not pertinent to a decision in this case, and are incidental to the alleged errors committed by the trial court, hereinbefore discussed.

The plaintiff is entitled to judgment against the defendant for the amount of the premiums tendered by the insured to the company, in the sum of $14.40, and in addition thereto the sum of $126, representing the amount of the paid-up insurance due at the time said policies lapsed for nonpayment of premium, to wit, December 21, 1936.

We hold that the trial court properly sustained defendant's motion for a directed verdict.

AFFIRMED.

BERNICE L. WERT, APPELLEE, V. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, APPELLANT.
283 N. W. 506

FILED JANUARY 20, 1939. No. 30441.

1. **Trial.** "When at the close of all the evidence there is a substantial conflict in the evidence, it is proper for the court to deny a motion for a directed verdict and to submit the disputed questions of fact for the determination of the jury." *Nittler-Rhump v. Jones*, 112 Neb. 238, 199 N. W. 542.
2. **Evidence:** ADMISSIONS OF AGENT. "An admission of an agent may be received in evidence against his principal, where the agent, in making the admission, was acting within the scope of his authority, and the transaction or negotiation to which the admission relates was pending at the time when it was made. Conversely, a declaration of an agent, not within the scope of his authority nor in the course of the negotiations to which it refers, is not admissible against the principal, unless it was made under such circumstances that the silence or acquiescence of the principal makes the admission his own, or was ratified by the principal. * * * The admission which it is sought to use must have been made in connection with the discharge of the agent's duty, must have been based on his own knowledge, and must be a statement of fact, rather than an expression of opinion." 22 C. J. 367.

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

Brown, Fitch & West, for appellant.

Beghtol, Foe & Rankin, contra.

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

SIMMONS, C. J.

In this case the plaintiff, as beneficiary, sues to recover

$2,126, which she alleges is due her upon five contracts of retirement annuity insurance entered into between her deceased sister, Julia M. Wert, and the defendant.

The defendant claims that it has paid said indebtedness by its draft for said sum which was made payable to the plaintiff, delivered to, accepted and indorsed by the plaintiff, and honored and paid by the defendant.

The burden of proof was on the defendant. The action was tried to a jury. At the close of the evidence defendant moved for a directed verdict or a dismissal. The motion was overruled. The jury returned a verdict for the plaintiff in the sum of $2,628.99.

A motion for a new trial was made by the defendant, which was overruled.

Plaintiff moved for the allowance of an attorney's fee, which motion was sustained, and an attorney's fee of $700 was granted. The defendant then moved to set aside the order granting the attorney's fee and to retax the same, which motion was overruled.

The defendant's first assignment of error is: "The court erred in overruling defendant's motion for a directed verdict made at the close of all of the evidence." This requires an examination of the evidence. We mention herein the material facts about which there is a dispute.

The defendant called as a witness Charles E. Reilly, one of its Lincoln agents. Four months earlier plaintiff had attempted to take his deposition in this case, and on the advice of his counsel, he refused to answer questions on the ground that it might incriminate him. Reilly testified that he had known the plaintiff and her sister for a number of years, that he had written their applications for retirement annuities, and had had other business transactions with them; that plaintiff had signed papers in his office possibly 100 times; and that plaintiff was a teacher in the public schools, very intelligent, and well-versed in business affairs.

In 1932, while Julia M. Wert was living, her policies were delivered to Reilly for the purpose of having changes

made in them. He claims to have returned the changed policies to her. The plaintiff denied that the policies were ever returned by Reilly.

Reilly received from the defendant and presented to the plaintiff a proof-of-death blank to be used in making claim for benefits. The original is in evidence. The amount of insurance in *dollars* payable under the policies has not been filled in. Reilly testified that there was no way for the plaintiff to know how much defendant owed her except what he told her, and that at the time she executed the proof of death he told her she had approximately $2,000 coming. Plaintiff testified that she did not know until 1937 that she was entitled to more than $35 a month, and that Reilly did not tell her then, or at any other time, that she was entitled to "that sum of money."

Reilly testified that plaintiff left the policies at his office "about May 8, 1933." After the proof of loss was sent in, Reilly received from the defendant a draft for $2,126 payable to the plaintiff, with instructions not to deliver it unless the policies were obtained and returned to the defendant's Omaha office. The draft was dated April 11, 1933, and Reilly testified that he received it shortly after that date; that he saw Miss Wert "about this draft" at the time she brought the policies in; that the draft was in his possession on May 8, 1933; that "some time elapsed between the time that the policies were sent in to the Equitable and the check was turned over to me;" that he first got the check prior to March 8, 1933 (probably May), but that he did not remember the number of days. When it was called to his attention that the draft was not cashed until May 27, 1933, he testified that he received the draft "some time between April 11 and May 27, 1933;" and still later he testified that the "check was in Miss Wert's possession from the time the policies were delivered until it was indorsed;" that he did not know why he had not said that before; that he gave her the check to take away either on May 8 or some time between that and May 27; that plaintiff had the check in her possession part of the time

from May 9 to May 27; that he did not know when he turned the check over to plaintiff. Still later he said he presumed he gave the check to her the day it was cashed; and that he did not know why he kept the check for three weeks.

Plaintiff testified that Reilly did not give her the disputed check; that she first saw it, with the disputed signature, in 1937; that up until that time she did not know that such a check had been issued payable to her order; nor did she know that her purported indorsement was on the check.

On the back of the draft was written "Bernice L. Wert, 1810 Garfield, Lincoln, Nebraska," and underneath, "Chas. E. Reilly." Reilly testified that he saw the plaintiff write her name there, that she indorsed it "in my office," with a fountain pen, around May 8, 1933. Later he testified that he did not recall that he had said that she had indorsed it in his office. He stated that plaintiff's indorsement on the check was in green ink, and that he did not have green ink in his office because "it would not photograph successfully."

When the plaintiff was asked, "Is that your signature on the back of that check?" she answered, "No; I never saw the check." She was then asked by her counsel, "Did you ever indorse or sign that check knowingly?" Her answer was, "No, sir."

On cross-examination, defendant's counsel quoted that question and said, "I don't know just what he meant by saying 'knowingly.' Do I understand your position to be that that signature, 'Bernice L. Wert, 1810 Garfield, Lincoln, Nebraska,' on exhibit A-141, that you did not write that, is that correct?" Plaintiff answered, "I did not write that."

With reference to the disposition of the proceeds of the check, Reilly testified that in March, after Julia M. Wert's death, he and the plaintiff began to talk about Reilly's keeping the money as a personal loan; that plaintiff thought it over two or three weeks; that it was agreeable to the plaintiff; that on one of her visits to his office he had shown her the check; and that on the day that plaintiff indorsed

the check, around May 8, 1933, he had a conversation with her with reference to the proceeds of the check to the effect that, if she would let him have the money, he could pay out the balance of her premiums, the original loans would be cleared up, and her policies would be clear; that he was to pay the premiums "during the period for which the premiums had been prepaid originally;" that he was interested in the check because he was going to borrow the money; that he told the plaintiff he would pay all the premiums; that the total amount he was to pay out of her money was about $2,600; that he agreed to pay her debts without knowing how much they were; that they had no writing between them; that they made no list of what he was going to pay; that the policies upon which he was to prepay premiums were not listed; that the plaintiff did not demand a receipt; that he did not suggest giving her one; that he said nothing to her about giving her a note or written evidence of the debt; that the plaintiff said nothing about interest on the loan; that immediately after he got the money he was to invest it in real estate; that nothing was said about whether the investment in real estate was to be for the plaintiff or Reilly; that the plaintiff was to have no part in the investment in real estate; that nothing was said about an accounting to the plaintiff for this money; that the plaintiff owed $486 on one policy and $135 on another; that he did not pay off these loans; that he paid $500 on July 24, 1933, as a premium; and that he owed the plaintiff $1,626.

Plaintiff denied the entire story which Reilly told with reference to the agreed disposition of the proceeds of the check, and denied that she had received any part of the $2,126.

Reilly testified that *on the day plaintiff indorsed the draft* he personally took it to the First National Bank and indorsed it, secured the money in currency on *May 27,* 1933, put the currency in his safety box in the Commerce Trust Company, and used it for his own purposes; that he did not know how long he kept the money before he began

to spend it; that he did not know where he got the money with which to make the $500 payment; that he did not tell plaintiff that he had made the payment; that he does not know whether or not she received a receipt; that he did not know whether plaintiff ever knew he had paid it; that he was not interested in getting some acknowledgment from her that he had paid it, and that he did not conceal the payment from her.

Plaintiff testified that to her knowledge she had no loans on her policies, and that she did not know Reilly had sent $500 to the defendant company, purporting to be a premium payment from her; nor did she know that Reilly had cashed the check and taken the money.

James H. Clapp, a witness for the defendant, testified that he was the cashier in the Omaha office of the defendant; that he received the check of $2,126 from defendant and sent it "to our agent, Mr. Charles E. Reilly" at Lincoln; that he knew the home address of the plaintiff at the time he sent Reilly the check; that he later received the policies and sent them to the home office for cancelation on May 9, 1933; and that in July, 1933, he received a draft for $500 from Lincoln as a premium on two of plaintiff's policies, and that it was so applied.

The defendant introduced 53 checks and various other papers bearing the admitted signature of the plaintiff.

Herbert J. Walter of Chicago, a witness for defendant, testified as a handwriting expert. After qualifying as such, and discussing at length the admitted signatures and the disputed one, he gave it as his opinion that the signature on the disputed check was written by the same person who wrote the signatures on the checks admitted to be the genuine signatures of the plaintiff; that it was the same ink; that he had not the slightest suspicion that any one other than the plaintiff wrote the indorsement on the disputed check, and that he knew nothing about the circumstances under which the disputed signature was written.

Robert M. Walker, of Chicago, likewise qualified and testified as a handwriting expert for defendant. He gave his

reasons at length and testified that, in his opinion, the disputed signature and the admitted signatures of the plaintiff were written by the same person. When asked if green ink would photograph all right, he replied, "You have to have color screens or it won't photograph at all;" and that where different colors were involved it was necessary to take more than one picture, with different screens, to get all the signatures, and then make a composite picture.

Plaintiff offered, as a witness, a commercial photographer of Lincoln, who qualified as an expert. He testified that it was possible to photograph green ink without the use of a screen or filter; that he took a picture of the back of the check bearing the disputed signature without the use of any screen. The picture so taken was received in evidence and the disputed signature shows clearly upon it.

Defendant also called the paying teller of the First National Bank of Lincoln as an expert witness. The records of the bank show that he cashed the disputed check. He examined the plaintiff's admitted signatures, compared them with the disputed signature, and gave it as his opinion that plaintiff signed all of them.

The cashier of the National Bank of Commerce, of Lincoln, qualified as an expert witness; examined the admitted signatures and the disputed signature; and gave it as his opinion that they were written by the same person.

The jury were furnished with a magnifying glass and were permitted to examine the exhibits bearing the admitted signatures of plaintiff and the disputed signature.

We have not included in the foregoing summary any reference to the evidence, the admission of which defendant claims was an error. That evidence is favorable to the plaintiff; hence, our omitting it in the consideration of the first assignment does not prejudice the defendant. Defendant's first assignment of error is based on the proposition that this "evidence is insufficient to support a verdict in favor of plaintiff," and that "the evidence is insufficient as a matter of law to sustain a finding that the indorsement on the back of the disputed draft or check is not the indorse-

ment of the plaintiff," and that for those reasons the trial court erred in overruling defendant's motion for a directed verdict at the close of all the evidence.

To sustain its proposition defendant cites the case of *In re Estate of O'Connor,* 105 Neb. 88, 179 N. W. 401. In that case, the question before the district court for determination, without a jury, was the question as to whether or not the signature of one John O'Connor to a purported will was genuine. The county court held the signature to be a forgery; the district court held it to be genuine; and this court on appeal held it to be a forgery. In the opinion, this court stated the issue thus:

"Was the trial court clearly wrong in finding that the will offered by proponents for probate was genuine?"

The court reviewed the evidence, the testimony of the witnesses, the circumstances surrounding the finding of the alleged will, its form, the testimony of the expert witnesses, and reached the conclusion that both "the expert testimony and the circumstances in which the truth on the sole issue of fact is found confirm the charge of forgery and condemn the will as spurious."

This court in that opinion said: "When an issue of forgery in a civil case is raised by pleadings and contested by evidence on both sides, there is no presumption either in favor of witnesses or in favor of circumstances." This court further said: "From the standpoint of a genuine will the stories of the witnesses who testified that it was executed and found are unusual, if not fanciful."

Reilly's story as to the indorsement of the check, the circumstances surrounding that alleged transaction, and the agreed disposition of the proceeds, with its many contradictions, is "unusual, if not fanciful." Applying to this case the test made in the *O'Connor* case, we are unable to say that the jury were "clearly wrong" in finding that the signature of the plaintiff was not genuine, and for the same reason we are unable to reach the conclusion that the trial court was "clearly wrong" in submitting the disputed questions of fact to the determination of the jury.

The defendant also cites the case of *Bank of Commerce v. McCarty,* 119 Neb. 795, 231 N. W. 34. The issue of the forgery of a note was involved. The alleged maker of the note (defendant) positively denied the signature. She denied the circumstances under which it was alleged that she had admitted or acknowledged that the signature was hers. This court said that "the evidence as to note number 6367 being a forgery is sharply conflicting, and the same is true as to the other material points of dispute between the plaintiff and defendant," and affirmed a verdict of the jury finding for the defendant.

In the syllabus of *Bank of Commerce v. McCarty, supra,* this court held: "Testimony of handwriting experts that a promissory note offered in evidence is a forgery and does not bear the genuine signatures of the makers thereof, if based on sound reasons and circumstances supporting that theory, may be sufficient to overturn the testimony of witnesses that they saw the note executed."

This is not a holding, however, that the testimony of expert witnesses that a signature is genuine is, as a matter of law, sufficient to overturn the testimony of the alleged signer that she did not sign the disputed instrument.

"When at the close of all the evidence there is a substantial conflict in the evidence, it is proper for the court to deny a motion for a directed verdict and to submit the disputed questions of fact for the determination of the jury." *Nittler-Rhump v. Jones,* 112 Neb. 238, 199 N. W. 542.

The evidence in this case, which we have summarized, is its own best commentary. From all of the testimony, we are unable to say that the verdict of the jury is clearly wrong, and, consequently, cannot reach the conclusion that the trial court erred in refusing to direct a verdict or dismiss the case.

The question of the genuineness of the signature was submitted to the jury under an instruction in which the court stated:

"Plaintiff denies that the indorsement of the name 'Ber-

nice L. Wert,' on the back of said draft or voucher, is her signature and says that she did not sign same. Therefore the burden is upon defendant to prove by a preponderance of the evidence that it did pay the plaintiff and that she received and accepted draft in payment of her claim against defendant. * * * If you find from a preponderance of the evidence that plaintiff accepted the draft in payment of her claim and that the indorsement is in fact the genuine signature of the plaintiff, your verdict should be in favor of the defendant. On the other hand if you find that the signature is not the genuine signature of plaintiff, then your verdict would be in favor of plaintiff."

This instruction is set out for the purpose of showing the view taken by the court of the issues and the testimony, and the questions which were submitted to the jury. The defendant, in this court, does not allege error in that or any other instruction. We conclude, therefore, that defendant's first assignment of error is not sustained.

For its second assignment of error, defendant claims that the trial court erred in permitting one Edith B. Ross, a niece of the plaintiff, to testify as to conversations had with the plaintiff, Mr. Croxson, Mr. Clapp, and Mr. Reilly, at Omaha, some four years after the disputed check was cashed.

For its fourth assignment of error, defendant claims that the trial court erred in allowing plaintiff to testify as to conversations had with her niece, Mrs. Ross, Mr. Croxson, Mr. Clapp, and Mr. Reilly, at Omaha, some four years after the disputed check was cashed.

Mr. Croxson was defendant's agency manager for Nebraska and its highest officer in the state.

On this phase of the case, the testimony of the plaintiff is that she and Mrs. Ross went to defendant's office in Omaha in March, 1937, on two occasions, about a week apart, to consult with defendant concerning Reilly. The first meeting was in Clapp's office. They conferred with Clapp and Croxson, and she told Clapp $35 a month was a rather small amount to receive for what had been paid

to defendant. Clapp said, "Don't you recall that we sent you a check for $2,126?" and that she said she had never heard of it; that Croxson said, "I was watching your face when Mr. Clapp told you of this check, and I knew by the expression on your face that you had never heard of it;" and that she did not know that there was anything additional due her until that trip. According to plaintiff's testimony, this quoted statement was made during the conversation had on the first trip to Omaha.

The second conversation took place in Croxson's office, and Reilly was present. The plaintiff testified that she did not know Reilly was to be there. She repeated what she had said on the previous visit to the effect that she had never seen nor heard of the check; that Clapp did the talking and showed Reilly the check, and asked him what he knew about it; that Reilly said plaintiff had indorsed the check and he had cashed it; that Reilly did not make any claim that he had borrowed the money to pay debts or invest in real estate; that Reilly said he owed her $1,600, and had paid $500 premium from her money; that Reilly said that he might have done some things that he should not have done, but that he had not committed forgery; that Croxson and Clapp gave her to understand that they thought she had received the $2,126.

Mrs. Ross testified that during the first conversation Mr. Clapp said: "At last I think we have Charlie Reilly's back to the wall. We have been suspicious of him for a long time but he always wiggled out of it. I think we have him now where he won't be able to get away with it."

Mrs. Ross was asked, "What was said on the *second* trip by your aunt and these gentlemen about this check?" She testified: "My aunt said she had never heard of the check before and Mr. Croxson said he knew that was true because he watched her face as they told her about it and he could tell she had never seen or heard about it before."

Defendant made proper objections to the introduction of this testimony, and its objections were overruled by the trial court.

Croxson was not called as a witness. Clapp did not deny any part of this testimony.

This court in *Waits v. Columbia Fire Underwriters Agency*, 129 Neb. 207, 261 N. W. 170, cited, with approval, the following rule from 22 C. J. 367:

"An admission of an agent may be received in evidence against his principal, where the agent, in making the admission, was acting within the scope of his authority, and the transaction or negotiation to which the admission relates was pending at the time when it was made. Conversely, a declaration of an agent, not within the scope of his authority nor in the course of the negotiation to which it refers, is not admissible against the principal, unless it was made under such circumstances that the silence or acquiescence of the principal makes the admission his own, or was ratified by the principal. * * * The admission which it is sought to use must have been made in connection with the discharge of the agent's duty, must have been based on his own knowledge, *and must be a statement of fact, rather than an expression of opinion.*"

The rule is stated in 22 C. J. 383, as follows:

"An admission made by the agent of an insurer is competent against the principal, provided, but not unless, it appears to have been made within the scope of the agent's authority at the time when it was made, and while he was engaged in the business of the principal, and that it amounts to a statement of fact rather than an expression of opinion."

The rule is stated in 22 C. J. 386, as follows:

"Admissions of an agent of a private corporation, when relevant to the issues, are competent against the corporation, provided, but not unless, they are within the scope of the powers of the declarant, were made in connection with the performance of his duties, and are statements of fact rather than mere expressions of opinion."

The rule is stated in 1 Jones, Evidence Civil Cases (4th ed.) 630, sec. 344:

"Declarations of conclusions or opinions, even though they may have been uttered under conditions which would

authorize their introduction if they were statements of facts, are not admissible as part of the *res gestæ*."

The rule is stated in 22 C. J. 469, as follows:

"Expressions of opinion are not ordinarily admissible as part of the *res gestæ*, even though they are accompanied by acts tending to show that the declarant really entertained the opinion so expressed."

The quoted statements, made by Mr. Clapp as to Mr. Reilly, and as to what Croxson "knew" from the expression on Miss Wert's face, are conclusions, statements of the opinion of the makers, narrative in form, are not statements of fact, and hence are not admissible.

Permitting Mrs. Ross to testify as to what Mr. Clapp said about Mr. Reilly was to tell the jury, in effect, that one of the officers of the defendant company believed the witness Reilly to be dishonest and that others in the defendant company believed the same thing. It is pointed out that this statement related to their opinion of him in 1937 and not in 1933 when he was trusted with the draft for plaintiff.

Permitting the plaintiff and the witness Mrs. Ross to testify as to what Mr. Croxson said was in effect to tell the jury that the general agent of the defendant company in Nebraska believed that plaintiff was telling the truth when she denied knowledge of the check. The admission of those two statements in evidence invaded the province of the jury, affected the substantial rights of the defendant, was prejudicial, and calls for a reversal of the case.

Defendant's third assignment is based upon the following question, which the court, over objection, permitted plaintiff to answer: "Up to that time did you have trust and confidence in him?" Plaintiff answered, "Yes." The question related to a conversation had with Reilly the early part of 1932. The defendant objected to the question as incompetent, irrelevant, and immaterial, and a self-serving declaration. The court supposed "it is foundational for something coming." Plaintiff's counsel said, "Yes, and shows the state of mind."

It is obvious that, at the time covered by the question, the plaintiff had full confidence in Reilly. It is likewise obvious that subsequent to that time, as a result of what has been disclosed in this record, she lost that confidence. We cannot believe that any substantial right of the defendant was affected by the facts disclosed in this assignment of error.

Defendant's fifth assignment of error goes to the question of attorney's fees. In view of the conclusion that we have reached in this case, it is not necessary that that assignment be considered.

Because of the errors pointed out in the admission of evidence, the judgment against the defendant is reversed, and the cause remanded for further proceedings.

REVERSED.

IN RE APPLICATION OF WILLIAM A. TYLER, SUPERINTENDENT. WILLIAM A. TYLER, SUPERINTENDENT OF BOARD OF DIRECTORS OF CONGREGATIONAL CONFERENCE OF NEBRASKA, APPELLANT, V. GERMAN CONGREGATIONAL CHURCH OF ZION ET AL., APPELLEES.

283 N. W. 512

FILED JANUARY 20, 1939. No. 30453.

Evidence examined, and decree of trial court affirmed.

APPEAL from the district court for Boyd county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Perry, Van Pelt & Marti and *A. B. Wallace,* for appellant.

Wills & Wills, contra.

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

SIMMONS, C. J.

This is an action brought under the provisions of sec-

tion 24-830, Comp. St. 1929, to secure the transfer of certain real estate of the German Congregational Church of Zion, of Butte, Nebraska, to the Board of Directors of the Congregational Conference of Nebraska.

The application is made by the superintendent of said conference. The action is resisted by three members of the church, who answer as trustees of the German Congregational Church of Zion, for themselves individually, and for all members of the said church and the church itself. For convenience in discussing the case, we will refer hereafter to the applicant as plaintiff and to the answering parties and the church, whose property is involved, as defendant.

Plaintiff alleges its own corporate capacity, the incorporation of defendant, that the defendant became affiliated with the other Congregational churches of this state in the congregational manner, "under, by virtue of and in accordance with the laws, customs, usages and discipline of the Congregational Conference of Nebraska;" that defendant does not now exist and does not now maintain its organization as a Congregational church in accordance with such laws, customs, usages, and discipline; alleges the defendant's ownership of property during its existence, and prays that the title of the property be transferred to plaintiff.

Defendant denies that the plaintiff is of the same religious denomination as the defendant, denies its affiliation with plaintiff, and alleges that it has at all times been, and now is, an independent existing organization, and that the plaintiff never exercised any authority or supervision over defendant.

Section 24-830, Comp. St. 1929, is as follows: "Whenever any religious society which is in any way under the control or supervision of any superior or general supervising body, ceases to exist or to maintain its organization, all its remaining real or personal property shall vest in, and be transferred, in the manner hereinafter provided, to the incorporated annual conference, presbytery, diocese, dio-

cesan council, state convention or other incorporated governing or supervising body of the same religious denomination within whose jurisdiction such society was located, or with which it was affiliated, it being intended that said property shall vest in and be transferred to the highest governing or supervising corporate body of the same denomination, having its original corporate existence within this state."

To maintain this action it is necessary for the plaintiff to establish two propositions: First, that the defendant church "is in any way under the control or supervision of any superior or general supervising body," and that the plaintiff is that general or superior supervising body; second, that the defendant has ceased "to exist or to maintain its organization."

The trial court found that the plaintiff "has no cause of action" and dismissed the application. Plaintiff appeals.

We first consider the question: Was the defendant "in any way under the control or supervision" of the plaintiff?

Control is defined as follows: "The word has no legal or technical meaning distinct from that given in its popular acceptation. It has been held as synonymous with superintendence, which is expressive of the meaning of the word, being defined as the act of superintending; care and foresight for the purpose of directing and with authority to direct; power or authority to check or restrain; restraining or directing influence; regulating power. Likewise the word 'control' is also sometimes employed or used as equivalent to, if not synonymous with, management; government; supervision." 13 C. J. 837.

Supervision is defined as follows: "Act of overseeing, or supervising; having general oversight of, especially as an officer vested with authority; inspection; oversight; superintendence. 'Supervision' implies oversight and direction." 60 C. J. 1164.

It appears to have been assumed at the trial that the plaintiff is the "incorporated annual conference * * * or other * * * governing or supervising body of the same re-

ligious denomination" of the Congregational churches of Nebraska. We will discuss that proposition only in so far as is necessary to consider it in relation to the problems presented by this case. The plaintiff conference was incorporated in 1910 by a group of men who recite in the preamble that they are members "of the religious denominational body or conference now known as the Congregational Conference of Nebraska," and that they incorporated "on behalf of ourselves and all others who are now or may hereafter become members of *this* corporation." The members of the plaintiff corporation "shall be such persons as have been duly elected directors of the Congregational Conference of Nebraska." Its objects, in part, are to coordinate under one management the "common activities of its members" and "to cooperate with our national beneficent societies, with the National Council of Congregational Churches, and with the *Nebraska* Home Missionary Society so long as that society shall maintain a *separate* existence," and "It shall receive * * * all * * * property * * * acquired * * * by the Nebraska Congregational Conference, *or to this corporation.*"

The plaintiff corporation by its articles is responsible and subject to the "authority of the Congregational Conference of Nebraska;" the qualifications of its treasurer are such as those required "in the constitution of the Congregational Conference of Nebraska." The constitution referred to is not in evidence. The plaintiff did not prove "the laws, customs, usages and discipline of the Congregational Conference of Nebraska." From a reading of the articles, there appears to be a difference between the plaintiff and the conference; also, that the conference is the governing body.

There was organized in 1857 in Nebraska by the Congregational churches an organization called "The General Association of Nebraska." The record does not disclose whether or not the General Association of Nebraska was a corporation; nor does it give much information about it. The plaintiff does not have "anything in a historical way

that would aid us in determining whether or not there was a sort of parent organization in 1857 and from there on down to the time of incorporation of this present body" and that the plaintiff is "simply a reorganization of the old organization."

The defendant in its articles of incorporation adopted a constitution "as is set forth and contained in the certain church manual known as that of Rev. M. E. Eversy, D. D." That "church manual" is not in evidence.

Plaintiff's superintendent was asked if he knew the Rev. Eversy. He answered that he did, and that Eversy "was superintendent of the *German* Congregational work for the whole country, for the United States." He was then asked and answered the following questions: "Q. Was he affiliated with your organization? A. Oh, yes; he was *employed* by the denomination. Q. Are you familiar with the manual there to some extent? A. I know what it was. It was a manual that *they* took as a constitution for *a* Congregational Church; since we are Congregationalists each church could adopt it or not." This evidence does not show that defendant was a part of the Congregational Conference or under its supervision or control, or under the supervision and control of plaintiff.

Defendant's articles further provide that the powers and duties of its trustees are as follows: "They shall hold the property of the church, superintend the raising of the minister's salary, provide for the incidental expenses, subject always to a direct vote of the church, but having no power to buy or sell, mortgage or *transfer* property, without a special vote of authority of the church."

After defendant's organization, it secured title to three lots in the city of Butte, upon one of which it built a church, and upon two lots it built a parsonage. The church building was later given to the English Congregational Church at Butte, and later became a part of the "community" church at Butte as it now exists, which the "Congregationalists" have a right to use. It likewise appears that the community church at Butte is not considered to be a Congregational

church. The lot upon which the church building was located was sold by the defendant in 1934. That sale was considered in this proceeding, and the district court quieted title in the purchaser. Plaintiff does not now seriously question that part of the decree.

Defendant secured a loan of $400 from the "Congregational Church Building Society of New York" in 1895. That mortgage contained a stipulation that the defendant shall "continue to be an *Evangelical* Congregational Church" and "make an annual contribution to the Congregational Church Building Society," and that, upon failure to do those and other things, the amount covered by the mortgage should become immediately due and payable, and that in the event the mortgage is paid the estate created by the mortgage became void. This mortgage was released of record by release dated in November, 1906. When asked regarding the organization of the mortgagee, plaintiff's superintendent replied: "We have in New York City what is called the Congregational Church Building Society which makes loans to Congregational Churches * * * and when I once inquired whether it could make a loan to a community church they said no, they could only make loans to Congregational Churches."

There is nothing in the record to show the authority and power of the Congregational Church Building Society of New York, and nothing other than the "we have" to show that it is in anywise connected with the plaintiff. The statement that they would make loans only to Congregational Churches, even if we disregard its hearsay status, does not show that that limitation was applicable when this mortgage was made in 1895. There is no evidence to show that an Evangelical Congregational Church is the same as the plaintiff church organizations. Quite obviously, the recitations in the mortgage were placed there as a part of the security for the loan. There is nothing in the mortgage or otherwise indicating that the plaintiff's preceding organization had anything to do with the securing of that loan by the defendant from the New York society. The defendant

in 1898 appears to have conveyed an undivided interest in the parsonage property to two other German Congregational Churches (one in Nebraska and one in South Dakota) and to have had that undivided interest reconveyed to it in 1905. There is nothing in the record to indicate that the plaintiff's preceding organization had anything to do with the conveyance away of this property or its conveyance back to the defendant.

It further appears, without the contract being in evidence, that the defendant contracted to sell the parsonage property in 1937, and that a part of defendant's remaining eight members had in mind the probable division of the proceeds of the sale among themselves. The bringing of this action resulted in the rescission of that contract of sale.

In addition to the provision in the mortgage, plaintiff contends that its supervision and control is shown by the fact that defendant made reports to the plaintiff from 1898 to 1922. These reports were made upon blanks sent out by the plaintiff or its predecessor to the pastor of the defendant. The pastor filled in the information called for on the blanks, and the plaintiff printed the information so furnished in its annual reports. These reports were purely statistical. They ceased in 1922, which year appears to have been the last year that defendant employed a full-time pastor. Subsequent to that time no reports were made.

Plaintiff did not offer the reports in evidence, and it "imagined" that they were destroyed. The defendant's records, written in German, were produced in court. They did not reveal that the defendant at any time ever authorized its pastor or any one else to make a report to the plaintiff, and no member of the church knows of special authority ever having been given to the pastor to do so, and no member of the church knew of the reports having been made. We conclude that these reports were made by the pastor at the request of, and for the information of, the plaintiff without authority from the defendant. There is no basis for holding that the pastor by making these reports recog-

nized any right of supervision or control of the defendant by the plaintiff.

The defendant's records further show that at different times it made contributions to the building society at New York, and to the Home Missionary Society. Plaintiff's superintendent testified that he "presumed" that that was the National Home Missionary Society in New York. Members of the defendant church testified that they made contributions to missions and to other purposes. There is nothing in the record indicating that the defendant church ever made contributions to the plaintiff, although it appears that, if contributions were made to different national organizations, those organizations in turn reported to the plaintiff that they had received the contributions from the defendant. This was purely a voluntary matter so far as the contributions were concerned, and the reports were statistical.

The plaintiff's superintendent testified that the Congregational Churches in Nebraska were organized "first into a district association and then into the state conference * * * and then we have our national conference." There is nothing to indicate that defendant ever joined in any way, was represented at, or participated in the district association or the state conference of the plaintiff. The superintendent further testified that the German Congregational Churches in Nebraska have "the *privilege* of nominating two members of the board of directors." This apparently presupposes a German Congregational Church organization or some association of the German Congregational Churches that could nominate two members of plaintiff's board. Here again the record does not indicate that the defendant church ever had anything to do with such a German Congregational Church organization, or that it ever participated in such an association or conference, for the nomination of members of plaintiff's board or otherwise.

In answer to the question as to whether or not the plaintiff recommended pastors to the different German Congregational Churches of Nebraska, the superintendent an-

swered that they never recommended pastors to any church "except as they ask us to." There is nothing in the record indicating that the defendant ever asked the plaintiff to recommend a pastor or to assist the defendant church in any way about a pastor or in any other manner. Plaintiff's superintendent further in answer to the above question stated: "Now the Congregational and Baptist and others that have a congregational form of organization *do not claim to have authority over the churches; we have only general supervision.*" Later when asked, "What is the nature of the supervision of your conference over these German Churches, for instance, over the German Congregational Church of Zion here at Butte?" he answered: "Our supervision over all the churches, as I mentioned a moment ago, differs from the Methodists; *we do not have supervision over the church.* * * * We work with them for their general welfare, and we give them special services, if they desire it."

He was next asked, "Do you have anything further in regard to the supervision, or do you think that covers it?" He answered: "Well, I might say that the *German* Churches do have a more special supervision by the *German* Superintendent, but *their* German Conference is a *national organization,* so we have, as a state organization, general supervision over them as well as the others." This statement again indicates that the defendant, if subject to supervision from any one, is subject to a German Conference and a German Superintendent. The record is silent as to what that supervision may be, as it likewise is silent on the question of the German Congregational Church organization. There is no evidence to show the basis of this contention that "we have general supervision over them." Outside of the reports which were sent in by the pastor to the plaintiff, at the plaintiff's request and on its blanks, the only contact that the plaintiff ever appears to have had with the defendant was that "once or twice a good many years ago" the superintendent "happened to be in Butte; talked with some of the officers, and tried to find out how they

were getting along." He further testified that he was acquainted with the church property, and that, at the time the church building was moved away, he talked with some of the members of the "English Congregational Church," who asked him if it was all right to move the church over for the use of the English Church, and he said that he thought that it was.

Here it is noted that he did not talk with the defendant, but with members of the *English* Congregational Church, who were securing the defendant's church building. The defendant did not ask the consent of the plaintiff for permission to dispose of its church building, nor did it submit the matter to them for their advice or approval. The defendant did not ask the plaintiff for permission to sell its parsonage property, and quite clearly it was the belief of all the members of the defendant church that they had the right to dispose of their property according to the provisions of their articles of incorporation. There is nothing in the record indicating that any member of the defendant church ever had any idea that the plaintiff ever had, or claimed to have, any control or supervision in any way over the defendant. There is no showing that the defendant ever authorized a "transfer" of its property to the plaintiff "by a special vote of authority of the church," as provided in defendant's articles of incorporation; neither did it take any step by such a "special vote" that can be construed to intend such a transfer.

Plaintiff is not shown to have given any aid or assistance to, or concerned itself with, defendant's spiritual or temporal problems. It contributed nothing to the defendant. It now asks for title to defendant's property. We conclude that the plaintiff has not shown that the defendant was in "any way under the supervision or control" of the plaintiff.

Defendant does not appear to have ever had a large congregation. It did maintain a regular pastor for some time. The deeds to the other churches which are in evidence, reciting that the undivided interest of each of the parties shall be "in such proportion as the membership of each of

the several churches herein mentioned shall be to the aggregate membership of the three churches," indicate that three churches in that community were using the parsonage as a place of residence for a minister who served all three churches. The defendant has a cemetery (not involved in this action) where it buries its dead. After 1922, up to and including the time of the disposition of the church building, ministers from other churches conducted services in defendant's church building, probably once a month, and not later than two years ago a minister came and administered the sacrament of the Lord's Supper to defendant's members.

The church records are not elaborate. The term of office of the trustees had expired at the time of the hearing in the district court, but their successors had not been elected or qualified, and those hold-over trustees were continuing to handle the parsonage property, to repair it, collect the rent, and pay the taxes upon it. They appear to have held irregular meetings to transact the business of the church, and, as trustees, entered into the contract to sell the parsonage property. Members of the defendant church who understand the English language attend the community church. The membership at the present time consists of eight people who desire to have certain religious services, including the sacrament of the Lord's Supper, given in their native language, which they best understand. They are all elderly people. No action has been taken to dissolve defendant's corporate capacity, and the membership clearly presumed and intended that they were maintaining their organization. Even plaintiff's records show the defendant church was inactive in 1931 and "dropped" in 1933. The fact that plaintiff "dropped" defendant from its records does not show that defendant has ceased to exist or to maintain its organization.

One of the defendant's trustees testified that the purpose of selling the parsonage property was "to liquidate it." And in answer to the question, "You figured the church property ought to be liquidated?" he answered, "Yes."

When asked if the reason was that "they were not able to carry on the church organization and carry on an active religious society?" he replied, "I wouldn't want to say just that, I couldn't express just what the others might say."

He was then asked, "There was no necessity, if you disposed of the church property and the contents and everything, there was no necessity for a parsonage, was there?" A. "Not in particular; no."

The defendant no longer had use for a parsonage building. It proposed to sell the parsonage as it had its personal property and had disposed of its church building by gift to another church. A religious society can exist without having either a church building or a parsonage. It is common knowledge that many church organizations have existed in Nebraska throughout the entire period of our history, holding their services in homes, schoolhouses, and quite often in church buildings owned by other denominations. Many religious societies in Nebraska have no tangible property, but they exist, maintain their organizations, serve their members and their communities, and are distinct forces for good in our citizenship. Defendant still continues as a church organization, ministering to its members as they desire, and is in a position to bury its dead.

We are not presented with, and do not decide, the question as to what disposition should be made of the proceeds of the sale of the parsonage property should it be subsequently sold.

We conclude that the decree of the district court was proper, and accordingly it is

AFFIRMED.

FIRST TRUST COMPANY, SUCCESSOR-TRUSTEE, APPELLANT, V. GEORGE C. MARYOTT ET AL., APPELLEES.
283 N. W. 518

FILED JANUARY 20, 1939. No. 30443.

1. **Corporations.** Two corporate trustees adjudged bankrupts, while in possession of bonds with authority to collect principal and interest for the beneficiaries, may be treated in equity as a single corporation, where one of them owned all the stock and kept all the records of both; the officers, place of business and nature of transactions being identical.
2. **Mortgages.** A trustee appointed by a court of equity to succeed a bankrupt trustee has generally the predecessor's authority to receive payment of matured principal and interest owing to the beneficiaries of the trust on bonds secured by mortgage.
3. ———. A partial payment by a mortgagor on a matured bond secured by mortgage, if made to a trustee duly authorized to receive it for the mortgagee or for the holder of the bond, is a discharge of the bond and the mortgage to the extent of the payment, in absence of fraud or negligence on the part of mortgagor.
4. **Estoppel.** Where one of two innocent parties to a transaction must suffer a loss through the misconduct or fraud of a third person, the burden will be allowed to fall where equity and justice place it—on the one who innocently made the loss possible.

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

Sterling F. Mutz and *Robert S. Stauffer,* for appellant.

Alfred D. Raun and *Perry, Van Pelt & Marti, contra.*

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

ROSE, J.

This is a suit in equity to foreclose a mortgage on the real estate described in the petition.

George C. Maryott and Anna M. Maryott, mortgagors, defendants, borrowed from the Lincoln Safe Deposit Company February 23, 1924, $16,000, evidenced the debt by 16

bonds of $1,000 each and secured them by a mortgage on 80 acres of land in Thurston county. The debt was subsequently reduced by payments to $8,000 prior to March 1, 1933. The mortgage and bonds were assigned by the Lincoln Safe Deposit Company to the Lincoln Trust Company September 18, 1928. The two companies named, while engaged in transacting business as trustees, were adjudged bankrupts July 9, 1932, and, by order of court, the First Trust Company became their successor-trustee, and in that capacity brought this foreclosure suit as plaintiff, alleging that the unpaid debt of the Maryotts, mortgagors, was $9,090.64, May 13, 1932, and that no part thereof has been paid except $1,872.50. Judgment for the difference was demanded with a prayer for foreclosure.

In an answer to the petition defendants pleaded payment of $7,490 on the debt after it was reduced by payments to $8,000, and offered to pay the difference between those items with interest. The reply to the answer was a general denial.

Upon a trial of the cause the district court found that defendants had paid $7,490 on the 8,000-dollar debt and that they still owed $632.12 with interest from June 24, 1932. Defendants were permitted to discharge the unpaid debt and the mortgage by payment of the amount found to be due, but, in the event of default in such payment, foreclosure was ordered. Plaintiff appealed.

The issue on appeal, as in the trial court, was the payment of $7,490 on the debt secured by the mortgage after it was reduced by payment to $8,000. The contentions of plaintiff, in substance, are that eight bondholders are the beneficial owners of the security; that they never received the alleged payment; that the bonds in controversy were not surrendered to defendants or indorsed as paid and were never paid; that the First Trust Company, plaintiff, is the owner and holder of the mortgage as successor-trustee of the two bankrupt companies for the benefit of the eight bondholders.

The position of defendants is that they paid to the Lin-

coln Trust Company before it became a bankrupt, while it was in possession of the bonds with authority to receive payment, $7,490, and that this was payment of the mortgage to that extent.

It is shown without dispute that defendants had fire insurance of $8,000 in four insurance companies on a store building destroyed by fire. The fire loss was adjusted at $7,490, each of the four insurers paying by draft $1,872.50. George C. Maryott, defendant, indorsed the drafts and sent them by mail to the Lincoln Trust Company before it was adjudged a bankrupt. Proceeds of one of the drafts were in fact credited *pro rata* on the bonds. Each of the bonds contains an agreement in this form:

"All payments to be made on this bond, whether principal or interest, shall be made to said Lincoln Safe Deposit Company, for the benefit of the holder thereof."

The parties to the mortgage entered into an agreement March 19, 1928, extending the time for payment from March 1, 1928, to March 1, 1933, making "both interest and principal payable at the office of the Lincoln Trust Company in Lincoln." This extension agreement is part of the petition which alleges that the successor-trustee "is given full power and authority as such trustee to collect and receipt for the interest and principal of such loans."

March 29, 1932, mortgagors gave additional security for the bonds and unpaid debt of $8,000 by the execution of another mortgage for that amount on 16 acres of additional land in Thurston county. This mortgage was payable to the Lincoln Safe Deposit Company, mortgagee. If others should become holders of the bonds, the Lincoln Trust Company was authorized by the mortgage to make collection in the event of default, to satisfy the mortgage, if paid, and to distribute the proceeds to such bondholders.

The bonds and the mortgage were continuously in possession of the Lincoln Trust Company or its successor-trustee, but the beneficial interests therein were assigned to the eight beneficiaries by means of certificates of participation in those instruments. The certificates in addi-

tion to the assignments contained on their faces the following conditions:

"This is to further certify that said Lincoln Trust Company retains the legal title to said bond and mortgage in trust for the use and benefit of the holders of said participation certificates, for the purpose of collecting same and enforcing payment thereof, and distribution of the proceeds thereof equally and ratably among the holders of said participation certificates, according to their several interests."

The fire insurance policies provided that loss or damage, if any, shall be payable to Lincoln Safe Deposit Company, mortgagee, or trustee, "as interest may appear."

The two bankrupt companies were for all practical purposes one corporation. The business transactions were similar. Their offices were in the same building. Their officers were the same. The Lincoln Trust Company owned all the stock of the other and kept the records of both. Identification of the two as one was recognized in former litigation. *First Trust Co. v. Danielson,* 132 Neb. 141, 270 N. W. 680; *Kansas City Life Ins. Co. v. Neverve,* 133 Neb. 29, 274 N. W. 390.

The eight beneficiaries never had possession of the bonds. Their beneficial interests were evidenced by the certificates of participation in which the legal title to the bonds and the mortgage was retained in the trustee for the purpose of collecting the debt and distributing the proceeds of the paper among the beneficiaries. The evidence makes it perfectly clear that the beneficiaries held their interests subject to the power of the trustee to receive payment and in default thereof to foreclose the mortgage, and that mortgagors were obligated by solemn contracts in writing to pay their debt to the mortgagee or to the trustee. The authority of mortgagee and original trustee to receive payment and to enforce collection in the event of default was transmitted to the successor-trustee. The latter exercised that authority in the foreclosure proceeding. The beneficiaries confided in and trusted the two now bankrupt corporations and their officers. Mortgagors, as directed by

their written agreements, paid to the Lincoln Trust Company $8,000 on the original debt. They also paid from the fire-insurance fund $1,872.50 credited on the bonds. The entire insurance fund was on the same footing and should have been so credited. The payment of $7,490 was a partial payment only and did not confer on mortgagors the right to demand the surrender of the bonds or the possession thereof as paid. Mortgagors had no part in any negligence or misappropriation by which the beneficiaries were defrauded. George C. Maryott, the principal mortgagor, testified that the names of the beneficiaries were unknown to him and that he never had any dealings with any of them. He made partial payment at the place and to the mortgagee or trustee appointed in his written obligations. The evidence and the rules of equity will admit of no other conclusion. There is evidence, however, that mortgagors were indebted to the same payee or trustee on other paper secured by mortgage, but the necessary conclusion from the record is that the transactions relating to the fire-insurance fund were directed to a partial payment of the debt secured by the mortgage in controversy. Notice that the payments made were authorized was communicated to the beneficiaries by certificates of participation in their own hands. By permitting their trustee to retain possession of the bonds with authority to receive payment for them, they made the loss of which they complain possible. In equity they must bear it, since mortgagors were not negligent or otherwise at fault.

Having reached the conclusion that defendants made the payment pleaded by them in their answer, as found by the district court, the discussion of other questions argued on appeal becomes unnecessary.

AFFIRMED.

MABEL MOISE, APPELLEE, V. FRUIT DISPATCH COMPANY, APPELLANT.

283 N. W. 495

FILED JANUARY 20, 1939. No. 30501.

1. **Workmen's Compensation**: COMPENSABLE INJURY. Under the workmen's compensation law, an accidental injury to an employee is not compensable if it does not arise out of his employment or is caused by his "intentional wilful negligence." Comp. St. 1929, secs. 48-101, 48-127.
2. ———. It is a purpose of the workmen's compensation law to shift from employee to modern industry burdens of economic waste or loss arising out of and in the course of his employment as a result of his accidental injury or death and to prevent his dependents from becoming a public charge.
3. ———: CONSTRUCTION OF LAW. "It has long been the policy of this court to give a liberal construction to the workmen's compensation law, so that its beneficent purposes may not be thwarted by technical refinement of interpretation." *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254.
4. ———: NEGLIGENCE OF EMPLOYEE. Negligence of an employee while in the performance of duty, unless intentionally wilful, does not necessarily prevent compensation for his resulting injury or death.
5. ———: ———. Disobedience of an order by a person other than employer, directing an employee not to smoke in a gas-filled room, if the negligence of the employee is not wilful, does not prevent compensation for resulting injury.
6. ———: "WILFUL NEGLIGENCE." In the workmen's compensation law the word "wilful," in its relation to negligence of an employee while in the performance of duty, means deliberate act; conduct evidencing reckless indifference to safety; more than want of ordinary care but not necessarily amounting to wantonness but approximating it in degree.
7. ———: ———. An inveterate smoker of a pipe for 30 years, who lighted it with a match in a gas-filled room while in the performance of his duties as an employee, thus causing an explosion which resulted in his death, did not by his negligent act prevent his dependent widow from recovering compensation, where he responded automatically to the promptings of habit and desire without the volition essential to a wilful act of negligence, within the meaning of the workmen's compensation law.

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

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

Monsky, Grodinsky, Marer & Cohen, contra.

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

ROSE, J.

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

J. C. Moise, employee of the Fruit Dispatch Company, employer, defendant, was killed by an explosion of gas August 12, 1936. His dependent widow, Mabel Moise, plaintiff, presented to the compensation court a claim for compensation which was allowed. Defendant appealed to the district court for Lancaster county and there resisted the claim on the ground that the fatal explosion did not arise out of the employment but was caused by the employee's wilful negligence in lighting his pipe with a match in a gas-filled room to gratify a desire or to indulge pleasure personal to himself, though warned of the danger and such negligence forbidden. On issues raised by the claim for compensation and the defenses outlined, the cause was tried before the district court, where there were findings in favor of plaintiff who recovered judgment for $15 a week for 325 weeks from August 12, 1936, and for the following statutory items: Burial, $150; nurse, $3; hospital, $14; ambulance, $5; physician, $57. Defendant appealed to the supreme court.

Counsel for defendant vigorously argued at the bar and in the brief that the allowance of compensation cannot be sustained, because the accident did not arise out of the employment and was caused by the "intentional wilful negligence" of the employee, within the meaning of the workmen's compensation law. The statute makes it clear that an accidental injury to an employee is not compensable unless it arises out of his employment. Comp. St. 1929, sec. 48-101. Nor is it compensable if it was caused by his

"intentional wilful negligence." Comp. St. 1929, sec. 48-127. The defenses are based on the proposition that these issues, considered together, are established by the evidence in favor of defendant, the employer. Decisions from other jurisdictions are cited to sustain the position thus taken.

The solution of the problems presented depends upon a proper understanding of the evidence and its application to the issues within the meaning of the Nebraska compensation law. It was a purpose of that legislation to shift from employee to modern industry burdens of economic waste or loss arising out of and in the course of his employment as a result of his accidental injury or death and to prevent his dependents from becoming a public charge. *Westcoatt v. Lilley,* 134 Neb. 376, 278 N. W. 854; *Tralle v. Hartman Furniture & Carpet Co.,* 116 Neb. 418, 217 N. W. 952; *Parson v. Murphy,* 101 Neb. 542, 163 N. W. 847. In a recent case it was said:

"It has long been the policy of this court to give a liberal construction to the workmen's compensation law, so that its beneficent purposes may not be thwarted by technical refinement of interpretation." *Wilson v. Brown-McDonald Co.,* 134 Neb. 211, 278 N. W. 254. Following *Maryland Casualty Co. v. Geary,* 123 Neb. 851, 244 N. W. 797.

The Fruit Dispatch Company, defendant, was engaged in distributing bananas by rail in car-loads to wholesale dealers in fruits. Its principal office is in Boston, and it maintains offices in other cities, each in charge of a resident manager. J. C. Moise was the resident manager at Omaha and his trade territory included Lincoln. He had been employed in that capacity for nearly 30 years. It was his duty to receive orders, inspect shipments of bananas to customers upon complaint of damages or of quality and report the results of his inspection to the Boston office of his employer with recommendations on adjustments.

In response to a complaint by the customer, Grainger Brothers Company, wholesaler of fruit at Lincoln, that bananas in a shipment received from defendant were too green, Moise, resident manager at Omaha, went to Lincoln

August 12, 1936, to make an inspection. When he arrived the banana room in which the fruit was temporarily stored contained natural and ethylene gases to hasten ripening and to produce the color of bananas naturally ripened. Before making the inspection Moise was warned of the danger of explosive gas and directed not to smoke in the banana room. He entered it with the president of the Grainger Brothers Company, the foreman of the banana department and two employees. Within 10 minutes the fruit was inspected and the four men were at the door of the room about to depart, when an explosion of gas wrecked the banana room, killing Moise and three other persons and seriously injuring others. Defendant's understanding of the evidence is that Moise ignited a match to light his pipe, and thus caused the fatal explosion. Under the circumstances disclosed by the evidence, defendant states its position on one feature of the case as follows:

"An employee, who has been a resident manager for almost 30 years, familiar with the use of explosive gas in the banana-ripening process, who is warned just before entering the room not to smoke therein because the room is full of gas, but who, nevertheless, after entering, lights his pipe and causes an explosion which kills him, causes the explosion by an act performed for his exclusive personal enjoyment and the act cannot be said to arise out of the employment."

While there are rulings by other courts in harmony with the view entertained by defendant, the trend of precedents under the Nebraska statute is to the contrary. At the time of the accident Moise as resident manager was in his employer's trade territory, where his duties at the time called him. He was at the identical place where service was required. He had not completed the work in hand and was on his way to the office of defendant's customer to perform further duties for his employer. By lighting a pipe for his own pleasure or comfort he did not necessarily abandon for the moment his relation to his employer. An employee engaged in business transactions for his principal may light

a pipe and smoke for his own pleasure with his mind and efforts directed to the latter's business. In a recent case the court observed:

"There was no abandonment of the defendant's business while the employee was thus smoking, but the employee merely combined the defendant's business with the employee's private pleasure of smoking." *Triplett v. Western Public Service Co.*, 128 Neb. 835, 260 N. W. 387, citing *Rish v. Iowa Portland Cement Co.*, 186 Ia. 443, 170 N. W. 532, wherein the supreme court of Iowa said:

"Smoking, while not a necessity, is a recognized and quite universal habit among workmen, and an indulgence reasonably to be anticipated by employers. The lighting of a cigaret with a match is not in itself attended by the slightest hazard. It was rendered dangerous to plaintiff only by the presence of a powerful explosive in common use upon certain parts of defendant's premises. It may be that the officers of defendant were not negligent or to blame for the presence of the explosive in the building, but the right of the employee to compensation does not arise out of tort, but exists by reason of the provisions of the workmen's compensation act."

Disobedience of the order not to smoke in the gas-filled banana room did not sever the employee from his employment or remove him from the sphere of his duties. The warning and order were not given by the employer. The latter's customer could not change or terminate the relation of employer and employee. Moise of course was negligent after the warning, but negligence, unless intentionally wilful, does not prevent compensation authorized by statute. Mere disobedience of an employer's order, even, regarding the manner of performing duties, does not necessarily defeat compensation. *Volcheck v. Western Union Telegraph Co.*, 128 Neb. 502, 259 N. W. 371; *Hibberd v. Hughey*, 110 Neb. 744, 194 N. W. 859.

Was the employee's negligent act in lighting his pipe in the banana room intentionally "wilful" within the meaning of the workmen's compensation law? In the sense therein

used "wilful" means "deliberate act;" "such conduct as evidenced reckless indifference to safety;" "involves more than want of ordinary care;" "not necessarily amounting to wantonness but approximating it in degree." *Ashton v. Blue River Power Co.*, 117 Neb. 661, 222 N. W. 42.

The evidence does not disclose a motive for self-destruction of employee. On the contrary, it tends to prove he was in the midst of a happy married life that had lasted 30 years; had a son and a daughter; never had domestic or financial trouble; was earning $280 a month; had a pleasant, happy home; employment with the same employer extended continuously over a period of 30 years; was in performance of his duties as resident manager when fatally injured.

It was shown by uncontradicted evidence that he was an inveterate smoker of a pipe; smoked almost continuously, while awake, for 30 years or more; smoked while at work and at home. It is the proper inference from the facts that he carried on his person tobacco, pipe and matches and responded automatically to the promptings of habit and desire without the volition or mental effort essential to the intentional wilful act of negligence contemplated by the language of the statute. It necessarily follows that, by his negligence, he did not deprive his widow of compensation. The district court took these views of the facts and the law and the judgment responding thereto is

AFFIRMED.

FARMERS UNION LIVESTOCK COMMISSION ET AL., APPELLANTS, V. UNION PACIFIC RAILROAD COMPANY ET AL., APPELLEES.

283 N. W. 498

FILED JANUARY 20, 1939. No. 30266.

1. Carriers: RATES: REGULATION. The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all railroads engaged in the transportation of freight or passengers within the state. Comp. St. 1929, sec. 75-201.

2. ———: ———. Rates and charges duly established by the railway commission, until altered or set aside, have the effect of a legislative enactment.
3. **Commerce:** TRANSPORTATION RATES. When, in the exercise of its constitutional and statutory powers, the interstate commerce commission finds that a disparity in interstate and intrastate rates is resulting in unjust discrimination against interstate commerce, and also determines what are reasonable rates for the interstate traffic and directs the removal of the discrimination, the carrier is entitled to put in force the interstate rates found reasonable and to remove the forbidden discrimination by bringing the intrastate rates to the same level.
4. **Carriers:** RATES. In such a case, where the state railway commission specifically adopts the rates and charges fixed by the interstate commerce commission as its own, they become the regularly fixed rates and charges of the state railway commission until altered or set aside.
5. ———: ———: REPARATIONS. The reparations statute, section 75-510, Comp. St. 1929, does not authorize the railway commission to retroactively condemn as unlawful a rate or charge previously established as lawful by it and subject a carrier which has conformed thereto to the payment of reparations measured by what the railway commission now holds it shou'd have decided in the earlier proceedings to be a reasonable and lawful rate.
6. **Constitutional Law.** A statute authorizing reparations under such circumstances is inhibited by the due process clauses of the state and federal Constitutions.

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

Dana B. Van Dusen, for appellants.

T. W. Bockes, T. F. Hamer, George C. Holdrege, J. W. Weingarten, Wymer Dressler, Robert D. Neely, Guy C. Chambers, W. P. Loomis and *D. M. Murphy, contra.*

Edwin Vail, amicus curiæ.

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

CARTER, J.

This is an action at law brought by certain live stock commission firms in Omaha, or their attorneys in fact,

against all of the intrastate railroad carriers of live stock serving the stockyards at that point, to enforce the payment of reparations ordered by the Nebraska state railway commission based on the failure of the line haul or trunk railroads to absorb switching charges of the Union Stock Yards Company, or its successor, the South Omaha Terminal Railway Company, for switching car-loads of live stock from the terminals of the trunk lines to and from the loading and unloading chutes of the stockyards itself. The trial court found for the defendant railroad companies, and the plaintiffs appeal.

The record shows that, prior to 1896, the line haul carriers serving South Omaha owned their own trackage into the stockyards and no switching charges were assessed on shipments to and from those yards. Subsequently, the railroad carriers of live stock entered into an agreement with the Union Stock Yards Company whereby that company took over the tracks owned by the line haul carriers in so far as those tracks were within the stockyards district. Since that time the Union Stock Yards Company has operated as a common carrier, primarily for the purpose of serving the stockyards, and has established switching charges for the handling of traffic between the interchange tracks of the line haul carriers and the chutes within the stockyards. As a result of this change a switching charge of 50 cents per car-load of livestock was assessed, which charge was wholly absorbed by the line haul or trunk railroads. On December 8, 1908, the railway commission authorized the Union Stock Yards Company to collect a switching charge of 75 cents per car-load of live stock and ordered further that the line haul carriers absorb the whole charge. On September 16, 1910, the railway commission authorized the Union Stock Yards Company to increase the switching charge to $1 per car-load of live stock and ordered the absorption of the full charge by the line haul carriers. On June 12, 1918, the railway commission authorized an increase of the switching charge to $1.50 per car-load of live stock and ordered the line haul carriers to

show cause why they should not absorb the whole charge. It appears, however, that the control of the railroads had been taken over by the federal government on December 28, 1917, and no attempt was made by the railway commission to compel a complete absorption of the switching charge by the line haul carriers. On August 27, 1920, the interstate commerce commission authorized a 35 *per centum* increase in all interstate rates. The Nebraska railway commission took similar action, but allowed a 25 *per centum* increase only on intrastate rates. On January 27, 1921, the interstate commerce commission ordered all steam railway carriers in Nebraska to comply with its order for a 35 *per centum* increase of freight rates for the reason that the Nebraska rates were discriminatory as against the interstate rates, making the switching charge of the Union Stock Yards Company $2 per car-load of live stock and the line haul carriers amount of absorption $1.50, leaving a balance of 50 cents per car-load of live stock to be paid by the shipper or receiver of the stock. On July 1, 1922, the switching rates along with all other freight rates were reduced approximately 10 *per centum,* making the new switching charge $1.82 per car-load of live stock, $1.35 of which was absorbed by the line haul carriers and 47 cents passed back to the shippers and receivers of live stock. By a decree of the United States district court, the Nebraska state railway commission was enjoined from enforcing sections of statutes and rules in conflict with the foregoing orders of the interstate commerce commission. Thereafter, and on May 5, 1922, the railway commission vacated its order increasing freight rates 25 *per centum,* and its orders supplemental thereto, expressly stating that the intrastate rates then in force should remain in effect until changed by a subsequent order of the commission. On May 3, 1924, the railway commission, after a complete investigation of the freight rate structure in Nebraska, entered its permissive order that all freight charges be based on distances from the points of origin to final destination. The opinion of the railway commission accompanying the order states:

"Distances to South Omaha stockyards shall govern the rates." On September 1, 1932, the railway commission, without entering an order, found the new rates to the Missouri river markets prescribed in the "Interstate Commerce Commission Docket 17000, Rate Structure Investigation, Part 9, Livestock—Western Division Rates," a copy of which is in the record, as reasonable maximum rates and that they should include delivery to the unloading chutes of the Union Stock Yards Company without the assessment of the additional switching charges. The effective date of this order was, upon application, postponed until November 1, 1932. It was therefore definitely ordered under the new rates effective November 1, 1932, whether interstate or intrastate, that line haul carriers were to absorb the full amount of the switching charge.

It is not contended by the parties that the switching charge of $1.82 per car-load of live stock is an unreasonable charge for the service and facilities furnished. The allegation of unreasonableness is based wholly upon the failure of the line haul carriers to absorb this entire charge out of line haul rates; in other words, upon the view that the line haul rates are unreasonable in amounts equal to the unabsorbed portion of the switching charge, in that they do not cover all transportation service to and from the loading and unloading chutes in the South Omaha stockyards. Plaintiffs further contend that the orders of the railway commission requiring the use of distances to the South Omaha stockyards necessarily contemplated the handling of stock to and from the loading and unloading chutes solely on the basis of the line haul rates. It is upon this basis that plaintiffs asked, and the railway commission granted, reparations to the extent of 47 cents per car-load of live stock shipped in and out of the South Omaha stockyards under the provisions of section 75-510, Comp. St. 1929. The period during which reparations must be paid, if liability therefor attaches, the number of car-loads of live stock shipped in and out of South Omaha stockyards, and the amounts owing if the defendants are liable,

are all stipulated in the record. The present action was brought only for the sum of $318.19 on a very few of the shipments involved in the order of the railway commission, these being selected in such a way as to lay the foundation for the determination of every issue involved in the commission's order. Plaintiffs estimate, and the defendants agree, that total reparations, with interest, if defendants are liable therefor, will amount to approximately $175,000. The question for determination in this suit is whether the trial court rightfully denied a judgment for reparations based on the order of the railway commission requiring their payment.

That the stockyards company is a common carrier has been heretofore determined. *State v. Union Stock Yards Co.*, 81 Neb. 67, 115 N. W. 627. Under the Nebraska regulatory act, section 75-403, Comp. St. 1929, it is not unlawful for the railway commission to allow charges in excess of the line haul rate for terminal service and facilities, the statute in part saying: "The schedules shall plainly state the places upon its road between which property and passengers will be carried, * * * stating separately any terminal charges, and any rules and regulations which in anywise change, affect or determine any of the aggregate of such rates, fares and charges." To like effect is the interstate commerce act as passed by the federal congress. 49 U. S. C. A., sec. 6, par. 1. It seems to us, therefore, that the fixing of a line haul rate does not of itself include the cost of terminal services and facilities and whether it does or not must be determined from the orders of the railway commission establishing such rates. See *Walker v. Keenan*, 73 Fed. 755; *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.*, 186 U. S. 320.

The source of the difficulty resulting in this litigation was the act of the federal government in taking over the control of the railroads on December 28, 1917. Prior to that date all line haul rates fixed by the railway commission on intrastate shipments included the whole of the switching or terminal charge of $1 per car-load of live

stock. At the commencement of federal control the switching charge on interstate shipments was $1.50 per car-load of live stock, 75 cents of which was absorbed by the line haul carrier. On June 12, 1918, the railway commission authorized the Union Stock Yards Company to increase its switching charges to $1.50 per car-load of live stock on intrastate shipments and ordered the railroads to show cause by June 24, 1918, why they should not be required to absorb the whole of the increased switching charge. Due to the fact that the railroad properties were being operated by the director general of railroads, no further order was made with reference to the absorption of the switching charges by the line haul carriers. The increased switching charge of $1.50 per car-load was duly put into effect and remained in effect all during the period of federal control which ended on February 29, 1920. During this period the railroads absorbed $1 of the switching charge on intrastate shipments and 75 cents of the switching charge on interstate shipments. The balance of each charge was collected from the shipper or consignee of the live stock.

The period of federal control was terminated on February 29, 1920, by an act of congress which provided in part: "All rates, fares, and charges, and all classifications, regulations, and practices, in anywise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the interstate commerce act, shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the commission." 41 U. S. St. at Large, Part I, p. 464. Pursuant to the power reserved to it in this act, the interstate commerce commission, effective August 27, 1920, authorized a 35 *per centum* increase in

rates on interstate traffic and specifically authorized such increase to apply to switching charges. On August 23, 1920, the Nebraska railway commission denied a 35 *per centum* increase and ordered a 25 *per centum* increase only. The order, however, contained the following provisions: "It is further provided that (d) intrastate switching and special service (such as transit, weighing, diversion, reconsignment, storage, car rental and transfer) charges shall be increased twenty-five (25) per cent., provided that all existing absorption rules will be applied to the advances herein authorized." Thereupon the interstate commerce commission found that the increase of 25 *per centum* on intrastate traffic was discriminatory as to interstate commerce, and pursuant to the authority of section 13, par. 4, 49 U. S. C. A., ordered the 35 *per centum* increase of rates to be made. See, also, *Illinois Central R. Co. v. Public Utilities Commission*, 245 U. S. 493; *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U. S. 563. The order of the interstate commerce commission was sustained by the United States district court for the district of Nebraska and the rates therein established were made effective. Under this order the switching charge on intrastate car-loads of live stock was $2 per car, $1.50 of which was absorbed by the line haul carrier. The switching charge on interstate car-loads of live stock was $2 per car, $1.25 of which was absorbed by the line haul carriers. These rates and charges were included in the tariffs published by the defendant railroad companies, copies of which were filed with the Nebraska railway commission and the interstate commerce commission.

On May 5, 1922, the Nebraska railway commission entered an order containing the following: "It is therefore ordered that the order made and entered in this cause on August 23, 1920, as modified by supplemental orders hereinbefore made, be, and the same is hereby vacated and set aside, thereby leaving the intrastate rates now in effect as lawful rates until hereinafter changed pursuant to order of this commission."

On May 24, 1922, the interstate commerce commission entered its order with reference to the order of the Nebraska railway commission under date of May 5, 1922, in part as follows: "*And it further appearing,* That by order entered April 7, 1922, as modified by order dated May 5, 1922, the Nebraska state railway commission has vacated and set aside its order of August 23, 1920, as modified, so as to authorize the Nebraska carriers to charge and collect on Nebraska intrastate traffic the full increases allowed by this commission in said docket Ex Parte 74, now in effect; and that the increased intrastate rates and charges prescribed by and established pursuant to the aforesaid orders heretofore entered by this commission will, if said orders of this commission be vacated in so far as they pertain to rates and charges for the transportation of freight, continue in effect as to the lawfully established and applicable intrastate rates and charges unless and until changes by further affirmative order of the competent authority of said state."

It seems to us therefore that the Nebraska railway commission, by its order of May 5, 1922, acquiesced in and adopted the rates promulgated by the interstate commerce commission and that the railroad companies were at this stage of the proceedings lawfully absorbing $1.50 of the $2 switching charge on each intrastate car of live stock and lawfully collecting 50 cents of the charge from the shipper or consignee. This is further borne out by the decree of the United States district court sustaining the intrastate rates established by the interstate commerce commission, wherein it states that the rates in question "are now lawfully in effect by virtue of the supplemental order of the Nebraska state railway commission in Application No. 4299, dated May 5, 1922."

On June 23, 1922, the railway commission authorized the railroads in Nebraska, effective July 1, 1922, to decrease their freight rates to correspond with decreases which had been authorized by the interstate commerce commission as shown by its order. The interstate commerce commis-

sion had ordered that the rates in effect be reduced so they would exceed the rates in effect on August 26, 1920, by 21.5 *per centum* instead of 35 *per centum*. In its order the railway commission said: "It is the intention of this order, and it shall be so construed, to permit Nebraska carriers, applicants in this case, to amend rates and charges on intrastate freight traffic in the same general manner and to the same extent as shall take place in complying with the findings of the interstate commerce commission." Clearly, this order authorized an increase in the switching charge of $1.50 per car in effect August 26, 1920, by 21.5 *per centum*, thereby fixing the switching charge at $1.82. On July 1, 1922, all railroads except the Union Pacific Railroad Company published tariffs by which they absorbed $1.35 of the switching charge, leaving the remaining 47 cents to be collected from the shipper or consignee. The Union Pacific Railroad Company provided in its published tariff of the same date for an absorption of $1.32 of the switching charge, leaving 50 cents per car-load to be collected from the shipper or consignee. On May 19, 1926, the Union Pacific Railroad Company applied for an order increasing the absorption on intrastate shipments from $1.32 to $1.35. On the same date, the railway commission entered its order authorizing the increase of the amount of the switching charge to be absorbed to $1.35 per car-load of live stock. There can be no question that the railway commission was fully aware of the amount of the switching charge and the amount being absorbed by the line haul carriers. The order of May 19, 1926, shows that the railway commission considered the switching charge and the amount of absorption as a fixed rate by the commission by virtue of its order of May 5, 1922, when it accepted the rates then in effect as lawful rates, and its order of June 23, 1922, authorizing a reduction of intrastate rates to the same extent that they had been reduced by the interstate commerce commission. The rates thus established remained in effect until November 1, 1932, when an entirely new rate scale was established on both intrastate

and interstate shipments of live stock based on the distance from the point of origin to the point of destination. The rates prescribed, effective as of November 1, 1932, specifically provided that the entire switching charge should be absorbed by the line haul carrier.

We conclude, after an examination of all the orders of the railway commission on the subject, that the amount of the switching charge absorbed by the defendant companies here complained of was done upon the legal orders of the railway commission. Appellants contend that an order of the railway commission entered on May 3, 1924, and known as Resolution 74, required the absorption of the whole of the switching charge on intrastate shipments. It is true that this purported order stated that "Distances to South Omaha stockyards shall govern the rates." But it will be observed from a reading of Resolution 74 that it was merely permissive in character and not an order fixing a rate having the force and effect of a statute. The order states in part:

"It is expected that the carriers will publish specific rates from the respective points of origin to final destination and not merely a distance scale. The scales here set forth are not intended for such rigid application as would prevent meeting short line, or reasonable cross-country, competition.

"No order will be entered at this time for the reasons heretofore set forth. These findings are sufficient warrant for the carriers to publish out on statutory notice rates in accordance with the scales attached hereto in appendix. It is expected that the rates will be published to be effective on or before July 20, 1924. If such publication is not made the commission will reopen the case for such proceedings as are appropriate."

It will be noted the commission's opinion states that no order will be entered at this time and that if the recommended publication is not made the commission will reopen the case for such proceedings as are appropriate. The case was never reopened and no subsequent action was ever

taken thereon. It is contended that all rates and charges established pursuant thereto must be treated as carrier made, and if found to be unreasonable by the railway commission, the railroads could be subjected to the payment of reparations. We think this is true, but the fact remains that nothing was said in the order about the absorption of switching charges, and in view of the fact that the amount of the absorption was not changed by the carriers after the making of the permissive order, we are obliged to hold that it was governed entirely by the commission made order previously made. We necessarily conclude that Resolution 74 is not an order that was binding upon the railroads as a rate or charge fixed by the commission. As we have stated, it was permissive, but not an order entitled to the force and effect of a statute.

To specifically set forth every contention advanced by the appellants in their attempt to show that the switching charges in question were never fixed by the railway commission would require an indeterminable amount of space in this opinion. We must, by necessity, content ourselves with the statement that the record and briefs have been examined as to each point raised and a finding that the partial absorption of the switching charges was not authorized by the railway commission cannot be sustained. The further consideration of the case must therefore be bottomed on the premise that the partial absorption of the switching charges complained of was a rate or practice approved by, and, in effect, ordered by the Nebraska railway commission.

This court is committed to the rule that a rate put into effect by order of the railway commission has the force of a statute on the subject. Unless held to be unreasonable and arbitrary by the courts, it expresses the only reasonable rate governing the subject-matter contained in the order. *Central Bridge & Construction Co. v. Chicago & N. W. R. Co.*, 129 Neb. 726, 262 N. W. 852; *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370. In other words, the absorption of $1.35 of the $1.82 switching charge and

the collection of the balance of 47 cents from the shipper or consignee was a legally and conclusively established legal rate or practice prior to November 1, 1932. It is not disputed that the railway commission's order of November 1, 1932, required the absorption of the whole switching charge by the line haul carriers. The question is whether, under such circumstances, the railway commission properly allowed reparations under section 75-510, Comp. St. 1929.

The reparations statute, section 75-510, Comp. St. 1929, is as follows: "That if, after hearing on a complaint under sections 6126, 6127, 6128, 6129 or sections 6137, 6138, 6139, 6140, Revised Statutes of Nebraska for 1913 (75-501 to 75-504, 75-506 to 75-509), the Nebraska state railway commission shall determine that any party complainant has on and after the taking effect of this act and within two years next preceding the filing of the said complaint paid unjust or unreasonable rates or charges to any defendant railroad or express company in this state on intrastate traffic or has on and after the taking effect of this act and within two years next preceding the filing of the said complaint suffered damages by reason of the maintaining, publishing, demanding, charging, receiving or retaining by such carrier of any rate or rates, charges, rules, regulations, services or practices on intrastate traffic which are found by the commission to be unjust, unreasonable, unjustly discriminatory, unduly preferential or otherwise unlawful, the commission shall make an order directing the railroad or express company to pay to the complainant the sum to which he is entitled on or before a day named."

It will be noted from the foregoing statute that reparations can be allowed only where it was found that the shipper had paid unreasonable or unjust rates or when the complainant suffered damages by reason of the collection of unjust, unreasonable, unjustly discriminatory, unduly preferential or otherwise unlawful rates or charges by the carrier. But the rate, or charge, or practice, whichever it may be in the instant case, was not unreasonable, unjust or unlawful, because the railway commission had

by action previous to its collection determined the contrary. Its action in so doing was equivalent to a legislative enactment on the subject. This being true, the railway commission was without authority to grant reparations.

There is a further reason why the plaintiffs cannot recover in this case. If section 75-510, Comp. St. 1929, could be construed to authorize the railway commission to retroactively condemn as unlawful a rate or charge previously established as lawful by it, it would amount to a taking of the property of the railroads without due process of law, a procedure inhibited by section 3, art. I, Constitution of Nebraska, and the Fourteenth Amendment to the Constitution of the United States.

In *Arizona Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, the court said: "Where the commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the commission now holds it should have decided in the earlier proceedings to be a reasonable rate." In the hearing of the same case in the circuit court of appeals, 49 Fed. (2d) 563, the court very aptly said: "The only constitutional restriction upon the legislative power to retroactively reduce rates suggested by the appellant is the constitutional prohibition against the taking of property without due process of law. That is, it is argued, the commission, having established a legal and lawful rate, the freight charges thus fixed, allowed and collected become the property of the carrier and cannot by a new retroactive law be arbitrarily taken away by legislative fiat. This position seems to be well taken. * * * That is to say, whether we regard the power of the commission in establishing a just and reasonable rate as a basis of reparations as a judicial power or as a legislative power, in either event

rates established by the legislative power and collected by the carrier cannot be taken from it because it is subsequently determined to be excessive, whether the belated determination is by court or legislature, or, to use the phrases more commonly applied to the acts of the commission, whether such subsequent determination is quasi legislative, administrative or quasi judicial—in either event a rate established by law—lawful when charged, remains lawful when attacked later by the shipper. The view we have expressed is supported by all the decisions of state courts construing laws establishing rate-regulating bodies having power to grant reparations for excessive rates charged by the carrier."

In *T. R. Miller Mill Co. v. Louisville & N. R. Co.*, 207 Ala. 253, 92 So. 797, the court said: "Such a practice would be odious to the generally established notions of justice, and would, moreover, be utterly subversive of the policy and utility of any system of rate regulation; for no rate could be relied upon as stable, and neither carrier nor shipper could ever be certain of the basis upon which business was being conducted. For it must be observed that, under such a practice, the commission would just as well find that a rate approved and imposed by it years before was in fact unreasonably low, and give retroactive operation to the higher rate later found to have been reasonable. Of course no such practice was contemplated, and no such power was vested in the commission."

Also, in *St. Louis-S. F. Ry. Co. v. State*, 155 Okla. 236, 8 Pac. (2d) 744, the court said: "The question before us, then, is whether or not, after the commission has made a rate, and it has been complied with by the carrier, and the goods hauled, and the collections made, it can later decide that the original rate allowed was excessive and require the carrier to refund. Natural justice would seem to require a negative answer."

In holding portions of a Kansas reparations statute invalid, the supreme court of that state said: "And to the extent that section 4 is designed in text and terms to

create a basis for a cause of action in behalf of a shipper for the exaction of a rate which the carrier was bound to charge under compulsion of statute, breaches of which were punishable by criminal prosecution, it violates the vested rights of the carrier under the provisions of the fourteenth amendment; it likewise offends against those orderly rules and principles for the administration of justice which constitute due process of law; and it is therefore unconstitutional and void." *State v. Public Service Commission,* 135 Kan. 491, 11 Pac. (2d) 999.

It seems quite apparent to us that the railway commission is without authority to set aside a rate or charge previously fixed by it on the ground that it is unreasonable as now viewed and proceed to grant reparations. Such a rate or charge is the reasonable, just and legal rate or charge until abrogated by the railway commission, or other competent authority, and an award of reparations based on the unreasonableness of such rate or charge is not authorized by section 75-510, Comp. St. 1929.

Appellants contend that the failure of the railroads to appeal from the reparations order made by the railway commission in which it was determined that failure to absorb the whole switching charge was an illegal practice has made that part of the commission's order conclusive. It is not necessary for us to decide the effect of the failure of the railroads to appeal. The fact remains that the railway commission did not have authority to grant reparations under the facts in this case. This being true, the commission's order purporting to so do is void. When the district court was called upon to enforce the railway commission's order for reparations, it had jurisdiction to inquire into the power of the railway commission to enter such an order. The trial court determined that the reparations order was invalid and in this it was correct. In view of the conclusion reached, it is not necessary for us to discuss or pass upon the other points raised in the briefs by the parties to the suit.

The judgment of the district court is

AFFIRMED.

CHARLES J. MCILWAIN, APPELLANT, V. MARGARET K. MCILWAIN, APPELLEE.
283 N. W. 845

FILED FEBRUARY 10, 1939. No. 30460.

1. **Divorce**: ALIMONY. A hearing upon an application to revise and alter an alimony decree, brought under the provisions of section 42-324, Comp. St. Supp. 1937, is not a retrial of the original case, nor a review of the equities of the original decree. The court upon such application considers the new or changed conditions of the parties and adapts the decree thereto, as present conditions require.
2. ———: ———. Remarriage is a change of circumstance that may be considered by the court, along with other changes of circumstances, in passing upon an application to revise and alter an alimony decree.
3. ———: ———. Remarriage does not relieve a husband from the obligations fixed by an alimony decree.
4. ———: ———. Where a divorced husband remarries, he owes a duty to his second wife, as well as to the former, that the law recognizes, and the court will make such adjustment as the relative necessities of the parties demand and the ability of the husband will warrant. However, the first wife has first consideration, and her necessities will not be unreasonably curtailed, nor her wants ignored.
5. **Evidence** examined, decree modified, and as modified affirmed.

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

Frank A. Peterson, for appellant.

S. W. McKinley, Jr., contra.

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

SIMMONS, C. J.

This is a proceeding brought under the provisions of section 42-324, Comp. St. Supp. 1937, to revise and alter a decree fixing permanent alimony.

The plaintiff and the defendant were married April 5, 1905; three children were born to the marriage; the youngest will become of age March 10, 1939. The plaintiff

is 60, the defendant 58, years of age. The plaintiff and the defendant resided in Nebraska until 1921, when, apparently with the plaintiff's approval, the defendant with the three children removed from Nebraska to California, where she and the three children have since resided.

Shortly after the marriage, residence property was bought in Omaha by the plaintiff and the defendant, title being taken in the wife's name, part of the purchase money being furnished by the defendant's father. This property was sold, and a second property bought, in part with a contribution from the estate of the defendant's father. This was profitably sold, and the proceeds thereof were taken by the defendant to California where, apparently using her own discretion and judgment, she invested and reinvested the money, sometimes with profit, sometimes with loss.

In April, 1933, the plaintiff brought an action for divorce against the defendant, alleging in his amended petition the incompatibility of the defendant and desertion of the plaintiff by the defendant. The defendant answered, admitting the marriage and denying all other allegations in the petition. At the trial of the divorce action, the defendant appeared by her attorney, introduced no evidence, and made no objections to the introduction of evidence. A decree granting the plaintiff an unconditional divorce on the ground of the defendant's desertion was entered November 1, 1933. On that date there was also filed with the clerk of the court a stipulation, dated May 10, 1933, providing, among other things, that, upon the signing of a decree in this action, if one was granted, regardless of who obtained the divorce, alimony should be settled as follows: Plaintiff to pay the defendant the sum of $75 per month until the younger son reached the age of 21 years; that thereafter the defendant was to be paid the sum of $40 per month; and that there should be incorporated in the decree the terms and conditions of the stipulation.

In the decree the court found "That the stipulation entered into between these parties is fair and reasonable, and considering the present earning capacity of the plain-

tiff and the circumstances of the parties, should be made binding upon them;" and decreed "That the terms of a stipulation entered into between these parties be binding upon the same;" and provided for the payment of $75 per month by the plaintiff to the defendant until the younger son became 21 years of age, and that "after said date the plaintiff is to pay the defendant the sum of $45 per month." Indorsed upon the stipulation is the following: "With alimony for defendant increased to $45 per mo. after son Laurence becomes of age. Stipulation approved." To that appears the signature of the trial judge.

On December 10, 1937, plaintiff filed his petition in said action, reciting the above decree, compliance therewith, his remarriage, a reduced earning capacity; that he has no property except his earnings; and praying for a decree altering and modifying said alimony decree by reducing the payments of $75 per month to a sum not exceeding $25 per month until the younger son becomes 21 years of age; and providing that thereafter all payments of alimony cease.

The defendant answered, alleging that the payments provided for in said decree were based upon a stipulated property settlement; that the same became binding upon the parties; that there has been no change of position of the defendant since said decree; setting out her property holdings; alleging the capacity of the plaintiff to continue said payments; and praying that the stipulated contract in said decree remain unaltered and unmodified; and that the terms thereof should be carried out in their entirety.

The matter was heard upon March 5, 1938. The trial court found "that the evidence does not disclose any substantial change in the circumstances of the parties," and denied a modification of the alimony payments "except that the modification of the original stipulation be and the same hereby is canceled;" and ordered that "the original stipulation providing for payments of $40 per month after the majority of the youngest child is hereby confirmed."

At the time of the hearing in the trial court, of the three children, the daughter was married and well-to-do; the

older son was unmarried, living at home, and well-employed; and the younger son was finishing high school and had the promise of a good job. The real estate owned by the defendant consisted of a small apartment house in which she lived, the rent of which, however, was collected by the loan company which held a mortgage upon it. She had no other income and was not in good health. It appeared, also, that the younger son had saved some money from the payments made under the court order by his father. The plaintiff had no property of any kind save a cheap automobile purchased in 1936, upon which full payment had not yet been made at the time of trial. During the twelve years before the divorce that the defendant resided in California with her children, the plaintiff contributed to their support a total of $21,000 from his earnings as a freight engineer; and at one time gave the defendant $500 to be used as the purchase price of property. The defendant has the residue of the property resulting from the contributions of her father and from the earnings of the plaintiff.

The record shows some dispute as to the present earnings of the plaintiff. The plaintiff testified that he was earning around $275 a month when the decree was entered in 1933. The record does not disclose whether the sum fixed for his 1933 earnings of $275 a month was net or gross. He testified he was earning around $190 to $200 when the case was tried in March, 1938. His gross earnings shown for February, 1938, alone, were around $217. His gross earnings for the year 1937 were $3,525.38, from which approximately $30 a month for road expenses should be deducted. He fixed his monthly expenses at the time of the trial at about $290, which included the alimony payment. His only disclosed income at the time of the trial, other than earnings, was $10 a month from a stepdaughter. He listed no debts other than those on his car, so we conclude his current income was sufficient to meet his current expenses, and that there has been no substantial reduction in his earnings since 1933. The terms of plain-

tiff's employment make him subject to voluntary retirement at the age of 65 with a pension of $92 or $93 per month according to present figures; and he is subject to compulsory retirement at 70 with a pension of about $110 per month. However, this contingency will not occur for five years at the earliest.

We first consider the effect of the stipulation as disclosed by the record in this case. We do not have the testimony, with reference to the property of the plaintiff or his earnings, at the time of the trial of the action for divorce other than his statement at the time of the hearing in 1938. However, the court in its findings considered "the present earning capacity of the plaintiff and the circumstances of the parties." So, we assume, that evidence was taken upon that question, and that the trial court, upon the basis of evidence offered at that time, had reason for increasing the stipulated amount to be paid to the defendant from $40 to an award of $45 per month after the youngest child became of age. However, that increase was not to become effective until March, 1939.

We agree with the statement made by defendant's counsel that "said decree was entered, in part at least, upon a stipulation between the parties." The effect of the stipulation, so far as the decree is concerned, is that it was taken merely as advisory to the court.

We view the case, then, from the standpoint of a decree entered providing for the payment of alimony, which decree is subject to revision and alteration from time to time by the court upon a proper petition therefor and proper showing thereon.

The applicable provisions of section 42-324, Comp. St. Supp. 1937, are as follows:

"After a decree for alimony or other allowance for the wife and children, or either of them, * * * the court, from time to time, on the petition of either of the parties and hearing thereon, may revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof. * * * And the court may make any decree re-

specting any of the matters which such court might have made in the original suit."

In the original suit the court has power to decree such alimony "as it shall deem just and reasonable, having regard to the ability of the husband, the character and situation of the parties, and all other circumstances of the case." Comp. St. 1929, sec. 42-318.

The power of the court to alter and revise provisions for alimony in a divorce decree is unquestioned. We have examined the decisions of this court in *Chambers v. Chambers*, 75 Neb. 850, 106 N. W. 993; *Cizek v. Cizek*, 76 Neb. 797, 107 N. W. 1012; *Williams v. Williams*, 119 Neb. 8, 226 N. W. 798, together with those of other jurisdictions having statutes exactly alike or similar to ours. We conclude that a hearing upon an application to revise and alter a decree under this statute is not a retrial of the original case, or a review of the equities of the original decree. The court upon such application considers the new or changed conditions of the parties and adapts the decree thereto, as present conditions require. The remarriage of the plaintiff, the establishment of a new home, and the support of a stepson, aged 15 years, are the only material changes of circumstances shown by this record. Remarriage, and the resulting new obligations, is a change of circumstance that may be considered by the court, along with other changes of circumstances, upon an application to revise and alter the original decree.

The plaintiff, at the time he secured the divorce from the defendant, consented to an alimony decree fixing payments of $75 a month to his wife up until the time the minor son became 21 years of age, and thereafter at $40 a month. It is true that the trial court at that time increased the award payable after the majority of the younger son. That increase, however, is not yet effective, and the trial court in its decree of March 11, 1938, reduces the amount payable after the majority of the younger son to $40 per month. The plaintiff knew at the time of his remarriage that he was under obligations to satisfy the decree that

the court rendered against him. His remarriage does not relieve him from the obligations fixed by that decree. *Winter v. Winter,* 95 Neb. 335, 145 N. W. 709. "Where a divorced husband remarries, he owes a duty to his second wife, as well as to the former, that the law recognizes, and the court will make such adjustment as the relative necessities of the parties demand and the ability of the husband will warrant." *Cook v. Cook,* 168 Wash. 649, 13 Pac. (2d) 38. However, the first wife has first consideration, and "her necessities will not be unreasonably curtailed, or her wants ignored." *Herrett v. Herrett,* 80 Wash. 474, 141 Pac. 1158.

So far as this record discloses, there has been no material change in the earning capacity of the plaintiff since the original decree was entered, and the affirmation of the decree of the trial court places no burden upon the present wife that was not there at the time of her marriage to the plaintiff. Under the facts and circumstances disclosed by the record in this case, the fact of remarriage standing alone is not sufficient to justify a modification of the original decree, or a reduction in the amount of alimony that the plaintiff should pay the defendant.

Plaintiff submits that decrees for alimony in instalments for life or for an indefinite period are invalid in the state of Nebraska. Plaintiff's contentions in that regard have been answered by this court in *McCord v. McCord,* 128 Neb. 230, 258 N. W. 474, wherein this court said: "We find nothing restricting the powers of our divorce courts, in a proper case, to enter judgments in this form."

The stipulation was offered for use in the divorce action in 1933, and should not have been confirmed in this proceeding.

The decree of the district court of March 11, 1938, is modified by setting aside that part of the decree which holds that the original stipulation is confirmed, and, so modified, is affirmed, subject to the right of the plaintiff to apply for and secure modification thereof at a subsequent time upon a showing of materially altered circumstances.

The costs of this action on this appeal are taxed to the plaintiff, including an attorney's fee of $100 for defendant's attorney for services in this court.

AFFIRMED AS MODIFIED.

IN RE ESTATE OF CHRISTIAN M. SKADE.
HANNAH EDWARDS, APPELLANT, V. ANNA D. YORK ET AL., APPELLEES.
283 N. W. 851

FILED FEBRUARY 10, 1939. NO. 30452.

1. **Appeal.** In reviewing a direction to the jury at the close of plaintiff's evidence to return a verdict in favor of defendant, the appellate court will assume the existence of all material facts which competent evidence on behalf of plaintiff establishes or tends to prove and give him the benefit of proper inferences from such facts.
2. **Contracts.** The making of a will which violates unperformed obligations of testator under a valid oral contract, after full performance by the other party, does not destroy the contract.
3. **Work and Labor.** A presumption that an adult child who performed valuable services for her parents in their home and on their farm did so gratuitously may be overthrown by evidence of an oral contract for compensation.
4. **Payment.** A presumption that a lender of money is not indebted to the borrower on a previous obligation not mentioned by either at the time of the loan may be overthrown by evidence of a preexisting debt owing from lender to borrower.
5. **Limitation of Actions.** The statute of limitations does not begin to run against the claim of an adult child for services continuously performed under an oral contract for parents during their lives until the contract is terminated by their death.

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

R. E. Bannister and *Herbert W. Baird*, for appellant.

Halligan, McIntosh & Halligan, contra.

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

ROSE, J.

In the county court of Dawson county, Hannah Edwards presented a claim of $11,800 against the estate of her deceased father, Christian M. Skade, for services performed by her from January 1, 1904, to January 30, 1937, under an agreement by him to pay her therefor; also a claim for an unpaid loan of $500 from her to her father April 2, 1934; total, $12,300.

Anna D. York and Elsa M. Rickey, daughters of decedent and sisters of claimant, contestants, objected to the allowance of the claims, pleading *nil debet*; no such agreement; attempt to annul duly probated will of decedent; statute of limitations. The county court disallowed the claims. From a dismissal of the proceeding claimant appealed to the district court, where there was a trial on the issues raised by the pleadings in the county court. At the close of the testimony on behalf of claimant, the district court sustained a motion by contestants to direct a verdict in their favor for insufficiency of the evidence to prove the claims. From the resulting judgment in favor of contestants, claimant appealed to the supreme court.

The vital issue on appeal is the sufficiency of the evidence to make a case for the determination of the jury on the traversed plea for compensation for services performed by claimant under an agreement by her father to pay her for them. The problem requires observance of this rule: In reviewing a direction to the jury at the close of plaintiff's evidence to return a verdict in favor of defendant, the appellate court will assume the existence of all material facts which competent evidence on behalf of plaintiff establishes or tends to prove and give him the benefit of proper inferences from such facts. *Central Nat. Bank v. Ericson*, 92 Neb. 396, 138 N. W. 563; *O'Hara v. Hines*, 108 Neb. 74, 187 N. W. 643; *Diller v. Chicago, B. & Q. R. Co.*, 119 Neb. 494, 229 N. W. 888; *Phelps v. Metropolitan Utilities District*, 120 Neb. 337, 232 N. W. 785; *State v. Havel*, 120 Neb. 832, 235 N. W. 584; *In re Estate of Hoagland*, 126 Neb. 377, 253 N. W. 416; *Zielinski v. Dolan*, 127 Neb. 153, 254 N. W.

695; *Andrews v. Clapper,* 133 Neb. 110, 274 N. W. 209; *Zimmer v. Brandon,* 134 Neb. 311, 278 N. W. 502.

The evidence establishes or tends to prove the following facts: Hannah Edwards, claimant, is the daughter of Christian M. Skade and wife, who had two other daughters, Anna D. York and Elsa M. Rickey, and two sons, Mats Skade and Henry C. Skade. Hannah's husband died January 24, 1904, leaving her with their only child, a girl three years of age. After the funeral, the father of Hannah took her and her child to his "home place," a 160-acre farm in Dawson county. When they arrived, there were present herself and her daughter, her father and mother, her sister Elsa, her brothers Mats and Henry, and Henry's wife who had become a mother the day before. For two weeks Hannah acted in the capacity of accoucheuse besides the performance of other services in her father's home. Henry's wife remained there until the next fall.

For 33 years Hannah, without receiving any compensation, in money, worked in the home of her father continuously, except at intervals when temporarily absent or prevented by illness. In the meantime the residence of the senior Skade was first on the south place, later on a 160-acre farm a short distance farther north, and finally on a lot in Cozad, where a house was constructed for the third home. At these homes roomers and boarders were kept at different times for compensation and visiting relatives were frequently entertained at each of those places.

The health and strength of Hannah's mother had been somewhat impaired by sunstroke and other afflictions and she did not perform many of the tasks incident to farm and home life. The more difficult services were performed by Hannah, who cooked, cleaned house, did the family washing, painted buildings, husked corn, milked cows, pumped water for hogs, took care of chickens, fed calves, worked in the garden. Services like those indicated were performed by Hannah on both farms. She put the house on the north farm in order for occupancy by the Skade family. She papered the Skade house in Cozad.

Hannah was not a dependent in 1904 when her father took her and her little daughter into his home, nor afterwards. She had been emancipated by marriage, age and separation from former relations. She had the income from a 40-acre tract of irrigated land which yielded her an annual income varying from $200 to $1,500. With her earning capacity for work she had the means of livelihood. She clothed herself and daughter until the latter became a self-supporting teacher.

In addition to the natural impulse of the father to care for his daughter after the death of her husband in 1904, there were inducements to take her into his home. He was then in need of a midwife for a daughter-in-law and also in need of a housemaid. Hannah acted in both capacities.

If there were any agreement to pay and receive compensation, performance on the part of the daughter is fully shown. In addition to facts already stated, the father himself, according to the testimony of a disinterested witness, said that Hannah could do a man's work; did not see how they could have gotten along without her; had done more for him than all the rest of them—referring to members of his family.

Is there evidence from which a jury could properly find that an agreement for pay was made? Hannah was not permitted to testify to transactions between herself and her deceased father. This handicap increased the difficulty of proving an oral contract for compensation. Resort to circumstances was necessary. A witness who testified with apparent candor, who had been a teacher, who was a neighbor and friend of the elder Skade, said the latter told him that Hannah had promised to stay with him and his wife and take care of them; that "he had always promised to pay her;" that he "intended to leave it in a will that she was to get it, but he was informed the will could be broken and he had decided she should just hand in for her labor for the time she had worked for them;" that he said to the witness: "You might have to repeat this some time."

The circumstances; the promise of Hannah to stay with her father and mother and take care of them; the promise of the father to pay for the services; the fidelity with which Hannah kept her promise for a third of a century, and the satisfaction she gave him by the faithful performance of duties—all tend to prove a mutual agreement for compensation, unless there is something in the record to overturn the case thus made.

A copy of the duly-probated will of the senior Skade is in the record. It is dated June 12, 1936, and willed in equal shares to the three daughters of testator the estate of which he died seised, except household goods and chattels bequeathed to Hannah. By will the two sons got nothing, because one of the farms had been sold and they had received proceeds of the sale amounting to $21,000.

The will made no provision for compensating Hannah for her labor, and it is argued in support of the peremptory instruction that the allowance of her claim would consume the estate and defeat the devise to the daughters Anna and Elsa. There was a formidable argument in support of this proposition, but it does not seem to be conclusive on the record for review. It has long been the law in Nebraska that the making of a will which violates unperformed obligations of testator under valid oral contract, after full performance by the other party, does not destroy the contract. *Peterson v. Bauer,* 83 Neb. 405, 119 N. W. 764; *Hespin v. Wendeln,* 85 Neb. 172, 122 N. W. 852; *O'Connor v. Waters,* 88 Neb. 224, 129 N. W. 261; *Johnson v. Riseberg,* 90 Neb. 217, 133 N. W. 183; *Brown v. Webster,* 90 Neb. 591, 134 N. W. 185; *Labs v. Labs,* 92 Neb. 378, 138 N. W. 561; *Kofka v. Rosicky,* 41 Neb. 328, 59 N. W. 788; *Damkroeger v. James,* 95 Neb. 784, 146 N. W. 936; *Lacey v. Zeigler,* 98 Neb. 380, 152 N. W. 792. Evidence that Hannah and her father entered into an oral agreement for services and compensation and proper inferences from the evidential facts outlined lead to the conclusion that any presumption of gratuitous labor by daughter to father was overthrown.

Another presumption is invoked to disprove a debt for

labor. The evidence shows that Hannah borrowed from her mother or father $1,500 in 1928, when a large part of the claim in issue was unpaid. In this situation the contestants state their position as follows:

"It is contrary to the experience and observation of mankind that one to whom another is indebted will borrow money from his debtor upon a promise to repay him, and at the same time make no mention of a debt claimed to be due from the debtor. A presumption arises from such a transaction that the lender is not indebted to the borrower in any sum."

The position thus taken is untenable for the reason that the presumption is overthrown by the evidence. The relation between a parent and an emancipated child does not prevent contractual obligations of one to the other. Hannah and her father were competent contracting parties. There was believable evidence of an agreement between them for labor and pay. A time for payment was not fixed. The amount of compensation was not mentioned. The period of service had not ended when the loan was made. While living in her father's home and working for him she had means for self-support. The evidence is that she did not borrow the money for her own benefit but devoted it to her daughter and son-in-law to aid them in procuring a home in Cozad, where they were engaged in the practice of dentistry. They paid the borrowed money back to her in instalments and she discharged her 1,500-dollar debt to her father—all ordinary business transactions. The better view of the entire record is that the presumptions upon which contestants rely are overthrown by the evidence.

The claim for compensation is not outlawed as pleaded by contestants. The agreement was a continuing one which did not expire until the death of the parents, when the statute of limitations began to run. *Phifer v. Estate of Phifer,* 112 Neb. 327, 199 N. W. 511.

The claim for an unpaid loan of $500 owing by testator to his daughter Hannah is not supported by the evidence. He received from her by check $500, but, for anything

appearing in the record, the transaction may have been payment of a debt owing by her to him.

For the error of the trial court in taking the case from the jury on the issue of compensation for services, the judgment below is reversed and the cause remanded for further proceedings.

REVERSED.

AMERICAN LOAN PLAN, APPELLEE, V. V. C. FRAZELL ET AL., APPELLANTS.
283 N. W. 836

FILED FEBRUARY 10, 1939. No. 30469.

1. **Replevin: AFFIDAVIT: WAIVER.** "Where an affidavit (in replevin) has defects in form or substance which might be amendable, if the parties in the case who might interpose objections to the affidavit appear, answer to the merits of the action, and go to trial without making objections to the affidavit, they waive the defects." *Hudelson v. First Nat. Bank of Tobias*, 51 Neb. 557, 71 N. W. 304.
2. **Novation.** "Where a creditor accepts from his debtor any form of new agreement in place of a prior contract or obligation between them, with the intent to cancel the former and to substitute the new one therefor, novation by the substitution of an obligation takes place." 46 C. J. 586.
3. **Usury.** "A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting the transaction with usury, though the difference in prices may exceed lawful interest for a loan." *Grand Island Finance Co. v. Fowler*, 124 Neb. 514, 247 N. W. 429.
4. ———. "Where original purchase of automobile on credit was valid, it is immaterial in defense of usury to suit on note for car that finance company solicited contracts from automobile dealers and furnished schedules for that purpose." *Grand Island Finance Co. v. Fowler, supra.*
5. ———. "Purchase of note at discount beyond legal rate of interest does not constitute transaction 'usurious.'" *Grand Island Finance Co. v. Fowler, supra.*

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

W. A. Ehlers, for appellants.

Monsky, Grodinsky, Marer & Cohen, contra.

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

EBERLY, J.

This is an action of replevin for a new Ford Tudor automobile, brought in the district court for Douglas county by the American Loan Plan, a corporation, against V. C. Frazell, John E. Frazell, and Marie Frazell. The record discloses that at the commencement of the action the plaintiff filed a petition, and also the statutory affidavit for a writ of replevin. It also appears that the writ of replevin issued, but the property claimed (the automobile in suit) was not taken thereunder, and the action proceeded as one for damages under the terms of the statute. Comp. St. 1929, sec. 20-10,106. A jury was duly impaneled, and, at the close of all evidence, the trial court sustained the motion of plaintiff, "to instruct the jury to return a verdict in its favor or that the jury be discharged and judgment entered for plaintiff," and entered judgment in favor of plaintiff and against said defendants, V. C. Frazell and John E. Frazell, and each of them, for the sum of $446.99 and costs of suit. From the order of the trial court overruling their separate motions for new trial, the defendants appeal.

The following facts appear in the record, substantially without dispute, viz.: In September, 1935, John E. Frazell approached the McFayden-Stewart Company to purchase an automobile. He sought a "time plan" purchase. There was a difference between the automobile price on a cash basis and when purchased on the "time plan." As the bargain was finally consummated, on the basis of the time plan, he purchased a new 1935 Ford, Tudor model; he received an allowance of $78.75 for an old automobile which he traded in, paid $50 in cash, and together with his father, V. C. Frazell, executed and delivered to the McFayden-Stewart Company a chattel mortgage note or contract in

triplicate, in the sum of $659, payable in 23 instalments of $27.50 and one of $26.50. At the time of the transaction it was expected by the parties that the Universal Credit Company would finance the transaction, and the chattel mortgage note or contract in triplicate was executed on blanks provided by that company. However, the Universal Credit Company refused to take the paper because of the time of maturity provided therein. Accordingly, the American Loan Plan, a corporation, plaintiff herein, was contacted, and it purchased the chattel mortgage note or contract (exhibits 5, 6, 7) and paid therefor by a check of $500, dated September 18, 1935, payable to the McFayden-Stewart Company, and received its purchase as indorsee or assignee thereof. Thereafter, within a few days, V. C. Frazell, John E. Frazell, and Marie Frazell (wife of John E. Frazell) executed a promissory note and a "conditional sale contract and assignment" securing the same (exhibits 1 and 2) covering the automobile purchased (and described in the chattel mortgage note or contract, exhibits 5, 6, 7, previously executed), which were delivered to the McFayden-Stewart Company, and then executed by the latter (together with necessary indorsements and assignments to the American Loan Plan), and in turn, by the McFayden-Stewart Company, delivered to the American Loan Plan, plaintiff herein. It appears that by agreement of the parties the instruments last executed (exhibits 1 and 2) were substituted for the instruments first executed (exhibits 5, 6, 7), which latter were, in due time, returned to and delivered back to Frazell, who accepted and received the same. Thereafter the Frazells made default in the payments contracted to be made, and thereupon this action was instituted to recover possession of the property covered by the conditional sale contract and assignment.

Appellants' first contention is that plaintiff cannot recover because in the affidavit in replevin it claims a right to recover by reason of a special ownership, and "the proof if any shows general ownership or title." The authorities cited by appellants in support of this contention are not in

point. True, it may be said the affidavit in replevin is defective. In this instrument the statement appears that plaintiff "has a special ownership in the above described property (the automobile in suit) under and by virtue of the terms and conditions of a certain instrument attached hereto marked exhibit 'A' and by special reference herein made a part of this affidavit," but "exhibit A" was not attached to the original affidavit in replevin and the terms and conditions of the instrument relied upon do not otherwise appear in this affidavit. No property was taken or secured by the writ of replevin which issued upon the filing of this affidavit. Neither was the sufficiency of this affidavit challenged by the defendants during or prior to the trial on the merits in the district court.

As applied to an action in replevin in the district court, a civil action is commenced by filing in the proper court a petition and causing a summons to be issued thereon. Its jurisdiction is dependent upon the petition filed and not upon what may appear in the affidavit in replevin. *Tiedtke v. Whalen,* 133 Neb. 301, 275 N. W. 79.

In the instant case the pleader had properly pleaded in its petition the conditional sale contract and assignment which furnished the basis of its cause of action. In fact, its sufficiency is not questioned. The case of *Hudelson v. First Nat. Bank of Tobias,* 51 Neb. 557, 71 N. W. 304, appears to control in the case here presented. In such *Hudelson* case no attack was made upon the affidavit in replevin preceding or during the trial. We quote from the opinion by the court, viz.: "It will no doubt have been noticed that there was an entire absence of any statement, either in the words of the Code or in their equivalents, or of facts which showed the wrongful, or any, detention of the property by the plaintiffs in error. This was a fatal defect. An allegation of unlawful detention is essential. Cobbey, Replevin, sec. 542. But this was an action in district court, and the petition, duly verified and on file, contained the statement of the wrongful detention of the property, and this was sufficient to give jurisdiction to issue the writ, and it was

not void but voidable; and had the writ and affidavit been attacked by proper plea, the court might on application have allowed the affidavit to be amended. *Commercial State Bank v. Ketcham,* 46 Neb. 568; *Lewis v. Connolly,* 29 Neb. 222. No objections were made to either the form or substance of the affidavit in the district court, nor was the validity of the writ of replevin questioned, so far as the record presented here discloses. By appearing and answering to the merits and going to trial without making such objections, the parties waived defects in the affidavit."

The appellants also contend that, "Where a purchaser of an automobile from a dealer receives a formal bill of sale complying with sections 60-310 and 60-325, Comp. St. 1929, transferring complete and absolute title to the purchaser, a subsequently executed conditional sale contract signed by the purchaser purporting to reserve the title of the automobile in the dealer is a nullity, the dealer having transferred his title by giving the bill of sale as required by law." In the instant case there are no third parties to this record. The controversy is between the appellants and the assignee of appellants' contract. The controlling rule is, viz.: "Where a creditor accepts from his debtor any form of new agreement in place of a prior contract or obligation between them, with the intent to cancel the former and to substitute the new one therefor, novation by the substitution of an obligation takes place." 46 C. J. 586.

Here, the conditional sale contract and assignment is supported by ample consideration. It is subscribed by both parties thereto. It creates by force of valid contract the rights therein specified, and is a valid, enforceable instrument. *Klingensmith v. Clow & Sons,* 270 Mich. 460, 259 N. W. 312.

The defense of usury, under the facts in this case, is clearly precluded by the doctrine announced by this court in *Grand Island Finance Co. v. Fowler,* 124 Neb. 514, 247 N. W. 429. We are there committed to these views, viz.:

"A dealer in automobiles may in good faith sell a car on time for a price in excess of the cash price without tainting

the transaction with usury, though the difference in prices may exceed lawful interest for a loan.

" 'Where original purchase of automobile on credit was valid, it is immaterial in defense of usury to suit on note for car that finance company solicited contracts from automobile dealers and furnished schedules for that purpose.' *Commercial Credit Co. v. Tarwater*, 215 Ala. 123.

" 'Purchase of note at discount beyond legal rate of interest does not constitute transaction "usurious." ' *Commercial Credit Co. v. Tarwater*, 215 Ala. 123."

See, also, *Fidelity Finance Co. v. Westfall*, 127 Neb. 56, 254 N. W. 710.

So, too, the action in replevin was properly instituted against the defendants executing the so-called conditional sale contract and assignment. The property sought to be taken on the writ having been concealed and not recovered thereunder, the action properly proceeded as an action for damages against the same parties. The evidence in the record is clearly insufficient to prove the defense that the orginal transaction was a usurious loan instead of a sale.

It follows that the judgment entered by the trial court is correct, and it is

AFFIRMED.

FRED PICARD, SR., APPELLANT, V. FRANK STEINACHER, SHERIFF, APPELLEE.

283 N. W. 849

FILED FEBRUARY 10, 1939. No. 30411.

Intoxicating Liquors. When an officer seizes alcoholic liquors on a search warrant issued on a complaint authorized by the Nebraska liquor control act of 1935 (Comp. St. Supp. 1935, secs. 53-301 to 53-3,107), it becomes his duty to hold such liquors until all prosecutions arising out of such search and seizure, including injunction proceedings commenced under such act, shall have been ended and determined.

APPEAL from the district court for Fillmore county: ROBERT M. PROUDFIT, JUDGE. *Affirmed.*

J. J. McCarthy and *E. J. McCarthy,* for appellant.

John C. Gewacke and *Robert B. Waring, contra.*

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

PAINE, J.

This was a replevin action, brought to recover liquors taken by the defendant, the sheriff of Fillmore county, under a search warrant. Trial was had to a jury. After each party had rested, the defendant moved for a directed verdict in his favor. Motion was sustained, and jury directed to return a verdict finding that the right of possession at the time the replevin action was begun was in the defendant sheriff, and fixing the value of the property taken. Judgment entered on said verdict. Motion for a new trial overruled. Plaintiff appeals.

The transcript in this case sets out a copy of all the instruments filed, but fails to set out the time of filing of any of such instruments in the office of the clerk of the district court. The petition in replevin was verified October 29, 1937, and sets out that the property was taken by virtue of a search warrant issued by the county judge, but alleged that the complaint had been dismissed, and that there was nothing on file in any court whereunder the sheriff was holding said property, and alleged that the sheriff was holding said property wrongfully and unlawfully; that plaintiff had made demand therefor of the sheriff, who refused to return the same. Plaintiff prayed for judgment for the return of the property, or a judgment for its value in the sum of $550, and for his damages in the sum of $150.

The affidavit in replevin, attached to the petition, set out on four pages an itemized description of the property taken, which consisted of over 800 pint and half-pint bottles, some 47 quart bottles, and 35 "fifths" bottles of American and foreign brands of rum, gin, wine, whisky, and alcohol.

It appears that on September 12, 1937, the county attorney filed a complaint in the county court of Fillmore

county for a search warrant against the plaintiff under section 53-378, Comp. St. Supp. 1935, charging that he had just and reasonable grounds to believe that alcoholic liquor is unlawfully possessed, used, disposed of, and kept for sale in said drug-store, and on the same day the sheriff made return that he had seized certain intoxicating liquors which were concealed therein, and had the liquors in his possession, and was holding the same subject to the order of the court, and the return also stated that he had arrested Fred Picard, Sr.

On September 13, 1937, the county attorney of said county filed a second complaint against said Fred Picard, Sr., charging among other things that he was maintaining a common nuisance in having in his place of business alcoholic liquor for the purpose of sale, and on September 14 the sheriff made return, showing that he had arrested the said Fred Picard, Sr.

On October 26, 1937, the county attorney filed a motion that the complaint against Fred Picard, Sr., charging the offense of maintaining a common nuisance under the liquor laws of the state of Nebraska, be dismissed without prejudice, with the reservation that this motion shall in no wise affect the complaint theretofore filed against Fred Picard, Sr., for the search warrant, and that all proceedings thereunder should remain intact and unaffected by the motion to dismiss the complaint charging the offense of maintaining a common nuisance. It is further set out that the reason for the motion of dismissal is that a temporary injunction has now been obtained (on October 7, 1937), restraining, enjoining, and abating said nuisance, and that said action is pending in the district court for Fillmore county, Nebraska, and that it was not for the best interests of justice or public welfare that the said Fred Picard, Sr., be tried for maintaining a public nuisance prior to the determination of the injunction suit now pending in the district court against him. Thereupon, Howard W. Hamilton, county judge, dismissed the complaint charging the offense of maintaining a common nuisance, and it was further ordered

that such dismissal should in no manner affect the complaint for search warrant, or any of the proceedings had under said search warrant, but that all such proceedings should remain intact, unaffected, and unprejudiced by said order. Upon the hearing, an injunction was granted in the district court, and Fred Picard, Sr., appealed said injunction action to this court, and after argument this court on June 8, 1938, made that injunction permanent (no opinion) in case No. 30372, *State v. Picard.*

A portion of said permanent injunction reads as follows: "The court further finds that the defendant should be perpetually enjoined from refilling prescriptions of any type whatsoever calling for alcoholic liquor, whisky, or any type of intoxicants. That the defendant should be perpetually enjoined from selling, giving away, or otherwise disposing of alcoholic liquor or other intoxicants by any shift or device whatsoever."

It will thus be seen that, some three days after the criminal action for maintaining a nuisance had been dismissed in the county court, and while the injunction case was pending in the district court, this replevin action was brought in the case at bar.

Sections 53-379 and 53-380, Comp. St. Supp. 1935, provide that, upon the issuance of such search warrant, the officer shall seize, remove therefrom, and confiscate all alcoholic liquors stored, kept, and sold, and the containers thereof, and shall make an accurate list and inventory of the articles, and "hold such property until *all prosecution* arising out of said search and seizure shall have ended and determined."

It is the contention of the plaintiff herein that, when the complaint for maintaining a nuisance was dismissed, such dismissal carried with it the dismissal of the search warrant complaint, and that all of the criminal proceedings were then terminated against said Fred Picard, Sr., and that the injunction case which was then pending was not a criminal prosecution, but only a civil action, and that said Fred Picard, Sr., was entitled to the return of all his

liquors; that as a druggist he had a right to have all of said liquors, for he made use of liquor in filling prescriptions, and that the injunction proceedings could not in any way dispose of the intoxicating liquor held upon search warrant; that Fred Picard, Sr., had an absolute property right to all of said liquor, and could not be deprived thereof, and that this replevin action was brought because said Fred Picard, Sr., had a property right therein which could only be reached by the replevin proceedings, in which he should have prevailed, for, there being no prosecution pending against him, the sheriff should have surrendered the liquors to him upon demand.

We are cited to the case of *Malli v. Willett*, 57 Ia. 705, 11 N. W. 661, in which the consideration for a contract for a life lease of real estate to Christina Malli was to settle a threatened prosecution for adultery. It is said by the court that a contract made in consideration of forbearance to prosecute would be void, yet it would not reverse a cause without clearer evidence that it was the criminal charge which was compromised than had been given, for the brother could have been prosecuted criminally for the offense, or a civil action for damages might have been brought, and the court says: "In common parlance the word prosecution is frequently applied to civil actions for torts."

In *Eastman Marble Co. v. Vermont Marble Co.*, 236 Mass. 138, 128 N. E. 177, in a contract between owners of marble quarries recitals as to controversies and prosecutions were held not void on its face as undertaking to strangle threatened criminal prosecutions, for the word "prosecution" is frequently used respecting civil litigation.

But, on the other hand, may not an injunction suit be, in effect, a criminal prosecution?

"In cases of public nuisances, properly so called, an indictment lies to abate them, and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction." Story, Equity (3d ed.) sec. 923.

This court, in the case of *State v. Ak-Sar-Ben Exposi-*

tion Co., 121 Neb. 248, 236 N. W. 736, said: "A wrong arising out of repeated violations of a penal statute and harmfully affecting the rights and interests of people generally throughout the state, when committed by a corporation engaged in the public service, is a public wrong which may be enjoined by the supreme court in an original suit in equity wherein the state is plaintiff."

For a full discussion of this question, see 10 Neb. Law Bulletin, 190, in which many citations may be found.

The jurisdiction and powers of courts of equity come directly from the Constitution, and consequently are not limited by subsequent legislation. *Matteson v. Creighton University*, 105 Neb. 219, 179 N. W. 1009.

To conclude our discussion, section 53-380, Comp. St. Supp. 1935, provides that the officer who seizes alcoholic liquor under a search warrant shall "hold such property until all prosecution arising out of said search and seizure shall have ended and determined."

In whatever light we view this injunction proceeding, whether it is a civil action or a criminal procedure, it is in any event clearly a "prosecution," based upon the alcoholic liquor seized, and, therefore, when this injunction proceeding was begun, the sheriff under the law was required to retain possession and custody of such liquors, and an action in replevin to take said property from the sheriff will not lie. For which reasons, the judgment of the district court is hereby

AFFIRMED.

JOHN C. THOMAS, APPELLEE, V. GEORGE FUNDUM ET AL., APPELLANTS.
283 N. W. 839

FILED FEBRUARY 10, 1939. NO. 30472.

1. **New Trial.** When codefendants join in a motion for a new trial, errors assigned which are not good as to all the defendants are not good as to any.
2. **Appeal.** In a law action the findings of a jury on conflicting

evidence will not be disturbed unless clearly wrong.

3. Evidence examined and *held* that plaintiff was not guilty of such contributory negligence as would bar a recovery as a matter of law.

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

Chambers, Holland & Locke, for appellants.

Burkett, Wilson & Van Kirk, contra.

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

CARTER, J.

This is an action to recover damages for personal injuries sustained by plaintiff while he was employed in harvesting wheat. The farm upon which the injuries were sustained was owned by Simon C. Mook until his death, which occurred three days prior to the accident. A verdict was returned against Merle Mook, administrator of the estate of Simon C. Mook, deceased, and George Fundum, another employee whose negligence is alleged to have caused the accident. A joint motion for a new trial was filed by the defendants. An appeal was taken from the overruling of this motion.

Plaintiff asks this court to invoke the rule that, when codefendants join in a motion for a new trial, errors assigned which are not good as to all defendants are not good as to any. This has long been the rule in this state.

In *Lydick v. Gill,* 68 Neb. 273, 94 N. W. 109, this court said: "Where a verdict is returned against a plaintiff and in favor of several defendants, on different, distinct and separate defenses pleaded separately by them, a single joint motion for a new trial against them all is insufficient, and it should be overruled if the verdict is good as to any one of the defendants." See, also, *Long v. Clapp,* 15 Neb. 417, 19 N. W. 467; *Gordon v. Little,* 41 Neb. 250, 59 N. W. 783; *Davey v. Aevermann,* 110 Neb. 62, 192 N. W. 956; *Koehler v. Farmers State Bank,* 112 Neb. 590, 200 N. W. 52.

After the application of this rule, the only question remaining is whether the court erred in overruling defendants' motions for a directed verdict. These motions were based on the contention that plaintiff's contributory negligence was such as to defeat a recovery as a matter of law.

The evidence in this case discloses that plaintiff and defendant Fundum were both employed on the Mook farm and were engaged in combining wheat at the time of the accident. It was necessary, whenever the bin on the combine became full, to stop the machine and back a truck up to it in order that the wheat could be transferred from the bin to the truck. It was then necessary to drive the truck away from the combine before it could continue with the cutting and threshing of the wheat. At the time the accident happened, the wheat in the bin on the combine had just been transferred to the truck. The defendant Fundum got in the truck to drive it away, and, instead of moving forward, it backed up and caught the plaintiff between the truck and the combine, inflicting the injuries of which plaintiff complains.

The plaintiff testified that, as Fundum got in the truck to drive it away, plaintiff walked in between the rear of the truck and the combine to remove the spout which conveyed the grain to the truck. While he was between the two machines, the truck suddenly backed up and jammed the plaintiff against the combine, causing the injuries for which this action was brought.

The testimony of the defendant Fundum was that the truck had been left in reverse, and as he turned on the switch the motor started without his stepping on the starter, causing the truck to back up unexpectedly. He further states that plaintiff was standing several feet from the truck at the time he got in to drive it away, and that he did not know or anticipate that plaintiff would walk in between it and the combine.

Plaintiff testified that Fundum directed him to go between the truck and the combine to remove the grain spout. This is denied by Fundum. The evidence of Fundum that

the truck motor started when the switch was turned on, without his stepping on the starter, is contradicted by the evidence of an expert mechanic who stated that it was impossible for the particular model of truck involved to start merely by turning the switch. It is not disputed that the ground upon which the truck stood was practically level and that there was no apparent slope.

We are convinced that the question of the negligence of the defendant and the contributory negligence of the plaintiff was for the jury, and that plaintiff was not guilty of such contributory negligence as would, as a matter of law, defeat a recovery.

There is no evidence in the record that the truck had ever backed up before on any of the numerous occasions that it had been driven away from the combine. There was no evidence of any fact or circumstance that would indicate to plaintiff that it was dangerous to walk between the truck and the combine. There was no warning of danger, unless the jury believed the testimony of Fundum as against the conflicting statements of plaintiff. There was nothing in the slope of the ground or other physical facts to warn plaintiff of danger. We conclude that the question of the negligence of defendant Fundum and the contributory negligence of plaintiff was one of fact to be determined by the jury. There was conflicting evidence which the jury necessarily considered in arriving at a verdict. We are not in a position to say that the verdict was clearly wrong and we will not, therefore, disturb it. *Anderson v. Lotman,* 124 Neb. 795, 248 N. W. 309, and cases therein cited. The trial court was right in overruling the motions for a directed verdict.

The trial court having correctly ruled on the only issue properly raised by the joint motion for a new trial, the judgment ought to be and is

AFFIRMED.

LILLIAN F. HOLFERTY, APPELLEE, V. SARAH M. WORTMAN ET AL., APPELLEES: BRUCE SHURTLEFF, APPELLANT.
283 N. W. 855

FILED FEBRUARY 10, 1939. NO. 30458.

1. **Execution.** Where a sale of real estate is conducted substantially in the manner prescribed by the notice and in accordance with the decree, it is sufficient, and confirmation thereof may be had.
2. ———. Proceedings of the sheriff who made the sale and all proceedings in connection therewith examined, and found to be in conformity to law, and the bid accepted *held* to be an unconditional bid, in conformity to the notice and decree of the court, and so treated by the party making the bid and by the court.

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

C. Russell Mattson, for appellant.

C. S. Wortman, Leyda & Leyda and *Chambers, Holland & Locke, contra.*

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

MESSMORE, J.

This is an appeal from an order of the district court for Cass county, overruling a motion by the appellant, Bruce Shurtleff, to require the sheriff to amend return on order of sale and declare him sole and only lawful bidder at the sale.

Plaintiff, Lilliam F. Holferty, on August 30, 1937, filed a petition, proper in form, to foreclose a tax lien. The only answering defendant was Sarah M. Wortman, who filed an answer alleging that she was the owner and holder of a judgment in the sum of $5,500, rendered October 1, 1936, in the district court for Cass county, in a foreclosure proceeding against Harvey Rathbone and Hazel V. Rathbone, defendants, asking for an accounting and that her judgment for $5,500 and interest be declared superior to all claims of other defendants; that said premises be sold and

she have a deficiency judgment for such sum as shall be due her against defendants Harvey and Hazel V. Rathbone. November 8, 1937, the district court entered a decree in foreclosure, finding that the plaintiff was entitled to the sum of $369.80, with interest, costs and attorney fees, and that defendant Sarah M. Wortman had a junior lien to that of plaintiff in the sum of $5,864.83, granting defendants Rathbone and defendants Hays, who defaulted, 30 days from the entry of decree to pay the plaintiff and the cross-petitioner-defendant the amount of the liens, and, upon failure so to do, said defendants' equity of redemption would be foreclosed. The court found the record title to be in defendant Ralph K. Hays. Defendant Harvey Rathbone claimed title by an unrecorded deed which he received in 1931, and since that time he has had control of the land and rented it to others, receiving the benefits therefrom and paying no taxes thereon. Allen Gillespie, the tenant, was served with summons, and there is a claim made that Glen Keetle was a codefendant with Gillespie and not served with summons, and as to the latter's alleged interest the record is very vague. There are no improvements on the real estate. The oral testimony raises a controversy as to the bid of Sarah M. Wortman; that is, whether it was conditioned upon confirmation and possession.

The affidavit of publication on January 17, 1938, shows that, pursuant to the order of the clerk of the district court, the property would be sold on January 22, 1938, to the highest bidder for cash. The property involved is an 80-acre tract designated as the east half of the northeast quarter of section 17, township 12 north, range 9, east of the 6th P. M., in Cass county. The return of the order of sale shows the premises sold to Sarah M. Wortman, defendant, in the amount of $6,000, using the language "upon confirmation of sale and possession." On January 25, 1938, objections to confirmation were filed by defendants Rathbone, setting forth that the 6,000-dollar bid of Sarah M. Wortman was made, conditioned upon confirmation and possession, and was, therefore, not a lawful bid. On Janu-

ary 29, 1938, the appellant filed a motion to require the sheriff to amend his return by making said return read "that the property was sold to Bruce Shurtleff, * * * for the sum of $3,000, he being the highest and best bidder for cash, for the reason that" he was "the only bidder for cash at said sale, and the only person making an unconditional bid, and that sale was closed after said $3,000 bid had been made and after a purported bid was made by another, said bid being in conditional form and conditioned upon possession of the property." This motion was supported by affidavit. On March 8, 1938, the objections of Harvey and Hazel V. Rathbone to confirmation of sale were overruled, and no appeal taken therefrom. The motion of appellant was overruled.

The court, in its decree of confirmation, confirmed the sale in Sarah M. Wortman, directed the sheriff to place the purchaser in possession of the premises so sold, and stated further: "After having carefully examined the proceedings of the sheriff who made said sale, and being satisfied that said sale has in all respects been made in conformity to law and that the sum of $6,000 bid for said premises by the said defendant, Sarah M. Wortman, was properly accepted and reported and was the fair value of said premises so sold under the circumstances and conditions of said sale."

Appellant assigns as error that the findings and judgment of the court are contrary to the law and the evidence.

The case of *Farmers Security Bank v. Wood,* 132 Neb. 175, 271 N. W. 349, is cited. In that case this court held: "The court should refuse to confirm a sale of lands under execution where it is evident from the notice, return of the sheriff and the decree, upon proper objections filed by parties in interest entitled to raise the question, that the sale was not conducted substantially in the manner prescribed by the notice and in accordance with the decree." The test is whether or not the sale was conducted substantially in the manner prescribed by the notice and in ac-

cordance with the decree. In the opinion it was said (p. 178): "The only way the officer (in the instant case, the sheriff) having the order of sale can be heard to speak is through his return which must affirmatively show that he complied with the law. *Gundry v. Brown*, 1 Neb. (Unof.) 877, 96 N. W. 610."

With this in mind, we turn to the return to order of sale in the instant case which in part reads: "To Sarah M. Wortman, defendant upon confirmation of sale and possession." The word "condition" does not appear in the order. Obviously, the words, "upon confirmation of sale," are not subject to exception, for, unless the sale is confirmed, no bidder would be obligated. The decree confirming the sale directed the sheriff to place the purchaser in possession of the premises so sold. Without question, decrees of confirmation may so state. The competent evidence, the proceedings relating to the sale, the return thereon, the decree of confirmation, all disclose that the parties treated the bid of Sarah M. Wortman as a *bona fide* bid, in conformity to the notice and decree of the court; that the sale was conducted substantially as prescribed by the notice and in accordance with the decree.

We believe, on the merits of this case, and without discussing the right of appeal from overruling of appellant's motion, which is not contested, that the trial court properly overruled appellant's motion and confirmed the sale.

AFFIRMED.

BEULAH LOWE, ADMINISTRATRIX, APPELLEE, V. CHICAGO LUMBER COMPANY OF OMAHA, APPELLANT.

283 N. W. 841

FILED FEBRUARY 10, 1939. No. 30595.

1. **Workmen's Compensation:** INDEPENDENT CONTRACTOR. "There is no hard and fast rule by which to decide whether one is an employee or an independent contractor, but that relation must be determined from all the facts in each particular case." *Showers v. Lund*, 123 Neb. 56, 242 N. W. 258.

2. ———: ———. "An independent contractor is one who renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished." *Reeder v. Kimball Laundry*, 129 Neb. 306, 261 N. W. 562.
3. ———: ———. "An independent contractor is generally distinguished from an employee as being a workman who contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer, except as to the results of the work." *Petrow & Giannou v. Shewan*, 108 Neb. 466, 187 N. W. 940.
4. ———: ———. A person who contracts to supply all the labor to build, and agrees to supervise the construction of, a barn according to a plan furnished, and to do anything necessary in line with regular construction, not mentioned in the contract, to insure a complete job, and receives a definite amount for the work done, furnishes his own tools, employs, controls and discharges the workmen and fixes their hours and wages, *held* to be an independent contractor and not an employee.

APPEAL from the district court for Platte county: LOUIS LIGHTNER, JUDGE. *Reversed and dismissed.*

Frederick M. Deutsch, for appellant.

Wagner, Wagner & Albert and *Carroll Thompson, contra.*

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

MESSMORE, J.

The administratrix of the estate of Charles E. Lowe brought an action to recover compensation, arising out of the death of Charles E. Lowe. The compensation court denied the claim, and on appeal to the district court for Platte county, an award was granted, from which the defendant appeals.

Plaintiff's petition is usual in form. The answer is a general denial and a specific denial that the deceased was in defendant's employ at the time of receiving the injury resulting in his death. The reply to the answer pleaded estoppel, and reference will be made thereto in the opinion.

The record discloses a contract made by the Penn Mutual Life Insurance Company with the defendant Chicago Lum-

ber Company of Omaha, a corporation, wherein the latter agreed to build a barn on the Hill farm in Platte county, Nebraska, which was owned by said insurance company, for the sum of $1,325, furnish all necessary material and carry compensation insurance "to cover all workmen engaged on such work." On or about June 2, 1937, the defendant entered into a contract with Charles E. Lowe, wherein the said Lowe agreed to supply all the labor to build, and agreed to supervise construction of, a barn on the Hill farm in Platte county, according to a plan furnished by defendant. The size of the barn and the general specifications are covered at some length in the contract, and following the general specifications appears this language: "The intention of this contract is that the barn shall be built by party of the first part, substantially and according to plan as near as feasible to make a satisfactory and good job. Anything necessary in line with regular construction not mentioned herein shall be accomplished by the party of the first part to insure a complete job." The contract also provided that Charles E. Lowe was to receive the sum of $325 and contained the following language: "Party of the second part (defendant) further agrees to carry full workmen's compensation Insurance and Public Liability Insurance, without cost to C. E. Lowe." The contract further provided that the work was to be completed in 60 days from May 24, 1937; the old barn on the farm was to be torn down, and all sound lumber therefrom was to be used in the construction of the new barn.

Before the contract was signed, the manager of the defendant and Mr. Lowe inspected the premises and the old barn thereon, and the manager designated the lumber from the old barn that would be used in the construction of the new barn. The work of razing the old barn was commenced June 5, 1937. Several changes were made in the construction of the barn to suit the tenant, and at times, when Mr. Lowe and his son would call at the lumber office of the defendant at St. Edward, Nebraska, the manager of the defendant and Mr. Lowe would talk over the changes

required by the tenant. The barn was to be built to suit the convenience of the tenant. During the course of construction of the barn many changes were suggested by the tenant and some by defendant's manager, which were talked over at the lumber office by Lowe and the manager; such changes were made. Most of them provided for the placing of doors at different points, enlarging the mangers, providing for a cement floor in front of the cattle stalls, and making a grain bin instead of a horse stall at one point, and other changes. While the changes were numerous, in most instances no greater amount of material or labor was necessary to complete them; no extra charge was made by Mr. Lowe, and nothing was said as to an additional charge with the exception of a charge for a cupola, placed on the barn, for which Mr. Lowe received $5. The record does not disclose exactly when or how the changes were agreed upon. The manager of defendant left about June 15, 1937, on a vacation and returned a few days after Mr. Lowe's death. No representative of the defendant was on the premises after the signing of the contract. On July 7, 1937, Mr. Lowe was working on a hay fork hood, putting on siding, when the scaffolding on which he stood gave way, severely injuring him, and from such injuries he died July 17, 1937. After his death his son, who was then working on the job, went ahead and completed it.

While the manager of defendant was on his vacation and after Mr. Lowe fell, one Wright was at the yard and apparently in charge. Wright went on the premises at one time and told the deceased's son how the hay door should be constructed, and the manner in which it would be most solid and hang the best. The son followed his directions. No other direction was given by Wright. Defendant's manager went on the premises once after Mr. Lowe's death, while the son was completing the job, and at that time talked about the changes in the mangers and the hardware needed to complete the barn, and some conversation was had about a cement floor in the horse barn which was not placed therein.

The plaintiff offered in evidence exhibit 2, a statement to the Penn Mutual Life Insurance Company for the construction of the barn, dated August 9, 1937, in an account with the defendant. This statement showed a total amount of $1,391.08 and contained the following: Workmen's compensation insurance on $330, $20.26; public liability insurance on $330, 82 cents. There was also offered in evidence exhibit 4, purporting to be copy of a letter written by the defendant to New Amsterdam Casualty Company under date of June 10, 1937, informing the company that defendant had taken a building contract for labor and material on a farm building on the Hill farm, the letter containing the following paragraph: "A complete record of the labor on this job will be sent in to our Omaha office and will be on file here for your auditor when he audits our payroll."

After the barn was completed and all expenses paid by the administratrix, there remained, including $5 for saving of lumber and $5 for the cupola, the net sum of $110. When Mr. Lowe was living he employed, besides himself and son, three men. At the time of his fatal injury, the deceased had worked 20 days. The evidence also establishes that Mr. Lowe was the sole and only support of his wife and two sons, 16 and 19 years of age, respectively. On the foregoing evidence the district court made an award.

The defendant contends that the decision of the trial court is contrary to and not sustained by the evidence and the law; that deceased was not an employee within the contemplation of the workmen's compensation act of this state but was an independent contractor, citing *Prescher v. Baker Ice Machine Co.*, 132 Neb. 648, 273 N. W. 48, wherein this court held: " 'An independent contractor is one who renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished.' *Reeder v. Kimball Laundry*, 129 Neb. 306, 261 N. W. 562;" and one "who has the right to employ his own assistants; who has the right to determine the

hours of labor; and who has the power to direct how and when the detail of the work shall be performed is an independent contractor within the meaning of the workmen's compensation law." In the opinion in the *Prescher* case we find this language (p. 650):

"Whether the deceased was an employee or an independent contractor cannot be decided by a hard and fast rule. The relationship can only be established by a consideration of the facts and circumstances of the case. *Showers v. Lund,* 123 Neb. 56, 242 N. W. 258. An independent contractor usually enters into a contract to do a specified piece of work for a specific price; makes his own subcontracts; employs, controls, pays and discharges his own employees; furnishes his own tools and materials; and directs and controls the execution of the work. * * *

"The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified piece of work for a specific price."

The case of *Petrow & Giannou v. Shewan,* 108 Neb. 466, 187 N. W. 940, in substance held that the distinction between an independent contractor and an employee is that an independent contractor contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer except as to the results of the work. It was further held: "The act of the employer in giving such directions as may be found necessary to secure compliance with the contract, according to the plan adopted by him and agreed upon between the parties, is not necessarily inconsistent with the existence of the status of his workman as an independent contractor." It was said that the issue as to whether or not a workman is an employee, as distinguished from an independent contractor, is to be determined from the facts in each case.

In *Potter v. Scotts Bluff County,* 112 Neb. 318, 199 N. W. 507, the opinion at page 321 cites *Barrett v. Selden-Breck Construction Co.,* 103 Neb. 850, 174 N. W. 866, wherein it was held: "The right to supervise, control, and direct the work is one of the tests for determining whether a person

is an independent contractor or an employee, but it is not the sole and only test. * * * A test is whether the contract requires the work to be done by the particular person contracting, or whether his personal services are not required, and any person whom he may employ may, under the agreement, do the job."

In the instant case, as provided by the contract, Charles E. Lowe agreed to supply all labor with which to build the barn and agreed to supervise ("to oversee for direction; to superintend; to inspect with authority." Webster's New International Dictionary) construction of the barn. There was a designated time in the contract for the barn to be completed, viz., 60 days from May 24, 1937. He employed all of the workmen, fixed their hours of work and the amount of their wages. He had control over the construction of the barn, and by the contract he agreed that the barn would be built "substantially and according to plan, as near as feasible ("capable of being done, executed, or effected." Webster's New International Dictionary), to make a satisfactory and good job;" also to do "anything necessary, in line with regular construction not mentioned" in the contract, "to insure a complete job." It was generally understood by the manager of defendant and Mr. Lowe that the barn was to be constructed for the convenience of the farm and the tenant thereon, and changes, such as were made, were within the contemplation of the parties. Mr. Lowe was satisfied with the general changes and did not make an additional charge therefor. He contracted to do a specified piece of work for a specific price, namely, $325. The manager of the defendant did not interfere with the progress of the work, did not control or supervise it, and during most of the period when Mr. Lowe was constructing the barn the manager was on a vacation and was not on the premises until after the son had taken over the work. Mr. Wright did not control or supervise the work, and the instructions given by the manager of defendant or Wright were such as were necessary to insure compliance with the contract according to the plans and specifications

thereof, adopted by the parties, and not inconsistent with the existence of the status of Mr. Lowe as an independent contractor. He was working for a profit; it was up to him to determine the amount of that profit by his saving on labor, time, etc. No definite wage was fixed for him. He knew the amount he was to receive upon the completion of the barn. The construction of this barn was his own independent business.

Plaintiff, by reply to the answer, alleged that the defendant verbally stated to Charles E. Lowe that it would carry compensation to protect him and all persons assisting in the construction of the barn; that Charles E. Lowe entered into the contract in reliance upon said statement, and that by reason thereof the defendant is estopped to deny that Lowe was working on construction of the barn other than as an employee of the defendant herein. The contract is not ambiguous, and if Mr. Lowe, himself, as an independent contractor, was carrying compensation insurance, he would be carrying it for the benefit of his employees, and no personal recovery for injuries received by him would have been had by him thereunder. As part of the consideration for the contract, the defendant agreed to carry compensation insurance to cover workmen in the construction of the barn and relieve Mr. Lowe of such responsibility. There is no evidence in the record that any statement was made to him to lead him to believe that he was, or would be, covered by such insurance carried by this defendant.

Speas v. Boone County, 119 Neb. 58, 227 N. W. 87, is cited, to the effect that the workmen's compensation act should be liberally construed, so as to obtain the accomplishment of its beneficent purpose. The court cannot create a liability where the law creates none. See 2 Schneider, Workmen's Compensation (2d ed.) p. 2130.

Appellee cites and relies on the case of *Habrich v. Bent*, 200 Wis. 248, 227 N. W. 877, stating that there is a great similarity between such case and the case at bar. In the *Habrich* case there was no written contract, and defendant

Bent was to complete the work started by Habrich on three branch roads. Bent was an expert in building roads; he had the heavy machinery necessary, and the current wages paid in the locality were agreed upon between the parties. Habrich had confidence in Bent, but retained the right to exercise control over the work, and at times did give orders to the men regarding the work. Bent was not on the premises to complete any certain piece of work. He was subject to discharge by Habrich. He was not there to work for any given length of time, and had no control over the details of the work, which it was within the power of Habrich to veto. The court said that there was nothing in the testimony that deprived Habrich of that power, and the question was not whether he exercised that power, but whether he had the right to exercise it. The facts in the instant case disclose the difference between the two cases.

We believe that the evidence in the case at bar is of such a nature that estoppel, as relied upon by appellee, cannot be sustained.

In analyzing the facts in the instant case, we can arrive at no other conclusion than that Mr. Lowe was an independent contractor and not an employee; that the relation of master and servant did not exist as between the parties, and the award made by the district court and judgment thereon should be and are reversed, and the cause dismissed.

REVERSED AND DISMISSED.

PRUDENTIAL INSURANCE COMPANY OF AMERICA, APPELLANT, V. HENRY J. NUERNBERGER ET AL.: F. H. ROOST, ADMINISTRATOR, ET AL., APPELLEES.

284 N. W. 266

FILED FEBRUARY 17, 1939. No. 30442.

1. **Mortgages: PRIORITIES.** "Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not

an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage." 41 C. J. 582.

2. **Equity.** "Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal *status*, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact." 2 Pomeroy, Equity Jurisprudence (4th ed.) sec. 849.

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

Sidney T. Frum and *Quintard Joyner*, for appellant.

W. V. Steuteville and *S. W. McKinley, Jr., contra.*

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

SIMMONS, C. J.

The problems presented in this case arise from the following facts:

In 1923 Henry J. Nuernberger and Louis Roost were the owners, as tenants in common, of a quarter-section of land in Dakota county, and at that time mortgaged the land to the plaintiff to secure an indebtedness evidenced by a promissory note of $8,000 running for a period of five years, with interest at 5 per cent. per annum.

Louis Roost died in 1926, leaving a last will and testament that was duly admitted to probate. The material provisions of that will are as follows:

"Item 1. It is my will that all my just debts and expenses of my last sickness, death and burial be first paid out of my estate.

"Item 2. I hereby give, devise and bequeath unto my wife, Annie Roost, if she survive me, all my household furniture and all the personal effects contained in my home, not including however, any money or evidences of debt that may be in my home at the time of my death.

"Item 3. I hereby give, devise and bequeath unto my said wife, Annie Roost, if she survive me, the home which I now occupy, and the lots on which the same is situated to wit: Lots 9, 10, and 11, in Block 20 Moan's Addition to South Sioux City, Nebraska.

"Item 4. I hereby give, devise and bequeath to my said wife, Annie Roost, the use, rents and income for the term of her natural life of all the property which I shall hereinafter bequeath in items 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, meaning hereby that none of the property which I hereinafter bequeath to the devisees named in items 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, shall pass to such devisees, respectively until the death of my said wife, and it is further my will in case the other property which I devise to my said wife, together with the use, rents and income from the property mentioned in the aforesaid items, shall at any time prove insufficient to properly support and care for my said wife, that she shall have the right to draw upon and use the principal of the bequests named in said items to such extent as may be necessary for her proper care and support."

In item 5 he devises certain real estate (not that involved in this action) to a nephew "subject however, to the use, rents and incomes thereof and other possible reservations mentioned and preserved to my wife in item 4 above."

"Item 6. I hereby give, devise and bequeath unto my nephew, Louis Roost, son of Frederick Roost, of Klein-Wootz, by Lenzen on the Elbe Province of Brandenburg, Germany, the sum of Three Thousand ($3,000) Dollars, subject, however, to the use and income thereof and other possible reservations mentioned and reserved to my wife in item 4 above."

Items 7 to 14, inclusive, in language similar to that of item 6, contain bequests totaling $11,000 to other named

beneficiaries, subject to the same condition as set out in items 5 and 6.

"Item 15. All the rest, residue and remainder of my property of every kind and nature not hereinbefore devised or bequeathed, I hereby give, devise and bequeath unto my said wife, Annie Roost."

In the probate proceedings, the executors of his estate reported on June 18, 1927, that they had no cash on hand; that they had a certain real estate mortgage for $10,500 and a certain contract for the sale of real estate, upon which there was a balance owing of $11,000; that there was no other personal property; that there were "certain cash bequests amounting to approximately $14,000, which are to take effect only after the death of the surviving widow, Anna Roost. That said Anna Roost is to have the use, rents and income from all of said bequests, including all the land of the deceased, during her lifetime. * * * That under the terms of the will the said Anna Roost is the residuary legatee after the payment of the cash bequests." The executors prayed that they be authorized to assign and deliver the said contract and mortgage to Anna Roost "under such terms and conditions as the court may fix;" and stated that it was their opinion that the said contract and mortgage should be assigned to her "as trustee under the will of Louis Roost, deceased, so that she can continue to draw the rents out and income therefrom, during her lifetime, and that the same may be preserved or such part of it as may be necessary for distribution to the several devisees named in the will." The contract and $10,500 mortgage were assigned, under orders of the court, to Anna Roost, "as trustee." In January, 1928, the executors were discharged.

In 1928 Nuernberger and Anna Roost made application for an extension of the 1923 mortgage, reciting in the application that they were the owners of the land.

At that time plaintiff had the abstract of title extended, and the probate proceedings in the Louis Roost estate were shown. Plaintiff's attorney then examined the abstract and

found "that at the time of the execution of said extension agreement the title to said premises was good in *fee simple* in Henry J. Nuernberger and Anna E. Nuernberger, his wife, and Anna Roost, widow."

In 1933 Nuernberger and Anna Roost again applied for renewal of this mortgage, reciting ownership of the land, and executed a new note to the plaintiff for $8,000, payable $200 each year beginning March 1, 1934, and $7,200 payable March 1, 1938, with interest at 5½ per cent., secured by a mortgage on said premises which was executed on June 15, 1933, and recorded at that time. The abstract of title was then brought down to date and examined by plaintiff's attorney, who said in his opinion "A good, marketable and indefeasible title in *fee simple* was vested in Henry J. Nuernberger and Anna Roost at the time said mortgage was executed and recorded," and that the mortgage dated March 1, 1933, "is a valid lien and the first encumbrance of record against said premises," subject to the mortgage of January 31, 1923, and "that there are no liens which have been subordinated" to the mortgage of January 31, 1923.

Following that, the 1923 mortgage was released of record by the plaintiff, and the evidence of indebtedness secured thereby was marked paid and was delivered to Nuernberger.

Anna Roost died in 1935. Her estate was duly probated, and notice to creditors given. The plaintiff did not file a claim in the Anna Roost estate. Following her death, F. H. Roost was appointed administrator *de bonis non* with the will annexed of the estate of Louis Roost, deceased.

As such administrator, he reported receipt of $5,000 Federal Land Bank bonds, which he had sold for $5,138; that from these funds, under orders of the court, he made payments to the specific beneficiaries, leaving a balance due them of $9,100; that he received no other personal property; that he received possession of one-hundred twenty-five acres of farm land near Ponca, and a half interest in a farm north of Emerson, that half interest being the

land involved in this controversy. It appears that the $5,000 of bonds was the remainder of a settlement of $7,500 which Mrs. Roost had made on the $10,500 mortgage, which had been assigned and delivered to her; and that the land near Ponca was the land that had been sold by Louis Roost under the contract hereinbefore referred to, which had been surrendered to her, encumbered with delinquent taxes, because of the default of the purchaser.

In December, 1936, plaintiff filed its petition in this action, asking for foreclosure of its 1933 mortgage, and subsequently filed an amended petition bringing in other parties, and joining the land as a party. Thereupon, F. H. Roost, as administrator of the estate of Louis Roost, filed an answer, alleging the ownership of Louis Roost in this property at the time of his death, his will, the special bequests, that the wife had a life estate in said premises and a residuary estate subject to the charge of said bequests, that 30 per cent. of the special bequests had been paid; that the unpaid bequests were liens prior to the plaintiff's mortgage, and prayed for either a dismissal of the action, or that, if the real estate were sold, one-half of the proceeds should be paid to the administrator to apply so far as necessary to the payment of the special bequests.

Thereupon the plaintiff filed its second amended petition, making the beneficiaries of the wills of Louis Roost and Anna Roost parties; set up its 1923 note and mortgage; alleged the death and the will of Louis Roost, execution of the 1933 note and mortgage; that the Nuernbergers and Anna Roost were the owners of the property; that it relied upon the statements in the applications; that it believed that the special legacies had been paid; that it believed that the mortgagors had a good title; that property was assigned to Anna Roost sufficient to pay these special bequests; alleged laches and estoppel on the part of the defendants; prayed for a foreclosure of its 1933 mortgage, or, in the alternative, if that was found not to give a valid lien upon the entire property, that the release and cancelation of the 1923 mortgage be set aside, and that mortgage

be reinstated; that it be subrogated to its former rights under the 1923 mortgage, and that the 1923 mortgage be foreclosed. Plaintiff prayed for equitable relief.

Those who were given the special bequests under the Louis Roost will answered; set up their rights; alleged that they had not been fully paid; that the plaintiff received a new consideration for its 1933 mortgage in the personal liability of Anna Roost, the increase in the interest rate, the payment of interest and taxes; and pleaded laches.

The trial court found that Anna Roost owned a life estate in this land and a contingent interest therein as residuary legatee after the payment of the specific bequests; that the estate was not sufficient to pay all of the bequests; that plaintiff made no effort to collect its indebtedness from the Anna Roost estate; that plaintiff received a consideration for the new mortgage not included in the original note and mortgage, to wit: The personal liability of Anna Roost, an increase in the interest rate, and collections of interest under the new note and mortgage; that plaintiff released its 1923 mortgage with full knowledge of all facts, and with full knowledge that the bequests had not been paid; that plaintiff's mistake was one of law and not of fact; that there remained unpaid $9,100 in specific bequests; that there were not sufficient assets without this land to pay the special bequests. The court denied the reinstatement and foreclosure of the 1923 mortgage; found that plaintiff had a first lien upon the undivided half interest belonging to Nuernberger, and a lien upon the one-half Roost interest, subject to the payment of legacies due under the Louis Roost will; rendered a decree against Nuernberger for the full amount due; and ordered a sale of his undivided one-half interest.

From that decree, the plaintiff appeals. In this appeal Nuernberger is not a party, and his interest in the land is not involved.

Did Anna Roost have the power to convey by mortgage the undivided one-half interest in this property free from, or superior to, the claims of the defendants for the pay-

ment of their special bequests? The answer to that question depends upon a construction of the will of Louis Roost.

"The court in construing a will must first ascertain the intent and purpose of testator as disclosed by the language of the will and then give effect thereto if not contrary to law. Section 76-109, Comp. St. 1929, requires such construction." *In re Estate of Hunter*, 132 Neb. 454, 272 N. W. 318. See *In re Estate of Mooney*, 131 Neb. 52, 267 N. W. 196.

"Where the intent of the testator is clear from the terms of his will, courts will unhesitatingly give full force and effect to such intent." *Seybert v. Seybert*, 118 Neb. 246, 224 N. W. 1.

"In determining the meaning of particular parts, the intention of the testator is to be determined from the will as a whole." 69 C. J. 104.

Applying these principles to the Louis Roost will, we reach the following conclusions: Louis Roost in his will made certain specific devises and bequests: First, certain personal property to his wife; second, the home place to the wife; third, a piece of land and specific cash bequests to named parties, subject to a life estate and certain granted powers to the wife; fourth, the residue to the wife.

His wife, Anna Roost, is given a *life estate* in the property described in items 4 to 14, inclusive, together with the powers therein set out. She is given an estate *in fee* in "all the rest, residue and remainder of my property of every kind and nature not hereinbefore devised or bequeathed." See Comp. St. 1929, sec. 30-202.

The undivided one-half interest in the land involved in this action was not "hereinbefore devised or bequeathed." It follows that it is not included in the devise of the life estate, or affected by the powers granted to the widow in item 4 of the will.

Certain cash legacies totaling $14,000 are provided in items 6 to 14.

"When pecuniary legacies are given in the will and there is a gift of the residue, both real and personal, the residue

being blended in one mass, the presumption arises that the testator intended to charge the entire residuary estate with the payment of the legacies, for the reason that, in such case, the residue can only mean what remains after satisfying the previous gifts." *In re Estate of Strolberg,* 106 Neb. 173, 183 N. W. 97.

It follows that under the will of Louis Roost, his widow, Anna Roost, received under item 15 of the will a devise in fee of the property involved in this action, and also a bequest of the $10,500 note and mortgage and the $11,000 contract of sale, charged with the payment of the legacies set out in items 6 to 14 of said will.

It further follows that Anna Roost had the right to mortgage said premises to the plaintiff, conveying her fee title therein, which was subject, however, to a charge for the payment of said legacies. Plaintiff's lien on said premises by virtue of its 1933 mortgage was subject to that charge.

Should the release of plaintiff's mortgage of 1923 be vacated and set aside, the lien of said mortgage revived and reestablished as a valid lien upon said undivided one-half interest formerly owned by Louis Roost, and the said lien, as so revived, be foreclosed?

The right of the beneficiaries to have this property applied to the payment of their legacies is derived from the will of Louis Roost. Their rights cannot be greater than his. At the time of the death of Louis Roost, his interest in the land was charged with the payment of this indebtedness. It is a "just debt" which his will ordered to be paid. Without that provision in the will, the law would require payment thereof. This indebtedness, therefore, was an obligation both under the will and by the lien of the 1923 mortgage superior to the rights received by the beneficiaries under the Louis Roost will. To grant the plaintiff the equitable relief prayed for will leave the defendants in the same position that they would have been in had the renewal mortgage not been executed and the original mortgage not been released. The beneficiaries have not

changed their position as a result of the renewal of this mortgage. They will not be deprived of any property rights given them under the will if the lien of the 1923 mortgage is reinstated.

No consideration passed from the Louis Roost estate, or any of the defendant beneficiaries, to the plaintiff for the renewal and release of the prior mortgage. The plaintiff's attorneys in 1928 and 1933 construed the provisions of the will correctly in holding that Anna Roost had a fee simple title to this property, subject to the lien of the 1923 mortgage. The attorneys made no reference in their opinions to the legacies. Their mistake appears to have been in finding that the legacies had either been paid, or payment secured by the assignment of personal property to the widow to be held in trust for the satisfaction of these legacies.

This mistake on the part of plaintiff's attorneys resulted in the plaintiff's releasing the 1923 mortgage and canceling the evidence of indebtedness secured thereby. The mistake was mutual as to plaintiff, Nuernberger, and Anna Roost.

The fact that the plaintiff filed no contingent claims in either the estate of Louis Roost or Anna Roost shows that plaintiff was looking to this land for payment. Plaintiff did not try to reach the other assets of either estate, or involve those assets in litigation or controversy to secure the payment of this indebtedness.

Legacies are payable first out of the personal estate of the testator. *In re Estate of Strolberg,* 106 Neb. 173, 183 N. W. 97. If there is not sufficient personal estate remaining to pay those legacies, it is due in part to the fact that the beneficiaries did not take any steps to preserve the principal of that estate.

The fact that collateral of the face value of $21,500 was assigned by the court to Anna Roost so that the same might be "preserved for distribution to the several devisees named in the will" might explain the opinion given by plaintiff's attorneys.

The parties intended the 1933 mortgage to be a renewal of the 1923 mortgage securing the payment of the original

indebtedness. In *Peoples Bank v. Trowbridge,* 123 Neb. 312, 242 N. W. 647, this court approved the following statement of law, which we quote from 41 C. J. 582:

"Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage."

Defendants raise the proposition that there was a change in the interest rate; that the plaintiff collected interest at the higher rate, and that that prevents the revival of the lien of the original mortgage.

"It may be conceded that an agreement for the payment of a higher rate of interest during extension is invalid as against a junior lienor in so far as it impairs the latter's security. * * * It is a very different thing to assert that such an agreement enhances the right of a junior lienor." *Barbano v. Central-Hudson Steamboat Co.,* 47 Fed. (2d) 160.

That proposition was presented in the case of *Lomas & Nettleton Co. v. Isacs,* 101 Conn. 614, 127 Atl. 6, wherein the court stated: "It is of course obvious that an extension of the loan would involve a change in the maturity dates of the note, and a change in the rate of interest *does not change the identity of the debt.*" (Italics ours.)

In *Cherry v. Welsher,* 195 Ia. 640, 192 N. W. 149, the court held: "The lien of the mortgage is presumed to continue until the debt is paid even though a new note be given therefor. The debt must be satisfied, and even the taking of a new note which includes an additional loan will not in the absence of an agreement to the contrary discharge the mortgage. It is elementary that, if the original mortgage is released through mistake, it may be restored in equity

and given its original priority, except as to subsequent purchasers for value and without notice."

Has an equity court the power to grant relief from the mistake of a plaintiff made under the circumstances of this case?

Pomeroy in his Equity Jurisprudence discusses the power of equity courts in matters of this kind and states:

Section 849. "I therefore venture to formulate the following general rule as being eminently just and based on principle, and furnishing a simple criterion defining the extent of the jurisdiction. * * *

"Wherever a person is ignorant or mistaken with respect to his own antecedent and existing private legal rights, interests, estates, duties, liabilities, or other relation, either of property or contract or personal *status*, and enters into some transaction the legal scope and operation of which he correctly apprehends and understands, for the purpose of affecting such assumed rights, interests, or relations, or of carrying out such assumed duties or liabilities, equity will grant its relief, defensive or affirmative, treating the mistake as analogous to, if not identical with, a mistake of fact."

Section 853. "All mistakes of fact in agreements executed or executory, express or implied, must be concerning either the subject-matter or the terms. In the first case, the terms are stated according to the intent of both the parties, but there is an error of one or both in respect of the thing to which these terms apply,—its identity, situation, boundaries, *title*, amount, value, and the like." 2 Pomeroy, Equity Jurisprudence (4th ed.) secs. 849 to 854.

The case of *Peterson v. First Nat. Bank*, 162 Minn. 369, 203 N. W. 53, involved the power of an equity court to grant relief from the result of a serious blunder made by a lawyer in the foreclosure of a mortgage. In the body of the opinion the court said:

"The idea that equity has no relief from mistakes of law had its origin in the almost humorous and wholly supposititious presumption that all know the law—a proposi-

tion contrary to both law and sense. There has been misuse also of the rule that ignorance of the law excuses no one. There is such a rule, but it goes only to the extent of making legal duty inescapable because of the subject's ignorance of the law. Neither in letter, spirit, nor purpose does it justify or even suggest that a loss should be imposed on one and an unconscionable gain permitted another merely because of the former's ignorance of law."

In that case the syllabus is: "In considering the competency of equity to relief against mistake, it is not controlling that the initial error is one of law rather than fact. It is not so much the genesis of the error as it is its unintended and unconscionable effect upon legal rights and obligations that makes a cause for relief."

This court in *Lewis v. Newell,* 110 Neb. 142, 193 N. W. 105, states: "It must be conceded that ignorance of the law excuses no one and equity will not relieve against pure mistakes of law. However, a distinction is made as to ignorance of general law and ignorance of one's private legal rights under the law, arising out of existing facts. In the latter case, when shared by both parties to an agreement and resulting in a loss of the rights of one of them, the agreement may be set aside at the suit of the injured party, though no fraud was practiced upon him. 6 R. C. L. 630, sec. 48."

The decision of this court in *Farrell v. Bouck,* 72 Neb. 875, 101 N. W. 1018, indicates that it is something more than slight negligence on the part of a mistaken party that would prevent an equity court from granting relief. In that case, the expression "culpable inertness" is used.

In *Cherry v. Welsher, supra,* the court said:

"This record however shows a release of an unsatisfied encumbrance, and the lien so released will be revived for the benefit of the party satisfying it. Justice and equity require that this should be done. When a person through misapprehension and mistake of the law parts with or surrenders a right of property which he would not have surrendered but for such misapprehension a court of equity will grant relief if it is satisfied that the parties benefited

by the mistake cannot in conscience retain the benefits or advantages so acquired. * * *

"Equity looks to the substance of the transaction rather than the mere form it assumes."

An equity court has the power and the duty, under the circumstances of this case, to grant the relief prayed for by the plaintiff.

Therefore the case is remanded to the trial court with instructions as follows:

(1) To enter a decree canceling the release of the 1923 mortgage and reinstating the lien of the same upon the undivided one-half interest in this property, formerly owned by Louis Roost, and which, under the will, passed to Anna Roost as residuary devisee.

(2) That an accounting be had as to the amount due on the 1923 note under the terms and conditions of that note and mortgage, giving full credit for all payments of either principal or interest made to the plaintiff by either Nuernberger or Louis or Anna Roost; that there be deducted from the amount so found due the amount of payments made by Nuernberger and Anna Roost as commissions, renewal fees, and other expenses connected with the execution of the 1933 mortgage, and that the one-half part of the amount so determined be decreed to be a lien upon said undivided one-half interest, based upon, and with the priority of, the 1923 reinstated mortgage.

(3) That if said undivided one-half interest be not redeemed from said decree, that it be sold as by law provided to satisfy said decree.

(4) That upon the payment of one-half of the amount of the decree rendered in the district court against the defendant Nuernberger, either by redemption or sale, that decree be held to be fully satisfied.

(5) To enter such further order or orders as may be necessary in the premises.

By so providing, there will be but one recovery in this action for the plaintiff, and justice and equity will be done in the premises. Should there be sales of either or both of

these undivided interests and a surplus remaining after the payment of either decree, the trial court, upon confirmation, shall order the payment thereof to the party or parties entitled thereto.

The litigation in this matter, so far as these appellee defendants are concerned, has been caused by the mistake of the plaintiff. Therefore the trial court shall enter its decree, taxing costs as follows: (1) The costs of this action in the trial court incurred by the defendant administrator and defendant beneficiaries shall be taxed to the plaintiff; (2) all other costs already incurred in the trial court shall be taxed as a part of the costs of the case, chargeable one-half against each interest in the property; (3) the costs of this action in this court are taxed to the plaintiff; (4) the costs in this action hereafter shall be taxed as a part of the costs of the case, chargeable one-half against each interest in the property. In the event of a sale under orders of the court, the costs so charged shall be paid first out of the proceeds of the sale, before distribution thereof is made as provided above.

REVERSED.

FARMERS & BANKERS LIFE INSURANCE COMPANY, APPELLANT, V. MARLENE MATHERS ET AL., APPELLEES.
284 N. W. 286

FILED FEBRUARY 17, 1939. No. 30467.

1. Insurance: PLEADING. "Where the insurer relies upon a stipulation in a policy to defeat a recovery, it must plead affirmatively a breach thereof as a defense." *Farmers & Merchants Ins. Co. v. Wiard*, 59 Neb. 451, 81 N. W. 312.
2. ———: ———: WAIVER. "If the defendant insurance company fails to set up a condition precedent contained in the insurance policy in suit, and fails to allege its breach by the plaintiff, such defense is waived." *Lehnherr v. National Accident Ins. Co.*, 126 Neb. 199, 252 N. W. 823.
3. ———. An insurance agent who writes in an application for life insurance and accepts false answers to questions pertaining

to the health of the applicant instead of the latter's truthful answers in good faith without knowledge of the falsehoods is the agent of the insurer issuing a policy on the application.

4. ———. Evidence of facts summarized in opinion *held* sufficient to support findings that an agent of a life insurance company wrote in an application for insurance false answers to questions instead of truthful answers of applicant.

5. Appeal. Where a jury renders a general verdict, the receiving of it without special findings on immaterial questions submitted is not prejudicially erroneous in that particular.

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

Raymond W. McNamara and *Jochems, Sargent & Blaes,* for appellant.

Burkett & Robinson, contra.

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

ROSE, J.

The Farmers & Bankers Life Insurance Company, plaintiff, brought this suit to cancel a 1,000-dollar life insurance policy issued by it September 5, 1936, to Dorothy B. Mathers, insured, the beneficiary being her minor daughter, Marlene Mathers. Insured died December 4, 1936. Defendants are the beneficiary and her father and guardian, Lawrence Mathers.

The petition alleged among other things that insured issued the policy, received the premium, and agreed to pay the beneficiary $1,000 upon proof of insured's death; that the policy is in form "Non-medical," which is issued upon the written application and the questions and answers therein in lieu of a physical examination; that insured in her application for insurance, without the knowledge of insurer or its agents or its officers, knowingly made the false and fraudulent statement that she was in good health, and stated other falsehoods pertaining to her health, physical condition, habits and family history for the purpose of inducing plaintiff to insure her; that, contrary to her state-

ments in the application, she had not been in good health since 1928, having suffered continuously with goiter, for which two operations had been performed; that she died the day after the third operation for goiter; that she had been otherwise in poor health; that plaintiff relied on the false statements in her application for insurance; that otherwise, had the facts been stated truthfully in the application, the policy would not have been issued. The application and the policy are parts of the petition.

In an answer and cross-petition on the policy to recover the insurance, the fraud imputed to insured was denied by defendants and judgment for the insurance demanded. In a reply to the cross-petition, there was an affirmative plea for the cancelation of the policy and for a dismissal of the cross-petition.

Upon a trial of the cause, the jury returned a verdict for $1,054.50 in favor of defendants on the cross-petition. From a judgment therefor and from the allowance of an attorney fee of $500 in favor of defendants, plaintiff appealed to the supreme court.

On appeal plaintiff insists the application and the policy contain the condition precedent that the insurance does not go into effect, if the applicant for it is not in good health when the policy is issued, and that her poor health at that time and formerly was established by uncontradicted evidence. In this connection it is argued that the trial court ignored the condition precedent and committed prejudicial error in refusing to direct a verdict for plaintiff and in overruling a motion for judgment in its favor notwithstanding the verdict. The position thus taken is untenable for the following reasons: Plaintiff did not affirmatively plead a condition precedent. The failure to do so was a waiver of it. The petition itself waived condition precedent as an issue. It was not pleaded by plaintiff as a ground for cancelation of the policy nor as a defense to the cross-petition of defendants for insurance. Since it was waived by plaintiff, defendants were not called upon to plead a waiver and did not. The law in Nebraska is:

"Where the insurer relies upon a stipulation in a policy to defeat a recovery, it must plead affirmatively a breach thereof as a defense." *Farmers & Merchants Ins. Co. v. Wiard,* 59 Neb. 451, 81 N. W. 312. Approved in *Lehnherr v. National Accident Ins. Co.,* 126 Neb. 199, 252 N. W. 823.

Insurer, under the cross-petition for insurance, was in the attitude of a defendant and was bound by the following rule of law:

"If the defendant insurance company fails to set up a condition precedent contained in the insurance policy in suit, and fails to allege its breach by the plaintiff, such defense is waived." *Lehnherr v. National Accident Ins. Co.,* 126 Neb. 199, 252 N. W. 823.

The trial court, therefore, did not err in omitting to submit to the jury or to decide the question of fact relating to the condition precedent, since it was not put in issue by the pleadings.

The only issue raised by the pleadings, tried by the parties and submitted to the jury was raised by the charges of fraud in the procuring of the insurance and the denial of the alleged fraud. The evidence on this issue was conflicting, but the preponderance was clearly in favor of defendants. The jury were at liberty to find from the evidence the following facts: In the transactions between insurer and insured, P. B. Craven was the authorized agent of insurer. He called on Dorothy B. Mathers and in the presence of others solicited insurance and wrote the answers to the questions in an application which he furnished. Insured told him in advance that she did not think she could pass a physical examination for insurance; that she had goiter and had operations for it. He said he had a policy that did not require a physical examination. He asked or omitted to ask questions in the application. She did not tell him she was in good health. She told him the truth about her health and goiter and operations and other subjects of inquiry. Craven wrote in the application the false answers indicating she was an insurable risk, handed the application to her and asked her to sign it. She did so without knowing

that falsehoods had been inserted instead of her truthful answers to questions. The scars of surgery for goiter were then on the applicant's neck. The person who committed the fraud was the agent of insurer and his fraudulent acts were the acts of insurer. *Farmers & Merchants Ins. Co. v. Wiard,* 59 Neb. 451, 81 N. W. 312.

The verdict has abundant support in the evidence on the only issue of fact for the determination of the jury.

Complaint is made because the verdict was received without requiring findings in answer to special interrogatories. In view of the conclusions reached on the pleadings and on the controlling question of fact, the unanswered interrogatories were immaterial.

The attorney's fee of $500, however, seems to be excessive in view of the amount involved in litigation and the nature and extent of the professional services required and performed. The fee allowed in the district court is reduced to $200 and an attorney's fee of $100 for services of counsel for defendants in the supreme court will be taxed as costs, the costs in both courts to be paid by plaintiff. In other respects error prejudicial to plaintiff has not been found in the record. The judgment for insurance is

AFFIRMED.

ALICE GRAHAM, APPELLEE, V. CLIFFORD C. GRAHAM, APPELLANT.

284 N. W. 280

FILED FEBRUARY 17, 1939. No. 30480.

1. **Divorce:** ALIMONY: MODIFICATION. "An application for a change with respect to alimony in a decree of divorce, made at a subsequent term, must be founded upon facts or circumstances which have arisen subsequently to the decree, and in the absence of such facts and circumstances the matter will be deemed *res adjudicata* between the parties." *Chambers v. Chambers,* 75 Neb. 850, 106 N. W. 993.
2. ———: ———: ———. In a divorce proceeding, where a decree is entered dissolving a marriage, and awarding the wife

a judgment against the husband for a definite sum, in full of all her claims upon him or his property by reason of their former marriage relations, courts have no jurisdiction to vacate or modify such a judgment after the term at which rendered, solely because of a change in the circumstances, financial or otherwise, of either of the parties thereto.

3. ———: ———. "A decree for alimony * * * made without reserve, though payable in instalments, is final and cannot be modified after enrollment of the decree, in the absence of statutory authority or a reservation of power in the decree itself." *Mayer v. Mayer*, 117 N. W. 890 (154 Mich. 386).
4. ———: ———. "Where a court has jurisdiction of the parties, its authority to grant a divorce carries with it authority to adjust the property rights of the parties with respect to personal property within its jurisdiction." *Hays v. Hays*, 75 Neb. 728, 106 N. W. 773.
5. ———: ———. Record and evidence examined, and *held* ample to support the decree entered by the district court.

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

Good & Simons, for appellant.

Burkett, Wilson & Van Kirk and *B. Frank Watson*, *contra.*

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

EBERLY, J.

This was originally an action for divorce in which Alice Graham was plaintiff and Clifford C. Graham was defendant, both being residents of the state of Nebraska. It appears that two children had been born to these parties during the existence of the marital relations, a daughter, born June 11, 1919, and a son, born November 17, 1920, both of whom survive. The ground for divorce set forth in plaintiff's petition was cruelty committed by the husband against the wife, and included the allegation that defendant had been guilty of cruelty, "(d) By the removal of the said two children of plaintiff and defendant from Lincoln to York county, Nebraska, preventing plaintiff from seeing

her children or being with them. (e) By the removal of the said plaintiff's personal belongings and furniture purchased with her earnings from Lincoln to York without plaintiff's knowledge or consent." This petition also sets out, viz.: "That the defendant is able-bodied and in good health. That he is regularly employed and is capable of earning, as plaintiff is informed and verily believes, and does earn not less than $250 per month." It also alleges that on or about December 29, 1929, "defendant carried said children away to York county," Nebraska. That defendant has contributed nothing to the support of plaintiff, and has taken plaintiff's "personal belongings from Lincoln to York county without plaintiff's knowledge or consent. That the plaintiff is wholly without means to support herself and her minor children except for her earnings which are insufficient for that purpose." The prayer of this petition included a prayer for a divorce; that the court make a decree restoring to the plaintiff the whole of the personal estate that shall have come to the defendant by reason of marriage; for custody of the children, and for temporary and permanent alimony.

Personal service of summons upon the defendant was had, but he failed to plead and made default. The cause was tried to the district court on December 4, 1930, upon the pleading and the evidence, and such court on December 5, 1930, entered an absolute divorce, and further decreed, viz.:

"II. That the custody of the said minor children, Nadine and Roger, be awarded to the plaintiff, Alice Graham, but that the said children may remain where they are at the date of this decree, that is, Roger with his grandfather, Mr. Natt Graham, of McCool Junction, Nebraska, and Nadine at the Christian Home in Council Bluffs, Iowa, until such date as their mother, the plaintiff, is financially able to support them, said date to be determined by subsequent application to the court and by its order thereon.

"III. That the said defendant, Clifford C. Graham, shall pay the said plaintiff, Alice Graham, the sum of thirty dol-

lars ($30) on the first day of January, 1931, and thirty dollars ($30) on the first day of each month thereafter, until the full sum of five thousand dollars ($5,000) shall have been paid her, provided the said sum may be paid in a lump sum at any time, and fifty dollars ($50) on the first day of January, 1931, for her attorney fees herein. It is further ordered that in case the defendant fails to pay any one or more of the said sums ordered herein, execution may issue without prejudice to the right of the plaintiff to proceed against defendant as for contempt; also that defendant pay the costs."

We quote from the brief of the husband, viz.: "Defendant paid plaintiff nothing after the divorce decree except to return a few items of personal belongings and fifty dollars for attorney's fees and court costs. * * * Defendant inherited a one-fourth interest in his father's estate in York county, in August, 1937, after the divorce decree was transcribed to the district court of that county. A partition of the real estate was had and because of the cloud on the title the money is now held in the hands of the district court of York county, the sum being approximately $2,100, and being defendant's entire inheritance from his father's estate."

For the purpose of defeating the satisfaction of the decree out of this property, it appears that the defendant filed his application for a modification of the decree of December 5, 1930. A hearing was had on the pleadings and the evidence, and on March 18, 1938, a decree was entered awarding the custody of the minor children to the defendant, but otherwise continuing the decree of December 5, 1930, in full force and effect. The defendant alone appeals.

The defendant contends that the district court in so deciding erred in the disposition of the issues presented to it for determination, which he summarizes as follows, viz.:

"The main question before the district court of Lancaster county was whether the five thousand dollars mentioned in the decree was in the nature of a property settlement or whether it was an award for the support of the minor

children, which award was subject to modification by the district court, both as to accrued and unmatured payments; also whether the support and care furnished by defendant to said minors was in equity a payment of the money award provided for in said decree; and for a revision of said decree as to the custody of the children."

Accepting this statement of issues determined as a statement of fact, but without any commitment to the principles of law contended for therein, we find the record presented is free from reversible error.

Appellant's fundamental contention is that the district court had jurisdiction to modify and cancel the decree in this case under the provisions of section 42-324, Comp. St. 1929, which reads as follows: "After a decree for alimony or other allowance for the wife and children, or either of them, * * * the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance, or the payment thereof, * * * and may make any decree respecting any of the said matters which such court might have made in the original suit."

This was originally enacted as section 27 of chapter LII of Part I, Code of Nebraska, by the territorial legislature, and was approved January 26, 1856. It was substantially a reenactment of chapter 84 of divorce of the Revised Statutes of Michigan for 1846, and the exact words of the section heretofore quoted appear as section 28 of such chapter of the Michigan statutes just referred to. The exact language of the controlling section (section 42-324, Comp. St. 1929) was construed by the supreme court of Michigan in 1864 in the case of *Perkins v. Perkins*, 12 Mich. 456, in the following language, viz.:

"The section must be construed to mean one of two things. It may be construed as empowering the court to change the decree for alimony, from time to time, on facts existing when the decree is granted, or on new facts thereafter transpiring; or as only authorizing a change on the latter, when they are of such a character as to make it necessary to

suit the new state of facts. The last we think is the true construction. We cannot suppose the first to have been in the mind of the legislature, as it would virtually take away the right of appeal, which the law gives to the party who may feel himself aggrieved by the decision of an inferior tribunal, and subject the rights of the parties to the discretion of the court making the decree, however arbitrarily or capriciously exercised. But as various circumstances might occur after alimony granted—as adultery on the part of the woman, or the loss of property by some inevitable accident on the part of the man, and the like—we are led to believe that the statute was intended to provide for such new circumstances, and that that was all the legislature had in view in enacting it; that it was not designed to affect the right of appeal, or to give to the court granting alimony power to review and to reverse or modify its own decree. Such a power would be unprecedented, and out of the ordinary course of judicial proceedings."

Two years after this Michigan decision had been announced, the Nebraska territorial divorce act of 1856 was, by an act entitled "An Act for revising, amending, consolidating and reenacting the Civil and Criminal Codes, and the laws of a general nature, of the Territory of Nebraska" (approved February 12, 1866), substantially reenacted without change. This act of 1866 is officially designated as the "Revised Statutes of Nebraska, 1866," and the exact language of section 42-324, Comp. St. 1929, appears therein as section 27, chapter XVI, Part I. While this section was amended in 1935, the language under consideration now was wholly unaffected by this amendment.

The terms of the original Michigan enactment were adopted in substance and effect by the legislatures of a number of the states. In the construction of these and kindred statutory provisions, it appears that the doctrine of *Perkins v. Perkins, supra,* has been generally adhered to. *Wilde v. Wilde,* 36 Ia. 319; *Reid v. Reid,* 74 Ia. 681, 39 N. W. 102; *White v. White,* 75 Ia. 218, 39 N. W. 277; *Fisher v. Fisher,* 32 Ia. 20; *Straus v. Straus,* 14 N. Y. Supp. 671;

Semrow v. Semrow, 23 Minn. 214; *Olney v. Watts,* 43 Ohio St. 499, 3 N. E. 354; *Buckminster v. Buckminster,* 38 Vt. 248; *Weld v. Weld,* 28 Minn. 33, 8 N. W. 900; *Vert v. Vert,* 3 S. Dak. 619, 54 N. W. 655.

In 2 Nelson, Divorce and Separation, p. 888, the rule is announced, viz.: "In those states where the decree for alimony may be revised it is held that no change will be made unless it is shown that the wife's needs or the husband's faculties have increased or diminished. The decree is *res judicata* as to all matters existing at the time it was rendered. New facts occurring since the decree must be shown. The estoppel extends to all matters properly before the court which the parties might have litigated." See, also, 17 Am. Jur. 485, sec. 636; *Gundick v. Gundick,* 208 Mich. 34, 175 N. W. 168; *Clarizio v. Castigliano,* 201 Minn. 590, 277 N. W. 262.

However, in 1883, by the terms of an independent statute legislatively declared to be cumulative, the powers conferred on the courts and the legal effect of judgments rendered by them were increased, and it was provided: "All judgments and orders for payment of alimony * * * shall be liens upon property in like manner as in other actions, and may in the same manner be enforced and collected by execution and proceedings in aid thereof, or *other action* or process as *other judgments.*" (Italics supplied.) Laws 1883, ch. XL, sec. 1 (Comp. St. 1929, secs. 42-319, 42-320). See, also, *McCord v. McCord,* 128 Neb. 230, 258 N. W. 474.

This enactment created a decided innovation in our law as previously existing, and to that extent differentiates it from the other states which have adopted the Michigan divorce act as the basis of their law on that subject. The alimony judgment is legislatively endowed with the same qualities as "other judgments," and by the same authority may "be enforced and collected by * * * other action" as "other judgments" are. The obvious legislative intent is to secure for them "full faith and credit," and that divorce judgments in Nebraska should be considered as possessing all the qualities essential for that purpose. Unless unalter-

able in the jurisdiction of its rendition, an alimony judgment is not entitled to "full faith and credit." *Lynde v. Lynde,* 181 U. S. 183, 21 Sup. Ct. Rep. 555; *Sistare v. Sistare,* 218 U. S. 1, 30 Sup. Ct. Rep. 682; *Yarborough v. Yarborough,* 290 U. S. 202, 54 Sup. Ct. Rep. 181.

This statute is a remedial statute, and, being remedial, is to receive a liberal construction to carry into effect the purpose for which it was enacted, and for effectuating its object. *State v. Fremont, E. & M. V. R. Co.,* 22 Neb. 313, 35 N. W. 118; *Becker v. Brown,* 65 Neb. 264, 91 N. W. 178.

It is obvious that, so far as not inconsistent with the express terms and recitals thereof, to construe an alimony judgment in favor of the wife as unalterable is in harmony with the legislative intent thus expressed. It will also be noted in passing that this court has consistently given full force and effect to the statute here under consideration from the date of its adoption. *Nygren v. Nygren,* 42 Neb. 408, 60 N. W. 885; *Lynch v. Rohan,* 116 Neb. 820, 219 N. W. 239; *McCord v. McCord,* 128 Neb. 230, 258 N. W. 474.

Quite consistent with the current of authority, this court in *Chambers v. Chambers,* 75 Neb. 850, 106 N. W. 993, announced the principle, viz.: "An application for a change with respect to alimony in a decree of divorce, made at a subsequent term, must be founded upon facts or circumstances which have arisen subsequently to the decree, and in the absence of such facts and circumstances the matter will be deemed *res adjudicata* between the parties." See, also, *Wharton v. Jackson,* 107 Neb. 288, 185 N. W. 428.

Again, in *Beard v. Beard,* 57 Neb. 754, 78 N. W. 255, this court determined, viz.: "Where, in a divorce proceeding, a decree is entered dissolving a marriage, and awarding the wife a judgment against the husband for $..... in full of all her claims upon him or his property by reason of their former marriage relations, it seems that the courts have no jurisdiction to vacate or modify such a judgment, after the term at which rendered, solely because of a change in the circumstances, financial or otherwise, of either of the parties thereto."

It is also a universally accepted principle that "A decree for alimony * * * made without reserve, though payable in instalments, is final and cannot be modified after enrollment of the decree, in the absence of statutory authority or a reservation of power in the decree itself." *Mayer v. Mayer,* 117 N. W. 890 (154 Mich. 386), 129 Am. St. Rep. 477, 19 L. R. A. n. s. 245.

However, appellant challenges the application of the rule of *Beard v. Beard, supra,* to the facts here presented, for the reason that the award of alimony in the instant case was not in the nature of a property settlement between husband and wife, but was in fact for the support of minor children, and, as such, subject to modification at any time, both as to future and matured payments; further, that the defendant had no property at the time of the original rendition of the divorce decree, and the petition for divorce lacks necessary allegations which would support a judgment for a property settlement, and that "the purported judgment is a nullity and void as far as being a property settlement." In support of this last proposition, *Lincoln Nat. Bank v. Virgin,* 36 Neb. 735, 55 N. W. 218, and *Branz v. Hylton,* 130 Neb. 385, 265 N. W. 16, are cited. It is thought that the principles evidenced by these decisions are wholly inapplicable, both because of the inherent nature of divorce proceedings and the statement of the pleading challenged. From the petition in the instant case we note that it is alleged on information and belief that the defendant is able-bodied and in good health, capable of earning, and is earning, $250 a month; and, further, the removal of plaintiff's personal belongings and furniture, purchased with plaintiff's earnings, from Lincoln to York, Nebraska, is alleged, with a special prayer for relief relating thereto. True, the personal belongings and furniture are not described, enumerated, or valued, but no attack has been made upon this petition in that regard until after final judgment was entered thereon.

The general rule appears to be, viz.: "Failure to allege the value of property, or to lay damages in a declaration

or complaint will be cured by verdict and the same is true of a declaration or complaint which is defective or not sufficiently specific in stating value or damages." 49 C. J. 881.

So, also, with reference to the failure of plaintiff to specifically enumerate or describe "plaintiff's personal belongings and furniture," carried away by defendant and presumably continuing in his possession and under his control, the controlling principle of pleading appears to be, viz.: "Facts which are, or which the law presumes to be, peculiarly within the knowledge of the other party may be alleged with less certainty and particularity than would otherwise be necessary, or may be alleged on information and belief; and they may even be omitted entirely." 49 C. J. 38.

In *Hays v. Hays*, 75 Neb. 728, 106 N. W. 773, in a direct appeal from a decree of divorce and alimony, we find the following, viz.: "A complaint is based on the order allowing the plaintiff the household furniture in her possession at the time of the decree. The defendant insists that this portion of the decree is outside the issues, because this furniture was not mentioned in the petition. Where the court has jurisdiction of the parties, authority to grant a divorce carries with it authority to adjust the property rights of the parties with respect to personal property within its jurisdiction. It is not necessary that each item of personalty be specifically mentioned in the petition. The evidence discloses with reasonable certainty the amount of household furniture." See, also, *Maxwell v. Maxwell*, 106 Neb. 689, 184 N. W. 227.

Whether the relief in such case is an assignment of definite articles of personal property or a monetary decree in lieu thereof is a matter resting in the sound discretion of the court.

In *Phillips v. Phillips, ante*, p. 313, 281 N. W. 22, the rule is announced, viz.: "In considering the amount of alimony that a court is to allow in such a divorce case, the court will take into consideration the estate of each party at the

time of the marriage, and their respective contributions since, the duration of the marriage, the wife's loss of her interest in the husband's property by virtue of the divorce, the social standing, comforts and luxuries of life which the wife would probably have enjoyed except for the enforced separation, the conduct of the parties leading up to the divorce, and to which party the divorce is granted, their age and condition of health, and all other facts and circumstances, and award an amount in alimony which appears to be fair and equitable between the parties."

The evidence adduced at the original trial of this instant divorce proceeding has not been preserved, and is not shown in the present record. The presumption, however, obtains that it was ample to sustain the judgment entered. The claims of plaintiff on account of her personal property necessarily formed an element of the problem considered by that court, and the decree rendered thereon necessarily constituted a property adjustment made between the parties. Indeed, the allegations contained in plaintiff's petition in reference to the husband's earning power constituted alone, without reference to ownership of property by him, an ample basis for award of alimony. *Lape v. Lape,* 99 Ohio St. 143, 124 N. E. 51.

The defendant in the instant case, as petitioner for revision and alteration, carries the burden of proof to establish the alterability of the decree. It is thought that he has failed in his contention that the rule announced in *Beard v. Beard, supra,* is inapplicable.

Nor are we impressed with the argument that the award of alimony is for the benefit of the minor children, and subject to revision as such. By our statutes, in a divorce decree, an award of alimony may be either permanent or temporary, and may be for the support of the wife, or of the children, or both, whether temporary or permanent. Comp. St. 1929, secs. 42-310, 42-311, 42-318, 42-323, 42-324.

In the instant case the award of alimony was made to the wife only. The express terms of the decree are "That

the said defendant, Clifford C. Graham, shall pay the said plaintiff" a definite sum of money ($5,000) in payments of $30 a month, commencing on January 1, 1931. The minors are not mentioned in any manner as beneficiaries in connection with the award, and while another distinct paragraph of this decree awards a technical custody of the two children of these parties, even that is in truth and fact "suspended" until further order of the court. The decree expressly provides that these minors may remain in the custody of those where they had been previously placed by the father, "until such date as their mother, the plaintiff, is financially able to support them, said date to be determined by subsequent application to the court and by its order thereon."

But, without reference to or consideration of this situation thus created, the terms of the alimony award direct that the payment of $30 a month to the wife shall commence on January 1, 1931, and shall thereafter be made regularly for the period of 166 2/3 months. The last payment under the terms of this decree is payable in October, 1944. Meanwhile the two children will attain their majorities on June 11, 1940, and November 17, 1941, respectively.

Thus, not only the express terms of the decree but the surrounding circumstances tend to sustain the conclusion that the award of alimony in the instant case, as authorized by the express terms of the controlling statute, was made to and for the wife, and not for the benefit and support of the children. Therefore, expenditures made by the father for the support and maintenance of the children while actually in his possession and under his control may not be treated as credits on the alimony award or considered as a satisfaction *pro tanto* thereof. This conclusion as to the inherent nature of the award of alimony is quite in harmony with the directions to the district courts of this state announced in *Connett v. Connett,* 81 Neb. 777, 116 N. W. 658, viz.: "The wife's alimony and the children's maintenance, if included in the same decree, should be separated

into distinct items, and not included in one sum." In determining the meaning of a decree, in the absence of any facts disclosed in the record to the contrary, compliance with this direction may be assumed.

It follows that the judgment of the district court, so far as here presented for review, is correct, and is

AFFIRMED.

HARRY MASON, APPELLANT, V. CLYDE REYNOLDS ET AL., APPELLEES.

284 N. W. 257

FILED FEBRUARY 17, 1939. No. 30421.

1. **Witnesses.** Where a witness, previous to the trial, has made a written statement, duly signed, favorable to the contention of the party calling him, and when called as a witness testifies to an entirely inconsistent state of facts, counsel should be allowed to introduce his previous statement to refresh his memory, or to probe his conscience, as well as to show to the court and the jury the reasons which induced him to call such a witness to the stand.
2. **Automobiles.** If injury is caused through the combined negligence of the drivers of two automobiles, cause of action is joint and several, and recovery may be had against either or both.

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

Dent & Deakins and *William E. Shuman,* for appellant.

Beeler, Crosby & Baskins, Robert B. Crosby and *Hoagland, Carr & Hoagland, contra.*

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

PAINE, J.

Action for damages, brought against two young men who, while racing their cars, ran into plaintiff's car, and also against the owners of the two cars driven by the young

men. At the close of the plaintiff's testimony a motion was made to dismiss the action, on the ground that there had been a misjoinder of causes of action, together with several other motions, all of which were sustained by the court. Jury returned verdict finding in favor of each defendant as instructed by the court. Plaintiff's action was thereupon dismissed by the court. Plaintiff appeals.

The plaintiff's evidence discloses that on March 14, 1937, about 4 o'clock in the afternoon, plaintiff was driving a 1930 Model A Ford two-door sedan on East Second street in the city of North Platte, and while there were still residences on each side of the street, it was just outside of the city limits proper. The road was graveled, and about 22 feet wide, and plaintiff was driving slowly, perhaps 10 to 15 miles an hour.

Plaintiff was within 30 or 40 feet of the driveway into the home and place of business of William E. Thompson, a car wrecker, where he intended to get some repairs. Looking in his rear-vision mirror, plaintiff saw the first of two cars coming about 200 to 300 feet behind him, but he did not hold out his hand, because the car was coming too fast, and he intended to let it go by. Within two or three seconds after he saw the car in his rear-vision mirror, it flashed up alongside of him, and he has a memory of some one, with face turned towards him, laughing. The first he remembered clearly after that was some time during the night, when he became conscious at St. Mary's Hospital.

Mr. Thompson, proprietor of the car-wrecking place to which plaintiff was going, testified that he saw the plaintiff in his car, and that the Oldsmobile coupé struck the front of the Ford car, which turned it sidewise, leaving it in about the center of the street; that the Oldsmobile blew out a tire and went into the ditch on the south side of the road; that the Dodge, just behind, hit the Ford pretty heavily and broke off the posts under three mail-boxes, and went on about 100 feet and stopped in the ditch. Mr. Thompson ran out to the Model A Ford and found the plaintiff had been thrown into the back end of the car, and, while

not exactly unconscious, he wanted to know what had happened, and Rev. Kana, a Japanese minister, who lived across the street from Mr. Thompson, took him to the hospital.

James G. Dietz testified that the two cars were coming down the street at between 60 and 70 miles an hour. They were throwing up considerable dust. They were side by side at first, but one was a little ahead of the other at the time the accident occurred. He said that he was a little over a block away, and did not actually see it, but heard it.

The plaintiff called in evidence Richard Allen, 18 years of age, a senior in the high school, who was riding in the Dodge automobile, and gave the names of the two boys and the two girls who were riding in the Dodge. He testified that, before they drove off the end of the pavement, Moore passed them in the Oldsmobile; that he thought the Dodge was running 40 to 50 miles an hour, and did not change any when it struck the dirt road. When the Oldsmobile passed the Dodge it threw gravel on the windshield. In his opinion, the Oldsmobile was "doing somewhere around 70" when it passed them; then Reynolds increased the speed of the Dodge to 50 or 55, and hit the Mason car, which witness Allen had seen just before the Oldsmobile passed them, but could not see it just before they hit it, for the dust was so thick he could not see a thing, and was knocked out by the collision. He testified that Raymond Reynolds' four-door Dodge sedan was owned by his father, Clyde Reynolds, and that Raymond lived with his father.

Raymond Reynolds testified that he was 19 years of age, and lived with his father and mother, and that his father owned the 1936 model Dodge automobile that he was driving, but that he had only driven the Dodge once before, which was about three months before the accident. He said that his father was asleep, and he took the car without his consent. He had had a driver's license since he was 16 years old. He had dropped out of high school, and had been working for his father, eating and sleeping at home, and paying his own board at the rate of $9 a week. He delivered groceries for his father's store in a truck. He

said that the truck was sitting in front of his father's car, and so he took his father's car without permission. He claimed that he bought the truck through his father; that they traded in another car, which was licensed in his father's name, but that he had made the payments on it each week through his father.

The plaintiff offered to show by the witness on the stand that, after the truck was purchased from the Alexander Motor Company, it was involved in an accident, and that Clyde Reynolds, father of the witness, swore under oath that he was the sole owner thereof, and collected from the insurance company as the owner. The plaintiff stated that he made this offer to prove for the purpose of impeaching the witness upon the stand, who appeared unfriendly. This was objected to as incompetent, irrelevant, and immaterial, and the court sustained the objection to the offer on the ground that "you can't impeach your own witness."

The witness testified that, while he did not look at his speedometer, he always had the habit of driving around 50 miles an hour. He testified that when they left the pavement the Oldsmobile, going at that time around 70 miles an hour, went by him and honked the horn.

Plaintiff then laid a foundation for the introduction of exhibit No. 1, being a typewritten statement, signed by this witness. He admitted making a statement in attorney Deakins' office a few days after the accident, and admitted it was his signature at the bottom of exhibit No. 1, just above the line reading, "I have read the above and it is true."

Plaintiff then offered in evidence exhibit No. 1 for the purpose of impeaching the witness, on the ground that plaintiff had been surprised by his testimony, which was absolutely contrary to the written statement given, and insisted that plaintiff had a right to impeach a witness when he is hostile, and when plaintiff is surprised by his testimony. Defendants objected to the offer as incompetent, irrelevant, and immaterial, not binding upon the defendants, and for the further reason that it is an attempt on

the part of the plaintiff to impeach his own witness. The objection was sustained by the court.

Exhibit No. 1 was about two typewritten pages in length, and it was signed, "Ray Reynolds." It stated that he was 18 years of age, had graduated from the North Platte high school two years before, was employed by his father, driving a delivery truck for the grocery; that the Dodge sedan he was driving was owned by his father, and used as a pleasure car, and at the time he was driving it it was with his father's permission; that at the time of the accident he had speeded up his car to 50 to 55 miles an hour, and that Moore passed them as though they "were standing still;" that in his judgment Moore was going 75 to 80 miles an hour, with his back wheels jumping back and forth across the road; that he could not tell whether plaintiff Mason's car was stopped or moving because of the dust; that the dust was so bad he could not even see his radiator cap; that he did not see Moore hit Mason; that just as he put his foot clear down on the brake pedal he struck the Ford Model A, which threw his car over into the left ditch, knocked over some mail-boxes, and the first thing he noticed about the Moore car was that it had slid sidewise about 90 feet, and had turned clear around and was facing in a westerly direction, while Mason's car was on the south side of the road, facing in a northerly direction.

At the close of plaintiff's evidence, motion was made for a directed verdict for the father, Clyde Reynolds, on the ground that plaintiff had not proved any family car relationship, or that the son was using the car with the consent of the father.

A motion was made to direct a verdict in favor of Raymond Reynolds and Clyde Reynolds on the ground that there had been a misjoinder of causes of action, and no joint enterprise, no concert of action, and no indivisible injury or damage had been shown. "The Court: The motion will be sustained as to the father." Thereupon, a similar motion was made on behalf of Harry Haffner, because evidence fails to show any connection with defendant Moore

(who was driving Haffner's Oldsmobile), and the further motion that no joint enterprise has been shown, and further, because there is a misjoinder of causes of action, and that the four defendants are not joint tort-feasors. "The Court: It seems to the court's mind that the court should sustain this motion and all the motions."

The question of whether counsel may introduce a previous inconsistent written statement of a witness who had materially changed his testimony from a statement he had signed before the trial was fully discussed in *Stanley v. Sun Ins. Office,* 126 Neb. 205, 252 N. W. 807. It is true the general rule in Nebraska had been against allowing such impeachment of a witness. *Nathan v. Sands,* 52 Neb. 660, 72 N. W. 1030; *Merkouras v. Chicago, B. & Q. R. Co.,* 101 Neb. 717, 164 N. W. 719. We find a 45-page historical discussion of this question in 2 Wigmore, Evidence (2d ed.) 252-297.

Penhansky v. Drake Realty Construction Co., 109 Neb. 120, 190 N. W. 265, settled the rule in Nebraska, as follows: "Where one has been misled or entrapped into calling a witness by reason of such witness, previous to the trial, having made statements to the party, or his counsel, favorable to the party's contention, and at variance with the testimony given at the trial, and the party believed and relied upon such statements in calling the witness, and is surprised by the testimony on a material point, he may, in the discretion of the court, be permitted to show the contradictory statements made before the trial."

To this holding we may add the reasons therefor: Counsel should be allowed to show such previous inconsistent statements of his own witness, for the reason of refreshing his memory, probing his conscience, and, if for no other reason, that he may show the court and jury the circumstance which induced him to call and vouch for such a witness. *Stanley v. Sun Ins. Office, supra.*

The ruling of the court in refusing to allow exhibit No. 1 to be received in evidence was prejudicial error, which requires a reversal of this case.

The question is raised, in the motion upon which the case was dismissed, as to whether there was a joint enterprise, and whether the drivers and owners of the cars causing the damage to the plaintiff were joint tort-feasors. This court has had this same question before it a number of times. *Schweppe v. Uhl,* 97 Neb. 328, 149 N. W. 789, involved an accident which occurred August 18, 1911, and was one of the early cases involving automobiles. Plaintiff was driving a team of horses attached to a wagon, and at a narrow place the defendants, each driving an automobile, came up from the rear and, by excessive rate of speed and loudly sounding the horns, frightened the team, which ran away, throwing plaintiff out, from which he suffered injuries. In this decision there is a citation from 1 Cooley, Torts (3d ed.) 247, which says: "The weight of authority will, we think, support the more general proposition that, where the negligences of two or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert action."

This court has held that, if separate, independent acts of negligence combine to produce an injury, each defendant involved therein is responsible for the entire result, even though the act of one alone might not have caused the injury. *Zielinski v. Dolan,* 127 Neb. 153, 254 N. W. 695.

In *Olson v. Hansen,* 122 Neb. 492, 240 N. W. 551, a farmer was driving his team, attached to a mower, along a public highway. Two cars, driving in the opposite direction, approached him. The driver of the first car stopped to visit with Olson, whereupon the second car collided with the first car in attempting to go around him, throwing the first car against the mower and injuring Olson, and it was again held: " 'An act wrongfully done by the joint agency or cooperation of several persons, or done contemporaneously by them without concert, renders them liable jointly and severally.' *Schweppe v. Uhl,* 97 Neb. 328."

In *Simmons v. Leighton,* 60 S. Dak. 524, 244 N. W. 883, it is said: "If injury was caused through combined negli-

gence of drivers of two automobiles, cause of action is joint and several, and recovery may be had against either or both." See, also, Berry, Automobiles (4th ed.) sec. 221.

In view of the evidence produced by plaintiff, and the authorities, we are inclined to the view that the trial court was not warranted in dismissing the action at close of plaintiff's evidence. Many other errors are relied upon for reversal, but it will be unnecessary to discuss them, for in another trial they may not occur. The cause is

REVERSED AND REMANDED.

MARY E. SWELEY, APPELLANT, V. JOHN W. FOX ET AL., APPELLEES.

284 N. W. 318

FILED FEBRUARY 17, 1939. No. 30481.

1. **Limitation of Actions.** Section 20-207, Comp. St. 1929, provides a four-year limitation in which actions for relief may be brought to reform on the ground of fraud. Actions for accident or mistake, not specifically mentioned in the statute, are classed with fraud, and limited to four years. *Ainsfield v. More*, 30 Neb. 385, 403, 46 N. W. 828.
2. ———. The recording of a real estate mortgage is not of itself, under all circumstances, sufficient to charge all parties with notice of a mistake therein, but, when accompanied with circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry, which, if pursued, would lead to discovery of the mistake, the statute of limitations begins to run from the recording of the mortgage, but not otherwise.
3. **Mortgages: REFORMATION.** To warrant reformation of a mortgage for mutual mistake, the proof must be clear, convincing, and satisfactory.

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

Lamont L. Stephens and *W. H. Line*, for appellant.

R. H. Mathew, contra.

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

PAINE, J.

This is an action in equity to reform a real estate mortgage by inserting the description of an improved 80 acres which, it is claimed, was omitted therefrom by mutual mistake, and to reform the proceedings in a foreclosure case brought on said mortgage, or, in the alternative, to foreclose the mortgage as reformed. The defense was that the plaintiff was guilty of laches, that she did not offer to do equity, that the statute of limitations had run, and that there was no such clear, certain, and convincing evidence as is required to support a decree of reformation of an instrument. The trial court found for the defendants, and dismissed the plaintiff's supplemental petition for reformation. The plaintiff appeals on the ground that the judgment entered was not supported by the evidence, and is against the weight of the evidence, and is contrary to law.

The evidence discloses that prior to 1929 John W. Fox, defendant, owned 320 acres of land five miles south of Litchfield, being the southeast quarter of section 21 and the northeast quarter of section 28, the whole farm being four 80-acre tracts of land lying north and south. The two south eighties were grass or pasture land, but worth in 1930 about $30 to $35 an acre. The north eighty was all plow land, and part of it very good farming land, and it was at that time worth perhaps $50 an acre, and was mortgaged for $1,500. The fourth eighty, being the second one from the north, was good farm land, with all the improvements thereon, consisting of a dwelling-house, barn, chicken-house, hog-house, windmill, etc., and the entire farm of 320 acres was worth in 1930 around $20,000.

In March of 1929, when Fox was planning to buy the Criffield filling station at Hazard for $7,000, a loan from the Lincoln Trust Company was approved for $8,000 on the whole 320 acres, but the deal fell through, and he never completed the loan. Fox bought a filling station in Litchfield in July, 1929, for $2,775, and he borrowed $3,000 for six months of the First National Bank of Litchfield, D. W. Titus, president, giving the bank a mortgage on the two

south eighties and on the north eighty, but the mortgage did not include the 80 acres with the buildings. In reference thereto, Mr. Fox gave this answer: "Well, the reason I kept that eighty out was—didn't mortgage that eighty—was because that was my home, and my house and my barn was there, and I thought if I lost the rest of the stuff in this gasoline venture I would still have a little home left."

When its mortgage of $3,000 became due, the bank undertook to assist Mr. Fox to secure a new loan for him from Harry Sweley, husband of the plaintiff. Mr. Engleman, a bank employee, called Mr. Sweley on the telephone and talked with him about making the loan to Mr. Fox, and Mrs. Sweley testifies that he told her, after telephoning, that the bank wanted him to make a loan of $3,000 on the improved eighty and the two south eighties of grass land owned by Mr. Fox. He agreed to make the loan, and Mr. Engleman in the bank drew the mortgage to Mr. Sweley of $3,000 at 6 per cent., but has no recollection whatever of the transaction. The mortgage was dated January 31, 1930, and recorded February 4, 1930, and this mortgage was given on the same three unimproved eighties of land which had been mortgaged to the bank for $3,000, and did not include the eighty which was the home place. It is, therefore, undisputed that Mr. Sweley never at any time had a mortgage upon the home place.

Mr. Sweley died, and his widow, the plaintiff herein, secured the interests of the other heirs, and became the absolute owner of the mortgage, and, the same being in default, it was foreclosed, and a regular stay was taken, and then a moratory stay taken, and the sale was not confirmed and a deed issued to her until October 7, 1937.

After she secured the sheriff's deed, the plaintiff went to the county treasurer's office to pay her taxes, and for the first time learned that she did not own the improved eighty, being the second eighty from the north. A few days thereafter she brought this action to reform the mortgage, reform her foreclosure proceedings, or, in the alternative, to foreclose the mortgage as reformed.

The plaintiff, to establish her claim for a reformation of the mortgage given in 1930 on the ground of mutual mistake, relies upon the telephone conversation which she says she heard between Mr. Engleman and her husband about making the loan to Mr. Fox. The attorney for plaintiff, in offering this testimony, claimed it was *res gestæ* and part of the transaction. Judge Hostetler, trial judge, said it was hearsay, and was not in the presence of Mr. Fox, and was just what somebody told her, and he did not think it was *res gestæ,* but allowed the testimony to be given on the ground that in a trial to the court it would not be error.

Aside from this telephone conversation which plaintiff testifies Mr. Sweley had, not with the defendant Fox, but with an officer in the bank whose loan Mr. Sweley was taking up, the plaintiff places weight upon two applications for insurance upon his buildings. The first one is dated September 5, 1931, and the second one is dated October 1, 1936.

The first policy of insurance was taken out by Mr. Fox over 19 months after the mortgage had been given to Mr. Sweley. Mr. Fox went to the bank, asked for fire and tornado insurance on his buildings, and the clerk in the bank filled out the application. This was not done at the request of Mr. Sweley at all. The first application, dated September 5, 1931, was for $1,000 on the house and $1,000 on the barn, and there were a large number of questions to be answered and blanks to be filled in on the application. "Cash Value—Land and buildings $16,000. No. of acres in farm? 320." To the question, "How many acres on the farm are tillable?" he answered, "160." He stated in the application that he had owned the farm for 15 years, and that it was incumbered for $4,500. Counsel for defendant insists that all of these answers were true, and described the situation of the whole farm of 320 acres; that there was a first mortgage on the north eighty of $1,500, and that there was a $3,000 mortgage upon the three unimproved eighties of the farm, which made a total of $4,500 incumbrance upon the farm, but the application did not

say that the 80 acres where the buildings were located were incumbered, and counsel for defendant argues that, when a clerk in a bank is filling in all of the information needed in an application for a fire insurance policy, it is not made out as carefully as an instrument conveying title. When he came to the question, "Name and address of mortgagee?" he filled in the name, "Harry Sweley," and attached a "Loss payable clause" to him to the policy.

This insurance policy expired in 1936, which was after Mrs. Sweley had started proceedings to foreclose this mortgage of $3,000, and about that time Mr. Fox went to her to get her to sign papers so that he could get a loan through the Federal Farm Loan Association, and she asked him about renewing the insurance on the buildings, and she says that he told her that that would be up to her to get the insurance, and she went to Mr. Lang in the bank when she found the policy would expire on September 5, 1936, and Mr. Lang agreed to get Mr. Fox to sign an application for a new policy. He filled in the application blanks. "No. of acres in farm? 240. * * * Incumbrance—Is the land incumbered? Yes. If so, what amount? $3,000. * * * Name and address of mortgagee? Mary Sweley, Litchfield, Nebr.," and a loss payable clause was made to her.

Counsel for defense suggests that perhaps Mr. Fox was then willing that she should have insurance on the buildings as additional security for her mortgage, even though she did not have a mortgage on the land, provided she paid for the insurance; or perhaps he did not even think at all, but just signed the application as they made it out.

Plaintiff claims that she understood at all times that the mortgage given to Mr. Sweley covered the eighty with the buildings on, or she would not have paid $15 premium for the new policy.

It appears from the evidence that Mr. Fox endeavored to get a loan from the Federal Land Bank upon all four eighties of his farm; that they offered to loan him $4,000; that to clean up the balance on the $1,500 loan, which was a first mortgage on the north eighty, it did not leave him

sufficient to take up Mrs. Sweley's mortgage in full; that he went to see her and told her that, if she would sign up the papers required by the government, he could get the loan, and it would leave him short about $270 of paying off her mortgage, and that she refused to accept this deduction, although he promised to pay the balance later whenever he could get the money.

Section 20-212, Comp. St. 1929, provides a limitation of four years on all actions not thereinbefore provided, while section 20-207, Comp. St. 1929, sets out that an action for relief on the ground of fraud may be brought within four years, and that the cause of action shall not be deemed to have accrued until the discovery of the fraud. In Cobbey's Ann. Code, sec. 1011, he entitles this section, "Actions for trespass on real property." And Chief Justice Cobb, in *Ainsfield v. More,* 30 Neb. 385, 403, 46 N. W. 828, says: "Actions for relief on the ground of accident or mistake are not specifically mentioned in the statute, but these three, fraud, accident, and mistake, have been always classed together as the three great fountains of equity jurisprudence."

In *Wright v. Davis,* 28 Neb. 479, 44 N. W. 490, it was held that the fraud will be deemed to have been discovered when such facts are known as would naturally suggest such inquiries as, if followed up, would lead to such knowledge.

If the fraud or mistake ought to have been discovered, and would have been if reasonable diligence had been exercised by the plaintiff, the statute will run from the time such discovery ought to have been made, for a plaintiff cannot excuse delay in instituting suit of his cause of action if his failure to discover it is attributable to his own neglect. 17 R. C. L. 858, sec. 218; 44 A. L. R. 78, Ann.; 106 A. L. R. 1338, Ann.

In *Forsyth v. Easterday,* 63 Neb. 887, 89 N. W. 407, it was said: "The recording of a fraudulent deed is not of itself, under all circumstances, sufficient to charge all parties with notice of the fraud. When accompanied with circumstances sufficient to put a person of ordinary in-

telligence and prudence upon inquiry, which, if pursued, would lead to a discovery of the fraud, the statute begins to run from the recording of the deed, but not otherwise." This appears to be the general rule, but in *Wood v. Carpenter*, 101 U. S. 135, and in Iowa, Kansas, Missouri, and many other states it is held that constructive notice arising from recording imposes upon the creditor the duty to investigate, and charges him with knowledge of the fraud. See 76 A. L. R. 870, Ann.

To reform a written instrument on the ground of mutual mistake, the burden is on the party alleging mistake to prove that the written instrument does not fully or truly state the agreement or intention of the parties. The precise terms of the contract must be proved. There is always a presumption arising from the instrument itself that it sets forth correctly the agreement of the parties. 23 R. C. L. 365, sec. 65.

"Much stronger and clearer evidence is required than in an ordinary suit for damages; * * * reformation is never granted on a probability." 23 R. C. L. 367, sec. 67. In *Paine-Fishburn Granite Co. v. Reynoldson*, 115 Neb. 520, 213 N. W. 750, this court held: "To justify reformation of a written instrument requires proof that is clear, convincing and satisfactory." See *Wheeler v. Brady*, 126 Neb. 297, 253 N. W. 338, to the same effect.

Defendant Fox denies that he ever intended to give Sweley a mortgage on his home place. There was no evidence of any agreement between them. Sweley simply bought a mortgage from the bank which covered the same three eighties the bank had held a mortgage on.

The mortgage in possession of the plaintiff for all those years plainly described the three unimproved eighties. She verified her petition for foreclosure, which had the same description. The heirs assigned to her their interest in the same land. The decree of foreclosure, the notice of sale, which was published for five weeks, the confirmation, and the sheriff's deed, all set out definitely the same three unimproved eighties, which she could have seen at a glance,

yet she never discovered the alleged error until she went to pay the taxes after she got the sheriff's deed. We are constrained to believe there was laches in bringing the action.

An interesting question arises as regards the rights of the wife, for at the time John W. Fox gave the Sweley mortgage on the three unimproved eighties he was living with his wife, Fannie E. Fox, on their homestead on the improved eighty. There has been no evidence called to our attention which connects her in any way with the giving of any mortgage on her homestead.

In our opinion, the evidence is not clear or convincing that any mistake was ever made, much less a mutual mistake, and the court is convinced that the trial judge, who saw and heard the testimony of the witnesses, decided the matter correctly, and the judgment of the district court is hereby

AFFIRMED.

JAMES POULTRY COMPANY, APPELLANT, V. CITY OF NEBRASKA CITY, APPELLEE.
284 N. W. 273

FILED FEBRUARY 17, 1939. No. 30381.

1. **Eminent Domain**: LEASEHOLDS: DAMAGES. The words "or damaged" in section 21, art. I of the Constitution, include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of a leasehold.
2. ———: ———: ———. In determining the amount of such damages, the jury may consider the diversion of travel, inconvenience of access and diminution of business carried on upon such leasehold, not as independent items of damage, but for the purpose of determining the market value of the leasehold immediately before and after the construction of such improvement.
3. ———: ———: ———. Where a leasehold has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such lease-

hold immediately before and immediately after the completion of the improvement from which the injury results.

4. ———: ———: ———. Whatever reduces the market value of a leasehold by the injuring of it for a public use may be considered in determining the compensation to which the owner of the lease is entitled, where he suffers damage not common to the public generally.
5. **Contracts:** MODIFICATION. "'Where a contract (lease) is clear, certain and distinct, it cannot be modified by proof of usage, for the reason that it disposes of all customs by its own terms which alone regulate the rights of the parties and determine their liabilities.' *Van Hoesen v. Cameron*, 54 Mich. 609, 614." *O'Gara Coal Co. v. Chicago, M. & St. P. R. Co.*, 114 Neb. 584, 208 N. W. 742.
6. **Landlord and Tenant.** The mere opinion of the parties as to the construction of a lease, not carried into effect by any action, will not amount to a practical construction.
7. **Eminent Domain:** LEASEHOLDS: DAMAGES. A lease, with the right of either party, under the provisions thereof, to terminate it on or after the date of the fixed term by serving of 30 days' advance notice on the other party, is a lease for a definite term, and the damage to the leasehold is based on the unexpired term of the lease.
8. ———: ———: ———. Anticipated profits from the continued carrying on of a business in an established location on a leasehold cannot be considered in estimating damages.
9. ———: ———: ———. Evidence of the volume of business transacted on a leasehold may be shown, not as an independent item of damage, but as it affects the market value of the leasehold before and after the construction of the improvement.
10. **Evidence.** The testimony of witnesses, properly qualified and with proper foundation laid therefor, is admissible where such testimony relates to the nature, kind and volume of business carried on upon the leasehold.

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

Frank A. Hebenstreit, Thomas E. Dunbar and *Kennedy, Holland, De Lacy & Svoboda*, for appellant.

Varro E. Tyler and *Raymond Frerichs, contra.*

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

MESSMORE, J.

This is a condemnation proceeding. The property in question is a leasehold on lots 4, 5 and 6, in block 79, Hail & Company's addition to Nebraska City, Nebraska, on the Missouri Pacific Railroad Company's right of way. The city of Nebraska City authorized by ordinance the construction of a viaduct. Trial was had to a jury, resulting in a verdict and judgment in favor of the plaintiff for $7,500, from which verdict and judgment the plaintiff appeals.

The pleadings admit that plaintiff is a Nebraska corporation and, since July 25, 1931, has been engaged in buying and selling gasoline, oil and automobile accessories at wholesale and retail, and in the buying, processing, dressing and selling of poultry, eggs, cream and kindred products in the city of Nebraska City. The business is located on South Eleventh street in said city, adjoining the right of way of the Missouri Pacific Railroad Company, and is carried on in a story and a half concrete, stucco and steel building, approximately 100 feet long and 40 feet wide. The defendant denied that the building was constructed of concrete, stucco and steel. The real estate, exclusive of the buildings, was leased by the plaintiff from the Missouri Pacific Railroad Company, and the improvements placed thereon were the plaintiff's, including necessary oil pumps, oil station, gasoline, kerosene and tractor fuel bulk tanks, unloading pumps and equipment, refrigeration equipment, cream-testing equipment, and all fixtures necessary and incident to such line of business. The lease was for a period of 10 years. In this connection, plaintiff alleged that the lease was continuing and set forth evidentiary facts in its amended petition to sustain such contention, the court striking such allegations from the petition and limiting the period of the leasehold to the unexpired term. This contention will be further summarized in the opinion, together with pertinent evidentiary facts upon which the plaintiff predicates error.

The second amended petition alleges the building of the

viaduct along the length of South Eleventh street immediately to and on the west side of the premises of plaintiff. The viaduct project contemplated the building of a reinforced concrete viaduct of an elevation of about 30 feet above the ground immediately in front of the plaintiff's premises, the viaduct to extend practically the full width of the street. It may be stated that the construction of the viaduct, as shown by the exhibits in evidence, does make the plaintiff's property almost inaccessible in furtherance of its business, and the plaintiff's leasehold is now between a radius of 27 to 30 feet below the traveled portion of the main highway which the viaduct seeks to serve. Plaintiff alleged that by the construction of the viaduct and condemnation proceedings its business was rendered practically useless for its purpose. This allegation was denied in the answer, and all matters pertaining thereto were also denied.

The tract of land upon which plaintiff built the improvements is located on Federal Highways 73 and 75 and on the Kansas City-Omaha main line of the Missouri Pacific railroad. The railroad tracks run approximately east and west and the highways north and south. The land leased by the plaintiff belongs to the railroad company and is in the southeast quadrant of the intersection of the highway and the railroad tracks. The lease was for a period of 10 years and was dated July 25, 1931. The plaintiff constructed on the tract of land improvements aggregating in cost $14,000. The location of the overpass is such that none of the ground leased by the plaintiff or the improvements thereon was appropriated, but access thereto was impaired to such an extent as to destroy its usefulness for a retail outlet. A small portion of some of plaintiff's buildings is on city property and presumably there without objection. The construction of the viaduct was commenced October 1, 1936. The plaintiff had been in business in Nebraska City for five years prior to the time it obtained this track-side location. This location enabled the plaintiff in its business to effect many economies; that is, it necessi-

tated less handling of its products and provided more efficient and safer loading and unloading of such products and a better market for the reception of poultry and kindred products and the processing thereof both for wholesale and retail trade. The business was likewise located in such a manner as to attract transient or tourist trade over the highways in question, such highways having direct routes north and south through the country. A summary of this evidence discloses that the location in question was an advantageous one for business of the kind and nature carried on by the plaintiff.

The measure of damages and the elements to be considered in arriving at the damages suffered are reflected by the following Nebraska authorities:

In *City of Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295, this court held: "The words, 'or damaged,' in sec. 21, art. I, of the Constitution, include all damages arising from the exercise of the right of eminent domain which cause a diminution in the value of private property." And in *Gillespie v. City of South Omaha*, 79 Neb. 441, 112 N. W. 582, this court held: "In determining the amount of such damages, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining the market value of the property before and after the construction of such improvement."

In *Lowell v. Buffalo County*, 119 Neb. 776, 230 N. W. 842, it was held: "Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the just compensation to which the property owner is entitled, where he suffers damages not common to the public generally." In the opinion, on page 781, the measure of damages was stated thus: " 'Where property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from

which the injury results.' *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239." On page 782 it was said:

"Whatever reduces the market value of real estate by the injuring of it for public use may be considered in determining the compensation to which the property owner is entitled, where he suffers damages not common to the public generally. Authority for this view is found in former opinions:

" 'The jury in fixing damages sustained by a landowner in consequence of the appropriation, or injury, of his property for a public use may take into account every element of annoyance and disadvantage resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property.' *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239; *Kayser v. Chicago, B. & Q. R. Co.,* 88 Neb. 343."

Plaintiff contends that the court erred in excluding testimony with reference to the lease of the plaintiff, showing the duration of a lease providing for a fixed term of years and "thereafter;" that the duration of the "thereafter" period may be shown, first, by custom with respect to similar leases known to the parties; second, the oral representations by the lessor to the lessee at the inception of the lease, constituting the inducement for the lease; third, reliance upon representations and expenditures in reliance thereon, creating an estoppel; and, fourth, confirmation of such oral representations after the commencement of the lease.

Plaintiff offered to prove by the special assistant to the vice-president of the railroad, who had supervised negotiations for railroad leases for the past 15 years, and who negotiated the lease in question which was signed by him in the name of the vice-president, that the lease was for a term of 10 years and thereafter; that, where a considerable amount of investment is required on the part of the industry, the industry, once located, is considered as permanent, and such leases are seldom canceled and only upon failure to abide by the covenants of the lease or when the

railroad company requires the use of the premises, which is rare; that the lease in question would not have been terminated on May 31, 1941, since the railroad company is dependent upon industries for its revenue; that the fixed terms of railroad industrial leases are in no way representative of the tenure or term of such leases; that it is a general policy of the railroad to make such leases with relatively short, fixed terms, but that they are all let with the idea of permanency. In the light of this evidence, the witness was asked to testify how long beyond May 31, 1941, the term of the lease would have extended. All of such testimony was excluded. The witness further testified that the reason why the lease was not made for 15 or 20 years was because a longer period was not requested.

There was an offer to prove that the improvements placed on the property by the plaintiff were contemplated and discussed in connection with the lease, and a letter, dated April 30, 1931, from the division superintendent to J. Cannon, vice-president and general manager of the railroad, with reference to the improvements, was offered in evidence, wherein a lease for a period of 10 years was requested, with an option to extend the lease an additional 10 years, and stating that the plaintiff company was establishing a permanent business. A letter was offered in evidence, dated March 1, 1937, addressed to the plaintiff, wherein Mr. Cannon stated that the plaintiff's lease would not expire on May 31, 1941, and added: "It is true, however, that either party would have a right under the provisions of the lease to terminate it on or after May 31, 1941, by the serving of thirty days advance notice on the other party." Evidence was also offered to prove the extension of the lease beyond May 31, 1941, as long as the plaintiff continued in business.

The lease is specific, definite and unambiguous and is for a term of 10 years, and, by the express terms thereof, either party may terminate the tenancy on 30 days' notice at any time after the expiration of the fixed term.

The applicability of usage and custom is reflected by the

following authorities: "No rule is better settled than the rule that customs and usages cannot operate to change an express contract. It is only where the contract is ambiguous, unprecise, incomplete, or inconsistent that the search for the intent may be aided by reference to customs and usages." 2 Elliott, Contracts, sec. 1705.

" 'Where a contract is clear, certain and distinct, it cannot be modified by proof of usage, for the reason that it disposes of all customs by its own terms which alone regulate the rights of the parties and determine their liabilities.' *Van Hoesen v. Cameron,* 54 Mich. 609, 614." *O'Gara Coal Co. v. Chicago, M. & St. P. R. Co.,* 114 Neb. 584, 208 N. W. 742.

Relative to the practical construction to be given to the lease and the intention of the parties at the time the lease was executed, the following principle of law is applicable: "The practical construction put on a contract by the parties cannot control the express unambiguous provisions of the instrument itself, and, further, a practical construction, to be adopted, must be reasonable. * * * The mere opinion of the parties as to the construction of the contract, not carried into effect by any act, will not amount to a practical construction." 13 C. J. 548, 549.

The letters in evidence, one written before the making of the lease and the other after the proceedings here had been commenced, are apparently the basis for the construction given to the lease by the parties thereto.

Plaintiff contends that the alleged contemporaneous agreement not to exercise the option to terminate the lease was confirmed by the letter of March 1, 1937, from Mr. Cannon to the plaintiff James, in view of the statement made in the letter: "It is true, however, that either party would have a right under the provisions of the lease to terminate it on or after May 31, 1941, by the serving of thirty days advance notice on the other party."

"When a lease is renewed in accordance with a covenant for renewal the new term is to be treated as part of the original lease so far as the tenant's right to damages by

the taking of part of the property is concerned; but a mere expectation of renewal based on evidence that the landlord and tenant were mutually satisfied and were likely to renew does not create an interest in land, and cannot be considered in determining the value of a leasehold estate." 10 R. C. L. 135, sec. 119.

In the following cases cited by plaintiff: *Hercey v. Board of Chosen Freeholders,* 99 N. J. Eq. 525, 133 Atl. 872; *Iron City Automobile Co. v. City of Pittsburgh,* 253 Pa. St. 478, 98 Atl. 679; *Hoffman Wall Paper Co., Inc., v. City of Hartford,* 114 Conn. 531, 159 Atl. 346; *State v. Northern P. R. Co.,* 88 Mont. 529, 295 Pac. 257, the tenant was granted a fixed term, with the right reserved to the landlord to terminate the lease before the expiration of the term. The fixed term constituted an estate or interest in the real estate. The landlord's option to terminate the tenancy did not operate to divest such interest until exercised. The tenant was the owner for a term of years, subject to a condition subsequent. The aforementioned cases are, therefore, distinguishable from the case at bar.

The cases of *In the Matter of William and Anthony Streets,* 19 Wend. (N. Y.) 678, and *North P. R. Co. v. Davis & Leeds,* 26 Pa. St. 238, cited by plaintiff, involved terms of leases which were, by express covenant, subject to renewal at fixed periods at the lessee's option. In such cases the lessee's right of renewal was considered in determining the value of the unexpired term, and the cases are distinguished from those in which the lessee does not have a legal option to such renewal.

Plaintiff cites *Mayor and City Council of Baltimore v. Rice,* 73 Md. 307, 21 Atl. 181, wherein one Rice was the owner of a brick-yard, constructed on leased premises. It was proposed to enter a street directly through the brick-yard, and Rice testified that if the street should go through the yard would be worth nothing. The agent of the owner testified that it had been his intention to renew the tenancy of Rice, if the street had not been opened, due to the value of Rice's investment and business, and the desire of the

owner to have Rice as a tenant. Plaintiff contends that the testimony of the owner's agent is parallel with that of Mr. Cannon and the representative of the railroad company who negotiated the lease in the instant case. The authority delegated to the superintendent was limited to that delegated to the vice-president and general manager, and did not extend beyond the written provisions of the lease. A railroad lease, extending beyond five years, had to be separately authorized by the president of the railroad. The lease in question was written as authorized, and the written lease expressed the agreement of the parties at the time the lease was made.

The trial court did not err in excluding the evidence offered. The lease was for a fixed period of time, and damage to the leasehold does not extend beyond May 31, 1941.

Plaintiff contends: "Where business property is damaged as the result of a public improvement, future profits, based upon past profits, are a pertinent inquiry in determining the value of the business property damaged,"—citing many cases.

Plaintiff sets out in detail in its brief the case of *City of Omaha v. McGavock,* 47 Neb. 313, 66 N. W. 415, wherein specific testimony was received as to a definite amount in the loss of business, namely, $3,000 a year, and that business had fallen off from a third to a fourth, due to the erection of a viaduct by the city. The writer of the opinion did not fully agree with his colleagues on the admissibility of such evidence. The foregoing case is cited and followed in *Gillespie v. City of South Omaha, supra,* however, not to the extent of permitting the showing of profits (see 79 Neb. 445), and attention is called to the conclusion in the opinion in *City of Omaha v. McGavock, supra,* which is significant, for the reason that the evidence discloses damages in a much larger amount than was returned, and, therefore, such evidence was ample to support the finding of the jury. This conclusion in the opinion indicates that the amount of damages returned was of such amount that to return the case for a retrial, because of evidence showing profits, if erroneous, would not be justified.

"Nor can the profits of a business be shown for the purpose of proving the value of the property. The profits of a business do not tend to prove the value of the property upon which it is conducted. The profits of a business depend upon its extent and character and the manner in which it is conducted. One man will get rich while another will become bankrupt in conducting the same business upon the same property. It is proper, however, to show how the taking will interfere with the use of the property, either for the purpose to which it is actually devoted or for any purpose to which it is adapted." 2 Lewis, Eminent Domain (3d ed.) 1271, sec. 727. See, also, 2 Nichols, Eminent Domain (2d ed.) 1171, sec. 446.

"Accordingly, it is well settled that when land occupied for business purposes is taken by eminent domain, anticipated profits from the continued carrying on of the business in its established location cannot be considered in estimating the damages." 10 R. C. L. 145, sec. 127, and cases cited under note 20.

While the Nebraska cases disclose that every element of annoyance and disturbance resulting from the improvement which would influence an intending purchaser's estimate of the market value of such property may be shown, it does not include, within the meaning of the rule, profits, as contended for by plaintiff.

Plaintiff cites the case of *Des Moines Wet Wash Laundry v. City of Des Moines*, 197 Ia. 1082, 198 N. W. 486, 34 A. L. R. 1517. In that case there was no attempt to recover profits. The opinion stated that this item would be too remote and speculative. The courts quite universally so hold.

In the case of *Gledhill v. State*, 123 Neb. 726, 243 N. W. 909, the value of a crop lease was the measure of recovery, and the opinion is so worded that the rule does not extend beyond the facts in the particular case.

In *Stanwood v. City of Omaha*, 38 Neb. 552, 57 N. W. 287, evidence was admitted as to the depreciated amount of rents before and after the construction of a viaduct, and this was given in round figures and involved purely rental

property, where the decrease could be shown with a degree of accuracy.

We adhere to the rule universally followed by the courts that profits in the future, based upon profits as shown by the past, are speculative and conjectural and not admissible as evidence of damage to a leasehold, and that profits, gross and net, do not go to the value of the leasehold under the Nebraska rule in showing diminution of business. We conclude that other citation of authority in this respect is not necessary.

Plaintiff contends that the court erred in denying it the right to show the volume of business conducted on the leased premises. It endeavored to prove the volume of business by showing the number of gallons of gasoline, oils and kindred products handled, and offered like proof with reference to the poultry, egg, cream and milk business carried on by plaintiff. The court permitted testimony as to the economies and saving, but restricted testimony as to the volume of business.

While stated figures in a business, such as plaintiff's, with fluctuating prices from time to time, would not be a proper basis of damage, certainly the amount of business by volume, that is, the amount of produce, oils, poultry, eggs, etc., handled and the amount thereof handled since the construction of the viaduct would be competent.

The value of a leasehold must be determined by consideration of the uses to which the property is adapted. All circumstances naturally affecting this value are open to consideration. Every legitimate use to which it may be applied may be considered. The market value of the unexpired term should be taken into consideration, also the situation, condition and use made, or that may be made, of the premises, and the nature and prosperity of the business carried on there, if it affects the value of the lease. *Bales v. Wichita M. V. R. Co.*, 92 Kan. 771, 141 Pac. 1009, L. R. A. 1916C, 1090. As to the extent of proof of elements, not as independent items of damage, but as it affects the market value, see *Pegler v. Hyde Park*, 176 Mass. 101, 57 N. E. 327.

The volume of business done on any given leasehold has a direct relation to the value of the leasehold, as volume is directly connected with the success of the business, and diminution of business means decrease in volume. See *Gillespie v. City of South Omaha, supra; City of Omaha v. Flood,* 57 Neb. 124, 77 N. W. 379; *Chicago, R. I. & P. R. Co. v. O'Neill,* 58 Neb. 239, 78 N. W. 521; *Des Moines Wet Wash Laundry v. City of Des Moines, supra.* And in *Lowe v. City of Omaha,* 33 Neb. 587, 50 N. W. 760, it was held: "The market value is not what the property is worth solely for the purpose for which it is devoted, but the highest price it will bring for any and all uses to which it is adapted, and for which it is available."

We believe that the court erred in excluding testimony as to volume of business and restricting proof thereof.

Plaintiff further contends that the court erred in excluding testimony of expert witnesses who were acquainted with the nature, kind and volume of business transacted by the plaintiff. The admissibility of evidence of experts is left largely to the sound discretion of the trial court, and it will not, ordinarily, be disturbed unless it is found that the court abused its discretion. 22 C. J. 526. However, it would not be necessary that a witness be acquainted with real estate values of the city in order to qualify as an expert. The value of the leasehold is the question at issue in this case. The leasehold stood upon a tract of ground on the Missouri Pacific right of way, with a nominal rental. The location had a distinct advantage, due to the nature of the business. Many track-side industries are placed along a railroad's right of way under similar and like leases, and businesses of a like or similar nature to that of plaintiff are also on leased right of ways. Witnesses, acquainted with the nature of the business, volume of business done, advantages of track-side facilities for the business, and who have a knowledge of the business by volume transacted by the plaintiff, would be competent to testify, and should not be restricted in their testimony on such facts, subject to proper qualifications to so testify and proper foundation

laid for such testimony. See *Cochrane v. Commonwealth*, 175 Mass. 299, 56 N. E. 610; *Consolidated Gas Co. v. Baltimore City*, 105 Md. 43, 65 Atl. 628; *Louisville & N. R. Co. v. Western Union Telegraph Co.*, 249 Fed. 385.

The trial court erred in restricting this testimony; such testimony goes to the diminution of the value of the leasehold for the unexpired term of the lease.

Plaintiff objects to certain instructions given by the trial court which we deem not necessary to be discussed here, for the reason that, on a retrial of this case, under the principles of law as announced in this opinion, certain instructions will be subject to modification or change, and others will be given as the proof develops.

For the reasons given herein, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, APPELLEE, V. CARRIE P. PERSON ET AL., APPELLANTS.
284 N. W. 260

FILED FEBRUARY 17, 1939. No. 30490.

1. **Subrogation.** " 'The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case.' *South Omaha Nat. Bank v. Wright*, 45 Neb. 23, and *Rice v. Winters*, 45 Neb. 517, followed." *Aultman, Miller & Co. v. Bishop*, 53 Neb. 545, 74 N. W. 55.
2. ———. Where defendant, competent to make valid liens, purchases real estate, assumes mortgage thereon and, in addition, executes and delivers to seller a second mortgage as part payment of the purchase price, and by a succession of mortgages, the original indebtedness is refunded; plaintiff's assignor, relying on defendant's application for a loan, containing an agree-

ment that the loan would be secured by a first mortgage on the real estate, and relying on abstract of title, and without knowledge of defendant's incompetency, and believing its lien will be a first lien on the real estate, lends and pays out the money as directed by defendant, and the then-existing liens are released of record; plaintiff as assignee, for valuable consideration, relying on the assignment, and on mortgagor's certificate of estoppel, and without knowledge of defendant's incompetency, and, believing it has a first lien, by extension agreement, extends the mortgage; defendant defaults in interest payments; plaintiff sues to foreclose its mortgage; defendant's guardian answers, alleging incompetency of defendant at the time of execution and delivery of such mortgage to plaintiff's assignor; *held*, plaintiff is entitled to be subrogated to the rights of the original mortgagees and to have release of such mortgages vacated and set aside, and the liens evidenced thereby revived and reestablished as valid liens on said real estate for plaintiff's benefit in such amount, and that said mortgage liens be foreclosed and real estate sold in satisfaction thereof.

3. **Appeal.** "In the absence of a bill of exceptions, a judgment supported by the pleadings will not be set aside because of special findings, if the latter can by any fair interpretation be held to support it." *Swobe v. Drummond Motor Co.*, 109 Neb. 631, 192 N. W. 320.

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

James E. Brittain and *H. E. Siman*, for appellants.

Winfield R. Ross, Brown, Fitch & West and *Fred S. Berry, contra.*

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

MESSMORE, J.

Plaintiff brought this action to foreclose a 7,500-dollar mortgage executed by Carrie P. Person, owner, and Per Person, her husband, on 160 acres of land in Wayne county, Nebraska. The judgment of the trial court awarded to plaintiff a first lien upon the real estate for the sum of $7,500, and ordered the land sold for the satisfaction of said lien, the defendants having failed to redeem within a

period of 20 days. From this decree and judgment of the court defendants appeal.

Plaintiff's second amended petition contained the usual allegations of a cause of action for foreclosure of a real estate mortgage, and alleged, in substance, that prior to the execution and delivery of the mortgage by defendants the land had been encumbered by two mortgages totaling $7,500, both of which were valid liens and made while defendant Carrie P. Person was mentally competent. Carrie P. Person bought 160 acres of land from Oliver Chapman, her uncle, on January 24, 1910, and received a warranty deed therefor. At the time, there was a mortgage on the land in the amount of $3,000, dated March 22, 1905, that had been executed by Chapman and wife, running to M. D. Cameron, due April 1, 1910. As part of the purchase price Carrie P. Person and her husband executed and delivered a note and mortgage to Chapman January 25, 1910, due April 1, 1915, in the amount of $4,500, subject to the 3,000-dollar mortgage, which was extended to April 1, 1915. March 19, 1915, the two mortgages remained unpaid, and, in order to refund the indebtedness, defendants made, executed and delivered to the Prudential Insurance Company of America a note and mortgage in the sum of $4,500, due April 1, 1920, and at the same time gave to Oliver Chapman a note and mortgage in the amount of $7,017.25, also due April 1, 1920. The proceeds from the loan obtained from the Prudential Insurance Company were paid to M. D. Cameron, and the balance over and above the amount of his mortgage was applied to reduce the Chapman mortgage. The Cameron mortgage was released of record April 20, 1915. On April 1, 1920, the entire indebtedness secured by the mortgage deeds, as aforesaid, was unpaid. The defendants then borrowed from Walter L. Hurlbert the sum of $4,500, giving a note and mortgage therefor, due April 1, 1925, and, to evidence the refunding of the indebtedness remaining due to Oliver Chapman, gave him a note and mortgage in the sum of $7,000, dated April 1, 1920. The money obtained from Hurlbert was paid to the Prudential

Insurance Company in settlement of its loan, and its mortgage was released April 15, 1920. On January 22, 1925, the entire indebtedness secured by the mortgage deeds, that is, of Hurlbert and Chapman, was unpaid, and, in order to refund part of said indebtedness, the defendants applied to the Forgan Investment Company for a loan in the amount of $13,000. The sum of $7,500 was loaned by the Forgan Investment Company to the defendants, and on February 20, 1925, defendants made, executed and delivered to the investment company a note and mortgage, due April 1, 1930. The Forgan Investment Company paid Hurlbert $5,212.45 in full for his lien, and applied to the Chapman indebtedness the sum of $2,310. The Hurlbert mortgage was released March 6, 1925, and the Chapman mortgage on March 30, 1925. February 20, 1925, the defendants, in order to induce the plaintiff in this action to purchase said mortgage and accept assignment thereof, made, executed and delivered to plaintiff a certain mortgagor's estoppel certificate. March 25, 1925, the Forgan Investment Company, for full value, assigned its note and mortgage to the plaintiff. On December 5, 1929, defendants, desiring an extension of the mortgage to April 1, 1935, made, executed and delivered to the plaintiff an extension agreement. Defendants failed and neglected to pay the interest coupons April 1, 1933, and April 1, 1934; hence this action to foreclose the mortgage in suit.

Plaintiff further alleged that the Forgan Investment Company made the loan to defendant Carrie P. Person upon the express agreement and covenants of defendants that plaintiff's mortgage would be a first lien on the real estate, and that the proceeds from the loan to defendants were paid out by said company as per their direction; and further alleged that, in the alternative, if the lien of plaintiff's mortgage deed on the real estate is not a valid first lien, the plaintiff is entitled to have the lien of the two mortgages to M. D. Cameron and Oliver Chapman revived and the respective releases thereof canceled and set aside, and that plaintiff is entitled to be subrogated to the rights

of Cameron and Chapman under their separate mortgages, and to be treated as the equitable assignee thereof, and to have the same reestablished on said real estate for the amount paid by the Forgan Investment Company to satisfy and discharge the Hurlbert and Chapman mortgages.

The answers of Per Person and Per Person as guardian of Carrie P. Person alleged that Carrie P. Person was insane and incompetent at the time of the execution of the mortgage in suit and at the time of the execution of the extension agreement and estoppel certificate, and was incapable of understanding the nature thereof; that she had been adjudged to be insane by the proper authorities of Wayne county in December, 1920, was confined in the State Hospital for the Insane at Norfolk, and had been insane for several years prior thereto; alleged an adjudication of the mortgage of Oliver Chapman by the district court for Wayne county in a previous action. The answer of Per Person admitted the corporate capacity of plaintiff; that he was appointed guardian August 15, 1933; that Carrie P. Person owned the fee simple title to the real estate involved, and the proceedings relating to the assumption of the 3,000-dollar mortgage of Cameron, the purchase of the real estate from Chapman and the giving of the 4,500-dollar mortgage to Chapman; and denied the other allegations of the plaintiff's second amended petition.

Plaintiff's reply contained an allegation of the ownership of the premises in Carrie P. Person and that the funds received from the 7,500-dollar mortgage were disbursed under her direction; that she is barred and estopped from alleging insanity and asserting that plaintiff's mortgage indebtedness is not a valid lien upon the real estate; denied that the Forgan Investment Company had any knowledge or notice of the alleged incompetency; denied generally the allegations of the answer.

The court found that the several mortgages referred to in the petition were executed as alleged and that, in order to refund the indebtedness on the several occasions, as heretofore mentioned in the petition, the several mortgages

were given; found that the original indebtedness of $7,500 on the land at the time Carrie P. Person was sane had never been reduced but had continued by virtue of other loans from the time of the purchase of the real estate and the mortgage evidencing former indebtedness released; that the Forgan Investment Company had no knowledge of the insanity of Carrie P. Person; found the amount due on the mortgage to be $11,313.26 as of date of March 10, 1938; gave the plaintiff a first lien on the real estate in the amount of $7,500, and upon failure of defendants to pay the lien within 20 days from the date of decree the realty to be ordered sold; the proceeds received therefrom to be first applied to the payment of plaintiff's lien, and second for the use and benefit of the defendants; and granted a decree in foreclosure. The court found for the plaintiff on what it terms straightforward equitable principles that should be invoked in this case, and did not apply the doctrine of subrogation.

The appellants start with the premise that the prayer for alternative relief contained in plaintiff's second amended petition is that its mortgage be established as a first and valid lien against the real estate, and that, if the mortgage is not valid, then the release of the Cameron and Chapman mortgages be vacated and plaintiff be subrogated to such mortgage liens; that the plaintiff is therefore relying on subrogation in case the mortgage in suit is found void. Defendants state that they are in accord with plaintiff in this respect, and call attention to paragraph 15 of the court's decree, which in part reads: "In case a debt as a matter of equity is entitled to be subrogated to the lien of a mortgage upon real estate, it is within the power of a court of equity, as a condition precedent to granting equitable relief to the owner of the real estate, to compel the payment of that mortgage, even though by its terms said lien be barred by the statute of limitations;" and state that if recovery is had it must be through subrogation.

The loan secured by plaintiff's mortgage was made in good faith; neither plaintiff nor its assignor had any knowl-

edge of the alleged incompetency of Carrie P. Person. There was no fraud or over-reaching, and the proceeds of the loan were disbursed in payment of her mortgage indebtedness as directed. As to insanity, appellants claim that the incompetency of Carrie P. Person was the only fact to be determined, and it was determined that she was insane.

With reference to the mental competency of Carrie P. Person, the court found that in 1920 and at the time of the original mortgage to the Forgan Investment Company in 1925, and at the time of the extension agreement in December, 1929, and at the present time, Carrie P. Person was suffering from *dementia præcox*; that in 1920 she had been incarcerated in the state hospital for four months, was paroled two or three years later and discharged; that it is not possible to know with certainty the extent to which this disease affected her judgment in the matter, or whether she knew the nature or extent of her transactions at any of those times; that she probably knew what she was doing when she signed the plaintiff's deed and extension agreement, but did not know or care about the amounts.

Appellants assign as error the rendering of the decree and decreeing any lien against the real estate in question, after having found Carrie P. Person incompetent, and that the findings of fact made by the trial court furnish neither reason nor basis for the decree, but show that the plaintiff is not, either in law or in equity, entitled to a decree.

Subrogation is a salutary, equitable remedy, conceived in justice, and the decisions in this state have given full recognition to the doctrine, as evidenced by the following authorities:

In *Aultman, Miller & Co. v. Bishop*, 53 Neb. 545, 74 N. W. 55, this court held: " 'The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid

down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case.' *South Omaha Nat. Bank v. Wright,* 45 Neb. 23, and *Rice v. Winters,* 45 Neb. 517, followed."

"Originally, the right of subrogation was limited to transactions between principals and sureties, but courts of equity have expanded the doctrine so that now it will be applied where one, not acting voluntarily, pays the debt for which another is primarily liable, and which, in equity and good conscience, the latter should have discharged. The doctrine will be applied in all cases where demanded by the dictates of equity, good conscience and public policy." *State v. Citizens State Bank,* 118 Neb. 337, 224 N. W. 868. See *Eaton v. Hasty,* 6 Neb. 419; *Frederick v. Gehling,* 92 Neb. 204, 137 N. W. 998; 25 R. C. L. 1313, sec. 2; 1314, sec. 4; 1322, sec. 10.

Law writers have generally classified subrogation into two classes: Legal subrogation, which is allowed in cases where one, who pays the debt of another, stands in the situation of a surety and is compelled to pay the debt to protect his own rights; and conventional subrogation which arises when one pays the debt of another under an agreement, existing at the time of the payment with the debtor or creditor, that the person paying it shall be subrogated to the rights of the creditor. *Luikart v. Buck,* 131 Neb. 866, 270 N. W. 495; 2 Story, Equity Jurisprudence (14th ed.) 110, sec. 706.

Appellants' contention is that plaintiff does not attempt to bring itself within the scope of legal or conventional subrogation; that plaintiff did not make this loan, or pay the Hurlbert mortgage and a part of the Chapman mortgage to protect itself; that it was not a surety for either; that it was a mere volunteer and was dealing at arm's length with Carrie P. Person; that no claim had been made and there is no evidence of an agreement with Carrie P. Person, Chapman or Hurlbert, that the mortgage liens of Hurlbert and Chapman should be kept alive and plain-

tiff subrogated thereto; that plaintiff is a volunteer and a stranger.

This court in *Bohn Sash & Door Co. v. Case,* 42 Neb. 281, 293, 60 N. W. 576, sets forth the definition of a volunteer or stranger as stated in *Emmert v. Thompson,* 49 Minn. 386, 52 N. W. 31: "The better opinion now is that one who loans his money upon real estate security for the express purpose of taking up and discharging liens or encumbrances on the same property has thus paid the debt at the instance, request, and solicitation of the debtor, expecting and believing, in good faith, that his security will, of record, be substituted, in fact, in place of that which he discharges, is neither a volunteer, stranger, nor intermeddler, nor is the debt, lien, or encumbrance regarded as extinguished, if justice requires that it should be kept alive for the benefit of the person advancing the money, who thereby becomes the creditor."

Appellants cite *Rice v. Winters,* 45 Neb. 517, 63 N. W. 830, wherein this court held: "A person seeking the benefit of subrogation must have paid a debt due to a third party before he can be substituted to that party's right; and in doing this he must not act as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt. The right of subrogation is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another. *Aetna Life Ins. Co. v. Middleport,* 124 U. S. 534, followed." See, also, *Meeker v. Larsen,* 65 Neb. 158, 90 N. W. 958; *Mavity v. Stover,* 68 Neb. 602, 94 N. W. 834; *Boevink v. Christiaanse,* 69 Neb. 256, 95 N. W. 652; *Sharp v. Citizens Bank of Stanton,* 70 Neb. 758, 98 N. W. 50.

In the instant case, the original indebtedness, in the amount of $7,500, has never been paid, but by a succession of mortgages the indebtedness has been refunded. At the time of the creation of the original indebtedness, as far as Carrie P. Person is concerned, she was sane and capable of contracting. The Forgan Investment Company relied

upon a written application for a loan of $13,000, containing an agreement that the loan would be secured by a first mortgage on real estate, and relied on an abstract of title, furnished by appellants; it had no knowledge of the alleged insanity. The plaintiff, as the assignee of the Forgan Investment Company, relied upon a certificate of estoppel and upon an abstract of title, and subsequently upon an extension agreement, and, by virtue of its assignment, stood in the same relation as the Forgan Investment Company. By purchasing the mortgage from the investment company, it purchased the debt. The proceeds had been applied by the Forgan company as directed, not by it but by defendants. By the very nature of the transaction, there is at least an implied agreement that this plaintiff would have a first lien on the premises, and in view of the facts, where the original indebtedness has not been extinguished and has been in existence and still is and evidenced now by plaintiff's mortgage.

In *Hoagland & Co. v. Decker*, 118 Neb. 194, 224 N. W. 14, referring to subrogation, it was said in the opinion: "The word 'conventional' is defined as growing out of or established by convention; that is, an agreement or mutual engagement between persons. As the name implies, conventional subrogation is founded upon some understanding or agreement, express or implied, and without which there is no 'convention.' "

"Conventional subrogation arises by reason of either an express or an implied agreement between the third person paying the debt and either the debtor or creditor." *State v. Holdrege State Bank*, 110 Neb. 814, 195 N. W. 120.

The following authorities also show the extent to which our court has gone in granting subrogation:

"A court of equity will apply the doctrine of subrogation where to refrain from so doing would permit a person who has received the benefit of money paid under a mistake of fact, which discharged a lien upon real estate, to retain such benefit under such circumstances that equity and good conscience dictate its repayment or the preservation of the

lien." *Lee v. Newell,* 96 Neb. 209, 147 N. W. 684. See, also, *Criswell v. McKnight,* 120 Neb. 317, 232 N. W. 586.

In *Hoagland & Co. v. Decker, supra,* it was held: "No general rule can be laid down which will afford a test in all cases for conventional subrogation. Whether or not the doctrine of conventional subrogation is applicable in any particular case depends upon its particular facts and circumstances, the principle not being enforced as a matter of legal right, but in order to subserve the ends of justice in the particular controversy under consideration."

Appellee cites the case of *Betts v. Sims,* 35 Neb. 840, 53 N. W. 1005, as being a precedent for granting subrogation in the instant case. The case cited was an action brought by Betts and wife against Sims to quiet title. Sims and his grantors had paid off prior mortgages, all believing they had a good title to the land. Sims asked for a revival of the mortgage liens and the right of subrogation to the rights of their holders and to have the liens enforced against Betts. The court held: "A purchaser of real estate who has paid off a prior mortgage thereon in the belief that he was the owner of the property purchased, will, on a failure of his title, be subrogated to the rights of the mortgagee as against the mortgagor and others who are in equity liable for the mortgage debt."

In the instant case, the Cameron 3,000-dollar mortgage and the Chapman mortgage were valid liens which were not paid by Carrie P. Person. The plaintiff and its predecessors paid these mortgages in the belief that they had obtained valid first mortgage liens. In *Betts v. Sims, supra,* the prior valid mortgage liens were revived for Sims' protection, and he was treated as the assignee of the same and subrogated to the rights of the mortgagees.

In the decree of the district court, in paragraph 15, the court found that a judgment in favor of Mrs. Person would, in effect, be a decree quieting her title, and that the statute of limitations does not run as against subrogation; that the guardian's answer for the incompetent ward, in fact, asked that her title to the real estate be quieted against plaintiff.

In the instant case, there is no bill of exceptions, and, in the absence thereof, it is presumed that all issues of fact raised by the pleadings received support from the evidence, and that such issues were correctly determined.

"In the absence of a bill of exceptions, a judgment supported by the pleadings will not be set aside because of special findings, if the latter can by any fair interpretation be held to support it." *Swobe v. Drummond Motor Co.*, 109 Neb. 631, 192 N. W. 320. See *Kupke v. Polk*, 73 Neb. 590, 103 N. W. 321.

The special findings in the instant case, by fair interpretation, are held to support the judgment of the trial court. To hold for the defendants would deprive the plaintiff of the full amount of $7,500 and permit Carrie P. Person to retain 160 acres of land, without indebtedness thereon.

In equity and good conscience, we believe that a decree should be entered, providing that the release of the mortgage to M. D. Cameron, dated March 22, 1905, and the release of the mortgage to Oliver Chapman, dated January 25, 1910, on said real estate be vacated and set aside, and that the liens of said respective mortgages be revived and reestablished as valid liens on said real estate for the plaintiff's benefit, and that the plaintiff be decreed to be subrogated to the mortgage liens of said M. D. Cameron and Oliver Chapman, and the mortgage liens foreclosed, and said real estate sold in satisfaction thereof, in the amount of said mortgage liens, namely, $7,500.

AFFIRMED.

EDGAR DUTIEL V. STATE OF NEBRASKA.

284 N. W. 321

FILED FEBRUARY 24, 1939. No. 30383.

1. **Criminal Law.** "In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import

of the written law." *Lane v. State*, 120 Neb. 302, 232 N. W. 96.

2. **Indictment and Information.** To charge a statutory offense, the information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent.
3. **Constitutional Law.** Before this court can rule on the question as to whether or not an act of the legislature creating a crime invades the constitutional rights of a person, it must be presented with a case where the issues and the evidence would support a conviction if the statute is valid.

ERROR to the district court for Douglas county: HERBERT RHOADES, JUDGE. *Reversed and dismissed.*

O. M. Olsen and *John M. Berger*, for plaintiff in error.

Richard C. Hunter, Attorney General, and *Edwin Vail, contra.*

Swarr, May & Royce, amici curiæ.

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

SIMMONS, C. J.

On January 19, 1938, a complaint was filed against the plaintiff in error, hereinafter referred to as the defendant, in the municipal court of Omaha, Douglas county, Nebraska, in which it was charged that "Edgar Dutiel on or about the 15 day of January, A. D. 1938, in the county aforesaid and within the corporate limits of the City of Omaha aforesaid, then and there being did violate Section 28-813, Compiled Statutes of Nebraska, for 1929 in that he did unlawfully loiter about, patrol, beset and picket, by means of carrying banners upon his person, and walking to and fro on the sidewalk in front of the place of business of Phillip Greenberg, located at 4935 South 24th Street, Omaha, Nebraska, where said Phillip Greenberg was engaged in a lawful business, for the purpose of inducing and influencing and attempting to influence and induce others not to trade with, buy from and have business dealings with said Phillip Greenberg, so that thereby the said lawful business

of the said Phillip Greenberg was obstructed and interfered with, contrary to the Statutes of the State of Nebraska, in such cases made and provided and against the peace and dignity of the State of Nebraska."

In the municipal court the defendant failed to plead; a plea of not guilty was entered by the court; and the defendant was tried, convicted, and sentenced to pay a fine of $10 and costs of prosecution.

An appeal was taken to the district court for Douglas county. The original complaint was refiled in that court. The defendant filed a motion to quash the complaint, and, among others, assigned the following reason therefor: "Because all of the acts alleged to have been committed by the defendant, and all of the things done by the defendant do not constitute a violation of any statute or rule of law." The motion was overruled by the trial court.

The defendant then filed a demurrer to the complaint, "for the reason that the facts stated in said complaint and information do not constitute an offense or crime punishable by the laws of the state of Nebraska," and assigned eight additional reasons therefor, the sixth of which is as follows: "Because all of the acts alleged to have been committed by the defendant, and all of the things done by the defendant do not constitute a violation of any statute or rule of law." The demurrer was overruled by the trial court.

The defendant was then arraigned. He refused to plead, and the court entered a plea of not guilty. A trial by jury was waived. The case was submitted to the court on "a stipulation of the facts in controversy in this case." No other evidence was offered.

The defendant was found guilty, fined $10, and ordered to pay the costs of prosecution. Thereupon the defendant filed a motion for a new trial for the following reasons among others:

"The court erred in overruling defendant's motion to quash the complaint and information filed herein.

"The court erred in overruling defendant's demurrer filed herein."

The motion for a new trial was overruled. The defendant, appealing to this court, in his petition in error alleges twelve errors of the trial court. We shall consider five of them, which are as follows:

"In that the verdict and judgment of the court are contrary to law."

"In that the verdict and judgment of the court are contrary to the Constitution of the State of Nebraska."

"In that the verdict and judgment of the court are contrary to the Constitution of the United States of America."

"In that the court erred in overruling defendant's motion to quash the complaint and information."

"In that the court erred in overruling defendant's demurrer to the complaint and information."

In his brief filed herein, the defendant sets out as errors relied upon for reversal substantially the same reasons assigned in his petition in error.

The complaint is based upon an alleged violation of section 28-813, Comp. St. 1929. In that act the legislature provided: "It shall be unlawful for any person or persons, singly or conspiring together,"

To do certain acts, which are: "To loiter about, beset, patrol, or picket in any manner the place of business or occupation of any person, firm, or corporation engaged in any lawful business or occupation, or any street, alley, road, highway or other place, in the vicinity where such person, firm or corporation may be lawfully engaged, in his, their or its work, business or occupation;"

With certain purposes, which are: "For the purpose of inducing or influencing, or attempting to induce or influence, others not to trade with, buy from, sell to, work for, or have business dealings with such person, firm or corporation;"

With certain results, which are: "So that thereby (1) the lawful business or occupation of such person, firm or corporation will be obstructed, interfered with, injured, or damaged, *and* (2) such person, firm or corporation *thereby* be induced or coerced against his, their or its will, intimi-

dated, or threatened, (a) to do something, he, they or it may legally refrain from doing, *or* (b) to refrain from doing something, he, they or it may lawfully do." (The numbers and letters in parentheses and the italics are ours.)

The following rules of construction are applied to this statute.

"In construing a statute, an imperative rule is that effect, if possible, must be given to every clause and part of the statute." *State v. Swanson,* 127 Neb. 715, 256 N. W. 872, and cases there cited.

"In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law. * * *

"So, too, in construing or interpreting provisions of criminal law it is to be remembered that if any doubts of the meaning exist in penal laws they ought to be construed in favor of the accused." *Lane v. State,* 120 Neb. 302, 232 N. W. 96.

"It is elementary that penal statutes are inelastic and must be strictly construed; they are never extended by implication." *Preston v. State,* 106 Neb. 848, 184 N. W. 925.

The doing of the acts, for the purposes, with the results set out in the statute are the elements of the offense.

Does the complaint herein contain a distinct allegation of each essential element of the crime as defined by the statute?

Without passing upon the sufficiency of the allegations of the complaint otherwise, it is evident that the complaint herein does not charge, nor attempt to charge, the occurrence of that element of the result of the alleged illegal acts which is set out in the following provision of the statute, which requires that such person, firm, or corporation shall "*thereby* be induced or coerced against his, their or its will, intimidated, or threatened, (a) to do something, he, they or it may legally refrain from doing, *or* (b) to

refrain from doing something, he, they or it may lawfully do." (Italics and letters in parentheses are ours.)

The above result is an essential element of the offense created by the legislature. Without the allegation in the complaint of the occurrence of that element, the offense created by the statute was not charged.

Section 11, art. I of the Constitution of Nebraska, provides: "In all criminal prosecutions the accused shall have the right * * * to demand the nature and cause of accusation."

To charge a statutory offense, the information or complaint *must* contain a distinct allegation *of each essential* element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. See *Smith v. State,* 21 Neb. 552, 32 N. W. 594; *Barton v. State,* 111 Neb. 673, 197 N. W. 423; *Herbes v. State,* 79 Neb. 832, 113 N. W. 530; *Knothe v. State,* 115 Neb. 119, 211 N. W. 619; *In re Application of Flanders,* 119 Neb. 761, 230 N. W. 684.

These decisions are based upon the constitutional provision above quoted.

"The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state." Comp. St. 1929, sec. 29-1809.

"A motion to quash may be made in all cases, when there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged." Comp. St. 1929, sec. 29-1807.

As to informations, the statute provides: "The offenses charged therein shall be stated with the same fullness and precision in matters of substance as is required in indictments in like cases." Comp. St. 1929, sec. 29-1603.

"The provisions of the criminal code in relation to indictments * * * applying * * * to motions, pleadings, trials and punishments * * * shall in the same manner and to the same extent, as near as may be, apply to informations, and all prosecutions and proceedings thereon." Comp. St. 1929, sec. 29-1604.

Section 29-1501, Comp. St. 1929 provides: "No indict-

ment shall be deemed invalid, nor shall the trial, judgment or other proceedings be stayed, arrested or in any manner affected * * * for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

In *Anthony v. State,* 109 Neb. 608, 192 N. W. 206, this court stated: "This statute was not intended to deprive accused of a substantial right, to his prejudice. Under our system of criminal law it is a substantial right of accused to have all elements of the offense for which he is prosecuted stated in the indictment or information."

Section 29-2308, Comp. St. 1929, provides: "No judgment shall be set aside * * * in any criminal case * * * for error as to any matter of pleading or procedure, if the supreme court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred."

This court in *Stowe v. State,* 117 Neb. 440, 220 N. W. 826, stated that, under this section of the statute, "The court will not ignore 'error as to any matter of pleading or procedure' in a criminal action, when thereby the constitutional rights of the accused conferred by section 11, art. I of the Constitution, have been violated by failure to give him proper notice of the 'nature and cause of accusation' against him."

This court also referred to that section of the statute in *Barton v. State,* 111 Neb. 673, 197 N. W. 423, and stated: "That section does not obviate the necessity of alleging in the information every material element of the alleged offense, and thus advise the accused of the charges which he may have to meet. This was a substantial right to which the accused was entitled. The sufficiency of the information was raised in due time in the district court by a motion to quash, and by demurrer. The demurrer should have been sustained."

The defect in this complaint is not one of technical procedure. A substantial right of the defendant is involved. This court cannot shut its eyes to the obvious failure of the

complaint to charge the commission of an offense as defined by the statute. The Constitution guarantees the right of an accused person to be so charged. The statutes of this state provide the method for its enforcement. The defendant has followed the prescribed method. This court has repeatedly protected an accused person under like circumstances. The demurrer should have been sustained by the trial court.

Both the Constitution of the United States and the Constitution of the state of Nebraska provide that no person shall be deprived of life, liberty, or property without due process of law. "Due process of law in a criminal case requires a law creating or defining the offense, a court of competent jurisdiction, *accusation in due form*, notice and opportunity to answer the charge, trial according to the settled course of judicial proceeding, and a right to be discharged unless found guilty." 12 C. J. 1202. Due process of law has been denied the defendant in this case.

Both in the printed briefs filed herein and the oral argument before this court, the parties have presented the question of the constitutionality of section 28-813, Comp. St. 1929. Before this court can rule on the question as to whether or not an act of the legislature creating a crime invades the constitutional rights of a person, it must be presented with a case where the issues and the evidence would support a conviction if the statute is valid. Here the court is not presented with such a record.

The judgment appealed from is reversed and the cause dismissed.

REVERSED AND DISMISSED.

HERMAN EISENHAUER, APPELLANT, V. OTOE COUNTY, APPELLEE.

284 N. W. 332

FILED FEBRUARY 24, 1939. No. 30529.

1. **Workmen's Compensation: APPEAL.** When one party accepts an award in his favor by a single judge of the compensation

court, he cannot prevent the defeated party from electing to waive a hearing before the Nebraska workmen's compensation court sitting en banc, and appeal directly to the district court.

2. ———. The burden of proof is upon an employee who claims to have suffered an accident in the freezing of his hands while driving a Caterpillar tractor in a blizzard to clear roads of snow, and the evidence having failed to prove such accident, the case is dismissed.

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

Thomas E. Dunbar, for appellant.

Edwin Moran and *Vantine A. James, contra.*

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

PAINE, J.

This is an appeal from an order of the district court vacating and setting aside an award for compensation made by Judge Jackman of the Nebraska workmen's compensation court.

The evidence discloses that Herman Eisenhauer had been employed since April, 1925, as a road patrolman by Otoe county. His work was in the southern part of the county, in and around the town of Burr, Nebraska. His duties were to drag and blade the roads. He had to work on these roads in all kinds of weather. In the summer time it was hot, and he had to keep the gravel roads of the county in condition, and in the winter time one of his jobs was to remove the snow from the highways.

On January 25, 1936, he was directed by telephone by Ed Wallen, county commissioner, to go and clear the roads of snow on a day when there was a severe blizzard on and all the roads were blocked. About the only person daring to venture out on this county road that day, according to the evidence, was one rural mail carrier, for there was a high wind, and it was 15 degrees below zero.

The equipment which Eisenhauer was using on the day of the alleged accident was a large Caterpillar tractor,

drawing a plow with which the snow was removed from the road. This equipment had no cab, or any kind of protection from the weather, and both of the men were entirely exposed to the elements, being high from the ground. They went from Burr east, and in coming back west they faced the wind, and the evidence disclosed that when Eisenhauer got home his hands were in a serious condition. They were blue and contracted, and he said he could hardly hold the levers, and he put his hands in snow, and then snow water, and suffered great pain that night from his hands.

On May 10, 1937, the said Judge Jackman held a hearing at Nebraska City, taking evidence in said case, and on December 1, 1937, entered an award, finding that Herman Eisenhauer suffered an accident on January 25, 1936, while plowing snow on a county road east of Burr, in that "plaintiff froze his hands, right cheek and nose; that as a result of said accidental injuries, plaintiff developed a latent disability on or about the 23d day of June, 1936, known as enlargement of phalanges, contracture of hand tissues, tendon spaces and sheaths to a terminal inability to flex the phalanges or palm of hands; that said latent disability was caused and is attributable to said accidental injuries which occurred to the plaintiff on the 25th day of January, 1936; that the nature and extent of said latent disability were such as to entitle plaintiff to compensation, hospital, medical and surgical care under the provisions of the Nebraska workmen's compensation law."

On December 11, 1937, the defendant, the county of Otoe, filed in the district court a certificate of waiver and election, to the effect that the county had elected to appeal directly to the district court for Otoe county from the award of Judge Charles E. Jackman, one of the judges of the Nebraska workmen's compensation court, which certificate was signed at Lincoln, Nebraska, December 11, 1937, by the Nebraska workmen's compensation court, Frank M. Coffey, presiding judge, and on the same day, December 11, 1937, the county of Otoe filed its petition on appeal in the district court for Otoe county, setting out the allegations of

the plaintiff as to the accident and damages, a brief summary of the answer filed by the county, a recitation of the hearing before Charles E. Jackman, one of the judges of the compensation court, then setting out ten grounds on which the award was erroneous and contrary to the evidence and the law, and praying that the award be set aside and the plaintiff's petition dismissed, and attaching thereto exhibit A, a copy of the petition filed by Herman Eisenhauer in the compensation court, exhibit B, a copy of the answer filed by the county of Otoe, and exhibit C, a full and complete copy of the award.

On December 16, 1937, Herman Eisenhauer filed his special appearance, objecting to the jurisdiction of the district court for Otoe county on the ground that, under the laws of the state of Nebraska, the Nebraska workmen's compensation court has exclusive jurisdiction of said cause, and that the purported appeal of the county deprived the plaintiff of a hearing before the Nebraska workmen's compensation court. It is further alleged in said special appearance that, although the plaintiff had elected to abide by the award of Judge Jackman, one of the judges of said court, and had requested no rehearing, the purported waiver and appeal by Otoe county to the district court attempts to deny the plaintiff a full and complete hearing before the Nebraska workmen's compensation court, which violates the express terms of the Nebraska workmen's compensation act and the amendments thereto, for the reason that the only appeal to the district court in compensation cases is from an award or judgment entered by the Nebraska workmen's compensation court upon a rehearing from the award of a single judge thereon. On February 28, 1938, the said special appearance of the plaintiff was overruled, and he was given ten days to plead.

Section 48-174, Comp. St. Supp. 1937, was enacted by chapter 57, Laws 1935, to create a Nebraska workmen's compensation court of three judges, and in section 13 thereof it provides that, when the answer is filed, one of the judges of said court shall hear the cause and make findings,

awards, or judgment, the same to be signed only by the judge before whom such proceedings were had, which findings are conclusive upon all parties until reversed or modified upon appeal. It further provides in subdivision 5 of section 13 that either party may, within 14 days from the award of the judge, file an application for rehearing, which rehearing shall be held in Lancaster county, or in another county, at the discretion of the court, but that the employer or the injured employee may waive rehearing before the compensation court and appeal directly to the district court of the county in which the accident occurred. It is further provided that, upon written stipulation of the parties, the matter may be submitted to the district court to be tried as a case in equity, and that appeals to the district court shall be perfected in the same manner as provided for appeals to the compensation court, which is by an application for a rehearing.

It appears that in some of the late cases brought to this court the appeal was first to the compensation court sitting en banc, as in *Johansen v. Farmers Mutual Hail Ins. Ass'n*, 133 Neb. 118, 274 N. W. 393, and in *Svoboda v. Mandler*, 133 Neb. 433, 275 N. W. 599, a hearing was first had before the deputy labor commissioner at Omaha, and then before Judge Welch, and then an appeal was taken to the three members of the compensation court.

In other cases, such as *Skochdopole v. State*, 133 Neb. 440, 275 N. W. 665, *Pillard v. Lincoln Packing Co.*, 133 Neb. 898, 277 N. W. 587, *Sheets v. Glenwood Telephone Co.*, *ante*, p. 56, 280 N. W. 238, *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N. W. 254, *Ludwickson v. Central States Electric Co.*, *ante*, p. 371, 281 N. W. 603, *Shamp v. Landy Clark Co.*, 134 Neb. 73, 277 N. W. 802, and *Westcoatt v. Lilley*, 134 Neb. 376, 278 N. W. 854, the transcripts show that the appeal was direct to the district court from a hearing before one judge, upon a waiver of a rehearing before the full compensation court.

In *City of Lincoln v. Nebraska Workmen's Compensation Court*, 133 Neb. 225, 274 N. W. 576, the employee filed in

writing his refusal to accept the award, and applied for a rehearing before the full compensation court, which application was granted. A few days later the city of Lincoln filed a waiver of rehearing and notice of appeal, as set out in said opinion, and thereafter an action in the nature of prohibition was instituted by the city of Lincoln as an original action in the district court for Lancaster county, and it was held that such employee was entitled to have his cause determined finally at his election by the Nebraska compensation court.

However, in the case at bar, the employee, Eisenhauer, is satisfied with the award made by Judge Jackman, and elects to accept said award. The county of Otoe desires to appeal from said award, and files a certificate and waiver of a hearing before the full compensation court, and appeals directly to the district court, which the county has a right to do, and the order of the district judge, overruling the special appearance, was proper, and not in conflict with our opinion in *City of Lincoln v. Nebraska Workmen's Compensation Court,* 133 Neb. 225, 274 N. W. 576. When one party accepts an award in his favor by a single judge of the compensation court, he cannot prevent the defeated party from electing to waive a hearing before the Nebraska compensation court sitting en banc, and appeal directly to the district court.

We will now proceed to examine the evidence in the case, as the plaintiff relies for reversal on the assignment of error that the judgment of the trial court is not sustained by the evidence. The county of Otoe admits that Eisenhauer was working on a very cold day, but absolutely denies that he ever had his hands frozen; admits that he testified that his cheek and nose were frozen. It is not disputed that the employee worked the next day as usual on the tractor, but he said that he wore heavier mittens, and that his hands were cold all the time. He continued to work at the same work for at least another month. When summer came he said his hands swelled some, and on June 23 he first went to see Dr. Thorough about his hands, who testified that he

found swelling, redness, tenderness, and the fingers were rather rigid.

In the bill of exceptions two doctors testified as experts in the case. Dr. Ramacciotti was called by the plaintiff, and testified that he had been practicing in Nebraska City for about six years; that he examined the plaintiff, who gave him a history of having frozen his hands some two years previously. He took no X-rays, but put him through several tests, and discussed the matter with Dr. Thorough. Dr. Ramacciotti testified that he felt that the condition of plaintiff's hands was from the freezing, but admitted that he had arthritis in his hands.

The medical expert for the county was Dr. Thomas Weekes, who testified that he had been practicing 18 years; graduated from Northwestern University, and had taken postgraduate work at Mayo's and several other places; that he had in his practice attended probably a hundred cases of freezing and four or five hundred cases of arthritis. He first made an examination of the plaintiff on May 14, 1937, and took X-rays of his hands and back. He testified that the plaintiff had given him a history of pain in the shoulders and back for years; that he had two or three attacks of lumbago; that he had had arthritis; that his tonsils were badly infected. He testified positively that, if plaintiff's hands had been frozen, he would have been unable to go to work the next morning. In response to a question calling for his opinion as to the cause of difficulty of the plaintiff's hands, he stated that their condition was due to arthritis deformans, and that he did not believe that the plaintiff's hands were brought to their condition by freezing. He also testified that if plaintiff's hands had been frozen sufficiently to cause changes in the joints he would have had gangrene in the hands shortly after the freezing, and that the X-rays all show a diseased condition of the joints and bones due to progressive changes caused by arthritis deformans. He testified that he saw no evidence of the plaintiff having frozen his hands, and that the same condition which exists in plaintiff's hands is also shown to

exist in his shoulders, spine, hips, and feet. He further testifies that a freezing, to damage the muscles, would affect the tendons, and cause the surrounding tissues to adhere to the tendons, which condition was entirely lacking here.

Dr. Weekes also stated that tissue would be white when it was frozen, and then turn red, or perhaps purple, and if there was a third degree freezing it would slough off. He testified that the hands could not have been frozen if they were blue when he got in from work, when the family first saw him.

The evidence shows that plaintiff made no complaint that his hands were frozen until nearly five months afterward, when on June 23, 1936, Dr. Thorough diagnosed the case and told him his hands looked like they had been frozen, and while Dr. Thorough had treated plaintiff for other ailments back to 1934, he had never made any complaint about his hands.

In this case the burden of proof was upon the plaintiff to prove that he froze his hands on January 25, 1936, as alleged, and, further, that such freezing caused the injury to his hands of which he now complains.

It was the decision of the trial court that he had failed to make out his case, and after a careful examination of the record, we believe the decision of the trial court was right, and it is hereby

AFFIRMED.

WINTERS CREEK CANAL COMPANY, APPELLANT, V. ROBERT H. WILLIS, CHIEF OF BUREAU OF IRRIGATION, WATER POWER & DRAINAGE, ET AL., APPELLEES.

284 N. W. 332

FILED FEBRUARY 24, 1939. NO. 30437.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Reversed.*

Mothersead & York, for appellant.

Richard C. Hunter, Attorney General, C. G. Perry and *William H. Wright, contra.*

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

CARTER, J.

This is a suit for an injunction brought by the Winters Creek Canal Company against Robert H. Willis, chief of the bureau of irrigation, water power and drainage, and A. C. Tilley, state engineer. The purpose of the injunction was to prevent the officials of the irrigation department from interfering with the diversion of more than three acre-feet of water per acre of land within the plaintiff district in the year 1936. The injunction was denied by the trial court and plaintiff appeals.

The issues involved are identical with those in *Enterprise Irrigation District v. Willis*, p. 827, *post*, 284 N. W. 326.

The record discloses that plaintiff has a valid appropriation of water from the North Platte river in the amount of 124-2/7 second-feet with a priority dating of October 18, 1888, limited only to the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry and within the limits of the capacity of the diversion works then constructed to vest said appropriation. The record further shows that on August 27, 1936, plaintiff had diverted during the calendar year of 1936 for irrigation purposes 3.58 acre-feet of water for each irrigable acre of land within its district. It is the contention of the defendants that plaintiff is not entitled to more than three acre-feet of water under the provisions of section 81-6311, Comp. St. 1929.

The evidence offered is almost identical with that adduced in the companion case of *Enterprise Irrigation District v. Willis, supra.* The conclusions of fact to be drawn therefrom are necessarily the same. The applicable rules of law are fully considered in that case so that further discussion thereof is not necessary.

For the reasons stated in *Enterprise Irrigation District v. Willis, supra,* the trial court should have granted an injunction.

REVERSED.

ENTERPRISE IRRIGATION DISTRICT, APPELLANT, V. ROBERT H. WILLIS, CHIEF OF BUREAU OF IRRIGATION, WATER POWER & DRAINAGE, ET AL., APPELLEES.

284 N. W. 326

FILED FEBRUARY 24, 1939. No. 30438.

1. **Waters: APPROPRIATION FOR IRRIGATION.** An appropriator of the waters of a stream for irrigation purposes, who has had his appropriation properly adjudicated under the laws of the state, secures a vested right which is entitled to all the protection of a property right.
2. ———: ———. An appropriation for irrigation purposes in this state, made prior to 1895, was not limited as to quantity save and except that it must be for some useful and beneficial purpose and within the limits of the capacity of the diversion works.
3. **Constitutional Law.** The right acquired by a valid appropriation being a vested property right, it cannot be diminished by subsequent legislation so long as it is used by the appropriator for some useful and beneficial purpose.
4. **Waters: APPROPRIATION FOR IRRIGATION: "DUTY OF WATER."** The duty of water is such a quantity of water necessary, when economically conducted and applied to the land without unnecessary loss, as will result in the successful growing of crops.
5. ———: ———: ———. The duty of water is a complicated question of fact that depends largely upon the circumstances of each particular case.
6. ———: ———: ———. In determining the quantity of water that can be put to a beneficial use of an appropriator, the policy of the law is to require, within reasonable limits, the greatest duty of water.
7. ———: ———: ———. In determining the duty of water, it is the amount of water delivered to the land and not the amount diverted from the stream that must govern.
8. ———: ———: ———. The prevailing customs and methods of applying water to the land in the interests of good husbandry in the territory where it is used are to be followed in determining the duty of water.

9. ———: ———: POLICE POWER. The state may regulate and control irrigation and the distribution and use of water therefor by virtue of its police power.
10. ———: ———: ———. It is a proper exercise of the police power to prevent the wasting of water or the diversion of more water than can be put to a beneficial use.
11. **Constitutional Law.** A provision in an act of the legislature arbitrarily limiting an appropriation to three acre-feet in the aggregate during one calendar year for each acre of land (Comp. St. 1929, sec. 81-6311) has no application to a valid appropriation which vested prior to its enactment.
12. **Case Limited.** *Vonburg v. Farmers Irrigation District*, 132 Neb. 12, 270 N. W. 835, limited.

APPEAL from the district court for Scotts Bluff county: GEORGE W. IRWIN, JUDGE. *Reversed.*

Mothersead & York, for appellant.

Richard C. Hunter, Attorney General, C. G. Perry and *William H. Wright, contra.*

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

CARTER, J.

This is a suit for an injunction brought by the Enterprise Irrigation District against Robert H. Willis, chief of the bureau of irrigation, water power and drainage, and A. C. Tilley, state engineer. At the time the suit was commenced the defendants were threatening to close the headgates of plaintiff's irrigation canal for the alleged reason that plaintiff had received all the water to which it was entitled during the irrigation season in question. In its petition the plaintiff asked that the defendant be enjoined from preventing it from diverting all the water that could be put to a beneficial use in the growing of crops. The trial court denied an injunction and plaintiff appeals.

The record discloses that in the year 1889 the Enterprise Ditch Company made an appropriation of water from the North Platte river, in accordance with the law of appropriation then in existence, in an amount in excess of 138.90

second-feet, subject only to the common-law rule that no more water could be diverted and appropriated than could be applied to a beneficial use. Thereafter the Enterprise Ditch Company sold its irrigation works and water appropriation to the plaintiff. Subsequent to the enactment of the irrigation law of 1895, providing for the creation of a state board of irrigation and for filing of claims and adjudication of water rights, a claim for such appropriation was filed with the state board of irrigation claiming an appropriation of 138.90 second-feet of water with a priority date of March 28, 1889. On January 7, 1897, the state board of irrigation entered its order, finding, adjudging and adjudicating that said appropriation was a valid appropriation for 138.90 second-feet of water with a priority of March 28, 1889, limited only by the rule that the amount so diverted should not be in excess of the amount that could be applied to a beneficial use. No appeal was taken from this order.

The irrigation laws of 1877 and 1889, the only ones on the subject at the time of plaintiff's appropriation, place no limitations upon the quantity of water that could be appropriated, save and except that the appropriation must be for some useful or beneficial purpose and within the limits of the capacity of the diversion works. See Laws 1877, p. 168; Laws 1889, ch. 68. The irrigation law of 1895 limited for the first time the quantity of water that could be appropriated to a specific amount, the statute stating "that no allotment for irrigation shall exceed one cubic foot per second for each 70 acres of land for which said appropriation shall be made." Laws 1895, ch. 69, sec. 20. The same act also provided: "Nothing in this act contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this act." Laws 1895, ch. 69, sec. 49. In 1911, the legislature placed a further limitation upon the quantity of water that could be appropriated, the statute providing "that no allotment for irrigation shall exceed one cubic foot per second of time for each seventy acres of land nor *three acre-*

feet in the aggregate during one calendar year for each acre of land for which such appropriation shall be made." Laws 1911, ch. 153, sec. 19. (Italics ours.) These same limitations appear in the irrigation law contained in the civil administrative code law of 1919. Laws 1919, ch. 190, p. 837. The 1919 law also provided: "Nothing in this article contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the fourth day of April, 1895." Laws 1919, p. 832. The last two cited sections of the civil administrative code of 1919 remain in force and are designated as sections 81-6311 and 46-506, respectively, Comp. St. 1929. It is the contention of the defendants that the limitation of three acre-feet in the aggregate during one calendar year for each acre of land for which the appropriation shall have been made, as contained in section 81-6311, Comp. St. 1929, applies to plaintiff's appropriation and, that amount having been exceeded at the time this suit was commenced, the plaintiff was not entitled to any more water and defendants should not be enjoined from closing the headgates of plaintiff's canal. Plaintiff contends that its appropriation is a right vested as of March 28, 1889, and that the statute in question has no retroactive force and, if such retroactive construction be placed upon it, it is violative of the due process clauses of the Constitution of Nebraska and the Fourteenth Amendment to the Constitution of the United States. Defendants contend that the statute is a proper exercise of the police power of the state and is not inhibited by either the state or federal Constitutions.

That the state may supervise and control the appropriation, diversion and distribution of the public waters of the state and impose that duty upon administrative officers is settled by our former decisions. *Farmers Canal Co. v. Frank*, 72 Neb. 136, 100 N. W. 286. Statutory provisions relating to the duties of administrative officers, in so far as they require or authorize a control and regulation of the diversion and distribution of appropriated waters in accordance with adjudicated priorities, are not inimical to the provisions of

the state and federal Constitutions. As was said in *Farmers Canal Co. v. Frank,* 72 Neb. 136, 100 N. W. 286: "It is the evident purpose of the law, taken as a whole, to enforce and maintain a rigid economy in the use of the waters of the state. It has been, and is, the policy of the law in all the arid states and territories to require and enforce an economical use of the waters of the natural streams. The urgent necessities of the situation compel this policy by the very force of circumstances. One of the main objects of the system of administration of public waters prescribed throughout the arid regions is to restrain unnecessary waste, and to provide for an economic distribution of that element so necessary to the very existence of agriculture in those regions. This is also the policy of the state of Nebraska in its regulation of the use of the waters of the state, and the law should be construed so as to effect a reasonable, just and economic distribution of water for irrigation purposes. The court will take judicial notice of the fact that there are hundreds of acres within the state susceptible of irrigation to every acre which there is water enough to supply, and it is obvious that a construction of the law that will best distribute the use of the waters is to be preferred, if such construction is not inimical to any constitutional inhibitions or limitations."

The various statutory provisions for the distribution of water among different appropriators according to their respective priorities by administrative officers of the state were undoubtedly enacted in furtherance of a wise public policy to afford an economical and speedy remedy to those whose rights are wrongfully disregarded by others, as well as to prevent waste, and to avoid unseemly controversies that may occur where many persons are entitled to share in a limited supply of public water for the purposes of irrigation. Such provisions have generally been sustained as a part of the police power of the state.

That an appropriator of public water, who has complied with existing statutory requirements, obtains a vested property right has been announced by this court on many oc-

casions. *Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N. W. 781; *Kearney Water & Electric Powers Co. v. Alfalfa Irrigation District,* 97 Neb. 139, 149 N. W. 363; *Nine Mile Irrigation District v. State,* 118 Neb. 522, 225 N. W. 679; *City of Fairbury v. Fairbury Mill & Elevator Co.,* 123 Neb. 588, 243 N. W. 774. This brings us to the question whether the subsequent condition imposed, limiting appropriations for irrigable lands to three acre-feet per acre for each calendar year, applies retroactively to appropriations obtained prior thereto, and, if so, is it inimical to the due process provisions of the state and federal Constitutions?

The record discloses that plaintiff had used 3.50 acre-feet of water for every acre of irrigable land in the district when the order was issued to close the headgate. Of this amount 3.03 acre-feet per irrigable acre was diverted from the North Platte river, while the balance was diverted from drainage ditches crossing plaintiff's canal. All measurements were made at the points of diversion and not at the points where water was delivered to the land. There is some evidence in the record to the effect that there was no loss by percolation, the usual losses of this character being offset by inflow. While this evidence was far from satisfactory, we are obliged to treat it as proved in view of the result at which the trial court arrived. It is also established that plaintiff had not exhausted its appropriation, assuming that the requirement as to beneficial use had been complied with and that statutory limitations as to quantity did not apply.

It is a principle of the common law that one may not divert more water, even under a valid appropriation, than he can put to a beneficial use. While many elements must be considered in determining whether water has been put to beneficial use, one is that it shall not exceed the least amount of water that experience indicates is necessary in the exercise of good husbandry for the production of crops. The extent to which landowners need and are entitled to have the benefit of irrigation water under a vested appropriation ordinarily depends upon aridity, rainfall, loca-

tion, soil porosity, adaptability to particular forms of production and the use to which the irrigable lands are put. In other words, the duty of water may be defined as such a quantity of water necessary, when economically conducted and applied to the land without unnecessary loss, as will result in the successful growing of crops. 2 Kinney, Irrigation and Water Rights (2d ed.) secs. 902 and 903.

Many persons engaged in farming within the plaintiff district testified that the water used by them had been used in the usual and ordinary way to produce crops, that there had been no waste or misapplication of the irrigation water, and that, at the time the closing of the headgate was threatened, their crops were in need of water. They also testified that a failure to obtain water would have resulted in a material decrease in the crop returns from their lands.

The defendants produced the evidence of two experts who testified that they had made many experiments as to the amount of water required to grow certain crops on various kinds of lands, including the types of land found in the plaintiff district. The conclusions of these witnesses were that three acre-feet of water was sufficient to grow the kind of crops raised on the lands within the Enterprise Irrigation district. The experiments testified to were made under conditions very dissimilar from those under which the farmers of the plaintiff district were forced to operate. Whether the difference in conditions would account for the difference in the amount of water used would require us to delve into the realms of speculation and conjecture. There is no direct evidence that the water diverted by the plaintiff district had been wasted or put to any use other than a beneficial one. The evidence also sustains the plaintiff in its contention that the crops being grown on the lands in the district were in need of water at the time of the threatened closing of the headgate in plaintiff's canal. After a consideration of all the evidence in the record on the subject, we are of the opinion that it will not sustain a finding that irrigation water was wasted or put to other than a beneficial use in the usual, ordinary and recognized

method of applying irrigation water in that section of the state.

It must be borne in mind that the quantity of water that can be diverted under a vested water right for irrigation purposes is an element of importance equal to that of its priority in determining its value. While such a right may be regulated and supervised by the state and its administrative officers for the purpose of protecting all adjudicated rights of appropriators having an interest in the waters of the stream, yet a law of this character cannot operate to divest rights already vested at the time it was enacted. While vested water rights may be interfered with within reasonable limits under the police power of the state to secure a proper regulation and supervision of them for the public good, any interference that limits the quantity of water or changes the date of its priority to the material injury of its holder is more than regulation and supervision and extends into the field generally referred to as a deprivation of a vested right.

In a similar situation the legislature of California declared that the term "useful or beneficial purposes" shall not be construed to mean the use in any one year of more than two and one-half acre-feet of water per acre in the irrigation of uncultivated areas of land not devoted to cultivated crops. It was contended that the act of the legislature was justified as a proper exercise of the police power of the state. In holding to the contrary, the supreme court of that state said: "It may be conceded that the phrase 'police power of the state' has, as to its scope and meaning been subjected to a quite severe strain of recent years in the endeavor to so expand it as to cover all sorts of legislation sought to be enacted in the asserted interest of modern progress; but we have yet to be referred to a case wherein it has been judicially so far expanded as to invest the legislative department of this state with arbitrary power to destroy vested rights in private property when such rights are being exercised and such property is being employed in the useful and in nowise harmful production of

wealth, and when such use and the product thereof cannot be said or shown to be inimical to public health or morals or to the general welfare; but, on the contrary, must be conceded to be beneficial to each and all of these. The use to which the owners of lands contiguous to a river devote its soil by the aid of the waters of such river in the annual production of crops or cattle is such a use. The extent to which such riparian landowners need, and use, and are entitled to have the benefit of the flow and overflow of such waters under their vested riparian rights therein is a matter which depends upon the circumstances of each particular case; upon location, aridity, rainfall, soil porosity, responsiveness, adaptability to particular forms of production, and many other elements which render the question essentially one for judicial inquiry and determination in all cases involving the proper use of water upon both cultivated and uncultivated areas. To concede that the state legislature has the right arbitrarily to fix as to the latter the amount of water which the riparian proprietor may take and use thereon would be to concede an equal power to make a like arbitrary fixation in respect to cultivated areas also, entirely regardless of the foregoing elements which are necessarily the determining factors in such fixation. To concede this would be to concede to the legislative department of the state government the arbitrary power to destroy vested rights in private property of every kind and character." *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, 252 Pac. 607. We are of the opinion that the principle of law set forth in the foregoing case is correct and that it has particular application to the facts in the case at bar.

The evidence, as we view it, shows that the plaintiff district has diverted more than three acre-feet of water for every irrigable acre in its district. It further shows that the water used has been applied to a beneficial use without waste. It is not disputed that additional water was required when the injunction was threatened and that plaintiff's appropriation, without the limitations complained of, was

sufficient to provide it without infringing upon the rights of prior appropriators. The evidence of the expert witnesses tendered by the defendants was not sufficient to overcome the undisputed evidence offered by the plaintiff. We recognize the value of the experiments and research conducted by experts in their respective fields, but the duty of water is a complicated question of fact which must be determined in accordance with the prevailing custom in the locality where it is used. Wiel, Water Rights (3d ed.) p. 507. Neither is it contemplated nor required that each appropriator should use the latest and most approved scientific method in applying irrigation water to the land. *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District,* 3 Cal. (2d) 489, 45 Pac. (2d) 972; *Joerger v. Pacific Gas & Electric Co.,* 207 Cal. 8, 276 Pac. 1017.

We fully realize the difficulty of regulating and supervising the holder of an appropriation such as the plaintiff possesses. However, the difficulty must be overcome by regulation and control over the district by virtue of a proper exercise of the police power of the state. The difficulties of the situation cannot be advanced as a justification for violating vested property rights. The various irrigation acts of this state show an intent on the part of the legislature not to interfere with or impair appropriation rights which vested prior to the enactment of the 1895 irrigation law. Construing these acts in connection with the provision in section 81-6311, Comp. St. 1929, limiting the amount of water that could be used in a calendar year to three acre-feet for each irrigable acre, we reach the conclusion that this statutory provision was never intended to have any retroactive effect upon plaintiff's appropriation right which vested in 1889. To place any other construction upon the provision would make it inimical to applicable provisions in the state and federal Constitutions.

It is the contention of defendants that the case of *Vonburg v. Farmers Irrigation District,* 132 Neb. 12, 270 N. W. 835, is determinative of the issues involved in the case at bar. That case involved the contract rights of certain irrigators

under contracts entered into in 1890. In the opinion we said: "It is argued by defendants that plaintiffs, in any event, should be limited to three acre-feet per acre during each irrigation season. We are inclined to agree with this proposition." An examination of the record and briefs in that case shows that the limitation mentioned was not an issue in the case. It was not pleaded, briefed, nor presented to the court for determination. This court is committed to the rule that a cited case is authority only on the issues presented which were necessary to a proper decision of the case. We cannot therefore treat the *Vonburg* decision as controlling on the issues raised in the suit at bar.

We conclude that, under the facts presented to the trial court, an injunction should have been granted.

REVERSED.

HELENA AMELIA HOPPER, APPELLANT, V. CLIFF T. KOENIGSTEIN, APPELLEE.

284 N. W. 346

FILED FEBRUARY 24, 1939. No. 30447.

1. **Workmen's Compensation**: COMPENSABLE INJURY. Unless other controlling factors are involved, injury or death from assault occurring during the course of employment is compensable under the workmen's compensation law, where the conditions of the employment expose the workman to the likelihood of such special risk, or where there is an immediate causal connection between the employment and the assault.
2. ———. The term "arising out of the employment" in the workmen's compensation law covers all risks of accident from causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.
3. ———. In determining whether a risk arises out of the employment, the test to be applied to any act or conduct of an employee which does not constitute a direct performance of his

work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard.

4. ———. Where an electrical refrigerating employee, who was sent to regulate the temperature control valves of a beer-cooling system in a beer tavern, which task required the making of a number of momentary adjustments over a several hour period, spent his leisure time in conviviality and beer-drinking with strangers in the tavern, including a salesman whose acquaintanceship he cultivated over a three and a half hour period, until the salesman became intoxicated and the employee himself had drunk six or seven glasses of beer, though without being shown to have been intoxicated, and the salesman struck the employee a fatal blow with his fist while they were drinking at the bar, no provocation being shown except such as may be inferred to have arisen from their continued fraternizing and drinking, such death was the result of a substantial deviation from the employment and of the creation of an independent hazard by the employee, and it did not arise out of the employment so as to be compensable under the workmen's compensation law.

APPEAL from the district court for Holt county: ROBERT R. DICKSON, JUDGE. *Affirmed.*

Fay H. Pollock, for appellant.

Kennedy, Holland, De Lacy & Svoboda, contra.

Heard before SIMMONS, C. J., ROSE, PAINE, CARTER, MESSMORE and JOHNSEN, JJ., and CHAPPELL, District Judge.

JOHNSEN, J.

The sole question involved is whether the death of Roy Hopper arose out of his employment, so as to entitle his widow to benefits under the workmen's compensation law. The compensation court dismissed her claim, and the district court, to which she appealed, similarly denied a recovery. She has appealed to this court.

Hopper was employed as a service man in the electrical refrigerating business operated by defendant at Norfolk, Nebraska. On June 24, 1936, he was sent to Stuart, Nebraska, to repair and adjust a beer cooling system, which he had installed about a month previously, in the tavern

or beer parlor of Carroll Eaton. He began work about 1:30 p. m. The condenser motor, located in the basement of the tavern, had burned out. It was removed and replaced with a larger motor. The refrigerating system then had to be balanced by adjusting the pressure and temperature control valves, so the beer would have proper foam content. The time usually required for the whole task was approximately four hours, although there is testimony that, under special conditions, it might take ten or twelve hours.

Irvin Kouba, the salesman who had sold Eaton the equipment, accompanied Hopper to Stuart and remained with him most of the time he was working in the basement. About 4:30 p. m. Kouba and Eaton decided to go fishing. Hopper still had to adjust the valves which controlled the amount of refrigerant going into the coils. These valves were located on the main floor of the beer parlor, two inside and one just outside the cooling compartment.

From that time on Hopper struck up an acquaintanceship with Floyd Denton, a polish salesman, who had come into the beer parlor during the afternoon. For about three and a half hours they fraternized and drank beer with each other. Witnesses describe them as talking, laughing and joking together. Hopper offered to buy drinks for two women who came into the tavern. The four seated themselves at a table, indulged in sociability, and consumed several rounds of beer. Denton undertook to sing, but was stopped by the tavern keeper. When the women had to leave, Denton invited them to return later. Denton's indulgences ultimately produced intoxication. There is no testimony that Hopper became intoxicated, and, on the autopsy performed a couple of hours after his death, no evidence of alcoholism was observed. It does appear, however, that he drank at least six or seven glasses of beer. Denton says they had forty or fifty glasses together, but his testimony is not worthy of much credence. He was an ex-convict, with a somewhat extensive criminal record.

Hopper apparently made some momentary adjustments of the temperature control valves during the course of his

companionship with Denton. Kouba, however, personally checked the thermometer, on his return from the fishing trip about 8:00 p. m., and asked Hopper to adjust the valves. Hopper did so and then returned to the bar where he was drinking with Denton. No further temperature adjustments were made or needed, although the caps or covers on the valves were not yet replaced. Within a few minutes thereafter, Denton struck Hopper with his fist, rupturing a blood vessel in the brain, and causing Hopper's immediate death.

Hopper was shown to have been a peaceable man, of good reputation and character. There was nothing in the conversation between him and Denton that had attracted the attention of the five or six other persons standing at the bar when the blow was struck. The record discloses no acceptable provocation, notwithstanding Denton sought to claim, in a deposition taken at the state penitentiary, where he was committed for Hopper's death, that Hopper had called him a vile name. At the time of his arrest he had made the following simple explanation to the village marshall: "I thought I would just bloody up his nose for him, and I hit him a crack." The assault, seemingly, was one of those expressions of resentment or assumed superiority which drunken men sometimes unloose toward those with whom they have been fraternizing.

The widow insists in this situation that she is entitled to compensation on the grounds, (1) that the assault was occasioned by the special risk to which Hopper's work in the beer parlor exposed him, and (2) that, even if the assault did not result from exposure to any special risk, Hopper's fraternizing and drinking with Denton were such reasonable and permissible incidents of his employment as to constitute part of the hazard of the industry.

The general rule is that, unless other controlling factors are involved, injury or death from assault occurring during the course of employment is compensable, (1) where the conditions of the employment expose the workman to the likelihood of such special risk, or (2) where there is an

immediate causal connection existing between the employment and the assault. 112 A. L. R. 1262, annotation.

The case of *Socha v. Cudahy Packing Co.*, 105 Neb. 691, 181 N. W. 706, where compensation was allowed for death resulting from the playful application of an air hose to the deceased's person by a fellow employee, is an example of the first class. It was there said: "If a person familiar with the whole situation could reasonably contemplate that such an accident might result from the peculiar nature and circumstances of the employment, and the nature of the place where the injured man was required to work, then it may reasonably be said to arise out of it."

In the present case, however, we are unable to accept the contention that Hopper's death was due to the fact that he was required to work in a beer parlor. If the beer parlor constituted a special hazard, as it is argued, the assault was not occasioned by that hazard. Hopper was struck, not because of his presence in the beer parlor, but because of his relationship with Denton. It was the culminating incident of their extended fraternizing and drinking together. Denton did not assault a stranger, of whom there were several at the bar, but his comrade of the afternoon, toward whom he did not feel the usual conventional restraints. He had apparently grown tired or resentful of Hopper, or he wanted to display his superiority, for, as he expressed it immediately after the assault, "I thought I would just bloody up his nose for him." The compensation court and the district court were right, therefore, in holding that Hopper's death did not result from a special risk to which his employment had exposed him.

There remains to be considered the contention that Hopper's fraternizing and drinking with Denton were incidents which his employer might reasonably have expected he would do in connection with his work, and that the consequences thereof accordingly arose out of the employment and were part of the industrial risk.

The term "arising out of the employment" in the workmen's compensation law covers all risks of accident from

causative acts done or occurring within the scope or sphere of the employment. All acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment.

The rule applicable to personal ministrations of the workman has been stated by a text-writer as follows: "Acts of ministration by a servant to himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, performance of which while at work are reasonably necessary to his health and comfort, are incidents to his employment and acts of service therein within the workmen's compensation acts, though they are only indirectly conducive to the purpose of the employment. Consequently no break in the employment is caused by the mere fact that the workman is ministering to his personal comforts or necessities, as by warming himself, or seeking shelter, or by leaving his work to relieve nature, or to procure drink, refreshments, food, or fresh air, or to rest in the shade." 1 Honnold, Workmen's Compensation, p. 381.

The cases of *Moise v. Fruit Dispatch Co., ante,* p. 684, 283 N. W. 495, and *Miller v. Reisch Co.,* 132 Neb. 338, 271 N. W. 853, illustrate this principle. *Goodwin v. Omaha Printing Co.,* 131 Neb. 212, 267 N. W. 419, is an example of another type of incident which was recognized as not constituting such a substantial deviation from the employment as to create an independent hazard.

The test to be applied in such a situation to any act or conduct of an employee which does not constitute a direct performance of his work is whether it is reasonably incident thereto, or whether it is so substantial a deviation as to constitute a break in the employment and to create a formidable independent hazard. The rule necessarily is not capable of formulaic application, and the particular facts of each case must be carefully considered.

It may be that, in the circumstances of the present case, as the widow contends, Hopper could reasonably be expected to take a drink of beer as an incident of his employment. Hopper's employer in fact testified that sometimes a service man sampled beer to test its temperature, although the customary way was to look at the thermometer. But even if it were Hopper's privilege to sample beer in testing its temperature, or to take a drink as a reasonable incident of a leisure interval of his employment, that privilege could not be carried to the point of license, so that it, and not the employment, became the dominating factor in his conduct and relationship. The drinking by Hopper of six or seven glasses of beer in a three and a half hour period, the cultivation and continuance of a personal relationship with Denton to the point of Denton's intoxication, and the general sociabilities which were engaged in during the afternoon together created a hazard that went beyond the privileges or reasonable incidents of Hopper's employment. At the time of the assault, he stood at the tavern bar exposed to a formidable independent hazard which he, and not his employment, had created.

His death, as held by the compensation court and the district court, did not arise out of his employment, within the meaning and intendment of the workmen's compensation law.

AFFIRMED.

ROSE, J., dissenting.

The opinion of the majority reflects the care and skill with which the evidence has been reviewed and the law stated, but there seems to me to be a different view of the case, equally plausible and perhaps more in keeping with the purpose and spirit of the workmen's compensation law. It was said in a recent opinion, following earlier decisions:

"It was a purpose of that legislation to shift from employee to modern industry burdens of economic waste or loss arising out of and in the course of his employment as a result of his accidental injury or death and to prevent his

dependents from becoming a public charge." *Moise v. Fruit Dispatch Co., ante,* p. 684, 283 N. W. 495.

A rule of interpretation reads thus:

"It has long been the policy of this state to give a liberal construction of the workmen's compensation law, so that its beneficent purposes might not be thwarted by technical refinement of interpretation." *Maryland Casualty Co. v. Geary,* 123 Neb. 851, 244 N. W. 797.

Of course the death of an employee is not compensable, if it does not arise out of the employment. The question is, did it so arise within the meaning of the workmen's compensation law?

In the present instance defendant was engaged in a great industry—electric refrigeration. The employee was a skilled electrical engineer. He was a man of good character and good habits. He did not designate the place where the duties of his employment called him. He had no choice of location or environment. His employer selected for him the identical room where electrical adjustments were to be made and tested according to standards of the employee's profession. The employee was directed to work in a beer tavern and barroom where beer was sold over a bar by the drink to persons standing about it or seated at tables in front of it. During the entire time required for the performance of the duties of employee, he was mentally and physically alert. While he was awaiting the result of a scientific test in the beer-cooling system in the barroom, a dangerous criminal with aliases and prison records, who had been drinking at intervals in the barroom nearly all afternoon, struck the employee without provocation and killed him. This was the place selected by the employer for the performance of the employee's duties.

It is common knowledge that a barroom is a place of danger frequented by ruthless criminals. When such common knowledge was notorious, the legislature created a department of government to license beer taverns and keep barrooms under surveillance. An employer may anticipate such a danger when he sends an employee into an open barroom to work.

In my opinion an electrical engineer employed for a complete service requiring tests and awaiting results in putting a beer-cooling system in order performs the duties of his employment while thus waiting as well as when using tools in making the adjustments. He was then in the place of employment engaged in his employer's business. He had at the time and place no other task for his employer or himself. He was in the midst of conviviality. Thus surrounded, he did nothing to impair his capacity for service as an employee or to provoke an assault. No duty was neglected. If he was negligent in drinking beer on a summer day with a dangerous criminal whose character was then unknown, such mere negligence did not prevent the allowance of statutory compensation for his death. Where an electrical engineer is assigned to a particular job until finished and is required to make adjustments and await results of tests, the relation of employer and employee does not attach when he begins work on an adjustment and detach while waiting for the result of a test, though, in the interim, he may drink beer which he is cooling by scientific processes.

Refinements and subtle reasoning to show that an employee departs from and resumes his work in a case of this kind seem to me to be more consistent with the rigors of the old common law than with a modern statute simplifying judicial procedure for the benefit of workmen under the compensation law. In my judgment the employment, under such circumstances, is continuous until the work in hand is completed, unless terminated by the employer or by the wilful negligence of the employee or by an independent, self-created hazard. The work in the case at bar had not been completed when employee was killed. He was then awaiting the results of adjustments just made and dismantled appliances had not been replaced. Some of his tools were still in the barroom where he had been working. As I view the whole case, the homicide would not have been committed, except for the place of danger in which the employee was directed by his employer to work. It seems

to me the death of the employee arose out of his employment, within the meaning of the workmen's compensation law. The industry should bear part of the loss. The entire burden shou'd not fall on the dependent widow or on the public.

PAINE, J., dissenting.

With due regard for the opinion of the majority of the members of this court, I respectfully dissent from the opinion which has been adopted.

It is very evident that it is a close case, for many decisions can be cited from other states to support either theory. Hopper was sent by his employer to a tavern in Stuart to repair and adjust a cooling system which was out of order. This work required hours to correctly adjust the system so it would properly cool the beer and produce the proper foam content. He was a skilled workman at his place of employment. He had not completed the job assigned to him. He had made an examination of the cooling system and the guage within a few minutes of the time he was killed. He had not replaced the caps; his tools were ready for use.

All admit that his death occurred in the course of his employment. The only doubt in any one's mind is whether it arose out of his employment. His employer knew just the kind of a place to which he was sending him. There were very few stools in front of the bar. It was perfectly proper for him to occupy one of these stools, and it brought him in close contact with the man who killed him.

I will refer to a very few cases from other courts, which strike me as somewhat in point, and where recovery was allowed.

In *State v. District Court,* 134 Minn. 16, 158 N. W. 713, a bartender was accidentally struck in the right eye by a drinking glass thrown by a patron who was so drunk that he did not know what he was doing. The court here considered the question, did the accident arise out of the bartender's employment, and did such employment in such a place result in the accident? The court answers the questions in the affirmative.

In *Shaw, Ltd., v. Macfarlane*, 52 Scottish Law Rep. 236, a helper in a foundry was struck by an intoxicated stranger and injured, and the court held that he suffered the injury by an accident arising out of, and in the course of, his employment.

In a Texas case, an oil pumper was lured at night from the shack where he was required to sleep, and was shot and robbed. It was held that the heirs could recover. It is said that, if a fireman is playing cards at a fire station and is injured, no one would contend he was not at his employment. *Southern Surety Co. v. Shook* (1931) 44 S. W. (2d) (Tex. Civ. App.) 425.

In *Ivory v. Philpot Construction Co.*, 145 So. (La. App.) 784, a negro was asleep in a tent provided for highway employees, and was injured by a shot from a passing truck at about 10 p. m. A judgment for defendant was reversed, as the injury was held by the court of appeals for Louisiana to "arise out of and in the course of the employment."

In an opinion by Martin, C. J., of the court of appeals for the District of Columbia in 1936, he held that the injury of a cook in a restaurant, when he was suddenly stabbed by a drunk-crazed stranger, arose out of and in the course of his employment. The court said: "It was suffered by the claimant when at his place of duty, when upon the industrial premises of his employer, and while he was engaged at the work for which he was employed." *Hartford Accident & Indemnity Co. v. Hoage*, 85 Fed. (2d) 417. Many cases holding to the contrary can be found in the reports from states where a liberal interpretation is not followed, as in Nebraska.

I now submit a very few decisions from our own court, which should be carefully considered.

In *Ridenour v. Lewis*, 121 Neb. 823, 238 N. W. 745, it was held that, when a radio repair man in passing along the street in Omaha was assaulted by hold-up men, robbed of his own money, and killed, his death arose out of, and in the course of, his employment. Many cases are cited in this opinion, one from the House of Lords, the famous case

of *Dennis v. White & Co.* (1917) A. C. 479, Ann. Cas. 1917E, 325, which says that, where a workman meets with an accident by reason of a risk of the streets to which his employment exposes him, the accident arises out of, as well as in the course of, his employment. See 15 Neb. Law Bulletin, 202.

In *Miller v. Reisch Co.*, 132 Neb. 338, 271 N. W. 853, an employee was sitting at a table and eating dinner. The foreman got up from the table and knocked him down, and this court held that recovery could be had, and that his injuries arose out of his employment.

In *Boyce v. Burleigh*, 112 Neb. 509, 199 N. W. 785, an employee of a chicken hatchery, aged 19, with several other boys, was handling a gun, *contrary to the orders of his employer*, and this court held that there could be a recovery, for while the employee was not engaged in doing any work for the master at the time of the accident, still the accident *arose out of* the employment.

In *Urak v. Morris & Co.*, 107 Neb. 411, 186 N. W. 345, the plaintiff was struck on the hip by a shovel by a fellow workman, the blow being given just for fun, and this court held that the injury occurred during a personal altercation between the two, and that it did not arise out of the performance of any duty or service to the employer. This decision would be authority for denying compensation to the widow in the case at bar if the drunken ex-convict and the deceased had engaged in a quarrel, fight, or altercation, but the evidence does not sustain that conclusion.

In the case of *Goodwin v. Omaha Printing Co.*, 131 Neb. 212, 267 N. W. 419, a traveling man for the Omaha Printing Company, using his own automobile, picked up a "hitchhiker," who shot and killed the traveling man four miles west of Schuyler in robbing him of his car, and in a careful review of many authorities it was held that the duties of the deceased required him to travel, and that highway robbery was a hazard of the highway, and of an employee who was required to travel the highway in the service of his employer. It was claimed in the *Goodwin* case that the de-

ceased, by inviting the "hitchhiker" to ride, brought the injuries upon himself, but the decision rejects this claim, and says that he did not disobey any directions or instructions of his employer in picking up a "hitchhiker." Can it be said in the case at bar that Hopper, by being in the tavern, as required by his employer, or in "jollying" the one who struck him, to keep him good-natured if possible, disobeyed any directions or instructions of his employer? Was he in any way responsible for his own death? Again, in the *Goodwin* case it is said that the traveling man did not step aside from his employment and act for himself on business or pleasure of his own in picking up a "hitchhiker" to visit with him. He was still *within the scope of his employment,* and the accident therefore arose out of and in the course of his employment, and that recovery was proper.

I do not think this court made a mistake in allowing the widow of the slain traveling man to recover for his death under the workmen's compensation law of Nebraska, but the cases are so closely in point that, if the decision is to stand in the case at bar, we should be consistent and set aside the opinion in the case of *Goodwin v. Omaha Printing Co., supra,* for there was no evidence there that the assault was directed against Goodwin because he was an employee, or because of his employment by the Omaha Printing Company.

In the case at bar, Hopper had not completed his work, but was engaged in it at the time he was killed. He was not loitering there for his own entertainment, but was required to be exactly where he was to properly adjust and test out the cooling machine, which it was his business to repair. In my opinion, considering the liberality with which the compensation law should be construed, these former Nebraska opinions are abundant authority upon which to justify a recovery in the case at bar.

HEINRICH FREDERICK MEYER, APPELLEE, V. EMMA SCHMIDT ET AL., APPELLANTS: DORA BANZHOF, CROSS-PETITIONER, APPELLEE.

284 N. W. 337

FILED MARCH 3, 1939. No. 30476.

1. **Contracts.** "Undue influence" may be defined as follows: "Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable." 2 Restatement, Contracts, 954, sec. 497.
2. **Fraud.** "There is no fraud where there is nothing wrong, and fraud cannot be deduced or inferred from that which the law pronounces honest." 12 R. C. L. 237, sec. 8.
3. **Contracts.** The mere fact that a person is unlearned, and ignorant of legal proceedings, affords no ground for relief in equity, unless the person against whom relief is sought misrepresented the facts to him.

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

McKillip & Barth and *Erwin A. Jones*, for appellants.

Harry L. Norval and *Peterson & Devoe, contra.*

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

PAINE, J.

Plaintiff and cross-petitioner each secured decrees of foreclosure. The defense was that the mortgagor, in concurrent mortgages given plaintiff and cross-petitioner, was weak-minded in business matters, could not read English, and executed the instruments through the undue influence of her husband. The defendants appeal.

Plaintiff filed a petition to foreclose a mortgage on 120 acres of land in Seward county because of the default in the payments due on two notes, one of $1,000 and one of $2,750. The cross-petitioner, Dora Banzhof, also brought action for the foreclosure of a similar mortgage for the de-

fault in payment of two notes for the same amounts, executed at the same time in the same transaction.

A single answer was filed to the petition and cross-petition, which answer includes a cross-petition, setting up many facts about the transactions between the various members of the family, and the line of descent, and setting out the homestead right of defendant Emma Schmidt in the property of her first husband, together with exhibit A, being a copy of the will of Diedrich Meyer, which will was witnessed by R. S. Norval, B. F. Norval, and Peter Goehner. This answer set out, as a defense to the mortgages, that defendant Emma Schmidt did not understand the nature of the transactions, or assent thereto, that she lacked the ability to comprehend, and that she signed her name to said instruments without knowing, or being advised of, her legal rights; that all the facts relating to the transaction were fraudulently withheld from said Emma Schmidt. The prayer of the cross-petition of Emma Schmidt and her husband is that, if the court finds that said instruments should not be canceled, then such instruments should be reformed so as to delete therefrom requirements for the payment of interest, and fix the due date at such time as Cajus Schmidt, husband of Emma Schmidt, finds himself able to make payments thereon, and that he be credited with the payment of $1,200 and given other relief. The replies thereto were general denials, together with specific denials that any fraud was at any time perpetrated upon the defendant Emma Schmidt.

It will thus be seen that the determination of the case rests primarily upon questions of fact rather than questions of law. The 200 pages of the bill of exceptions set out various family difficulties, and the private arrangements which were made to handle the real estate as some members of the family decided would be more equitable than as by the law provided.

The evidence of the defendants against the decree of foreclosure is largely based upon the incompetence and lack of mentality of Emma Schmidt. She testified that she was 52

years of age; that she was born in Ohio May 12, 1885. She testified that she came to Seward county when five years of age, and went to a parochial school every winter until she was 14 years of age. She told the studies which she took, and said she was pretty good in German. She testified that she married her first husband, Herman Meyer, November 10, 1915, and that he died May 22, 1916, and that she continued to live on the farm. She testified that she married her present husband, Cajus Schmidt, December 15, 1920. She said she did not know what a note was, nor could she write a check, and made a sorry attempt to write a check in court on the witness-stand, as well as an attempt to write down sums of money on a sheet of paper, and to add the sums dictated to her by her attorney. She admitted she took eggs to town for sale, but could only count them by sixes, it being claimed she can only count up to six. Upon direct and leading questions, she confessed she did not know what the papers were that she had signed at the Norval office, except that they were to "make settlement."

Only two questions were asked of her on cross-examination, bringing out the fact that whatever she did in Norval's office she did for her husband and at his request. Defense counsel claimed that it was clear from her evidence that she was not competent to contract by reason of her ignorance and weak understanding, and cites several Nebraska cases, *Meyer v. Fishburn*, 65 Neb. 626, 91 N. W. 534, *Wilson v. Bergmann*, 112 Neb. 145, 198 N. W. 671, and *Von Loh v. Graham*, 112 Neb. 306, 199 N. W. 553, which it is claimed are in point and support the proposition that contracts of a person of weak understanding will be set aside by the court when the conclusion can be drawn that deliberate judgment has not been exercised.

In the first of the three cases relied upon, we have a young man, 22 years of age, whose mental imbecility showed such a flagrant disregard of his own interests as challenged a strict examination of his contracts, and an experienced banker gained his confidence, and assisted him in making business deals, in each of which the young man lost out.

In the case of *Wilson v. Bergmann, supra,* it appears that Bergmann was 23 years old, had little education, could read with difficulty, and his perceptions were dull; his father said he paid two prices for everything he bought. In this land deal, an agent took him off by himself, and through fraud, artifice, and cunning, unduly influenced him to trade off his 80 acres of land, which his father had given him, for a piece of land of less value.

In the third case, Arthur Von Loh, incompetent, brought action by his guardian to recover a balance due in an adjustment of their mutual accounts.

We do not believe that the facts in any of these three cases are near enough in point with the facts in the case at bar to entitle the holdings therein to be accepted as precedents in this case.

It may be pointed out that the only evidence that Emma Schmidt was mentally incompetent was given by herself and her husband; that for over 45 years she had mingled with her neighbors, and done such business in selling produce as is customary for a farmer's wife. In addition to this, the evidence shows that, when her first husband died, she was appointed by the probate court of Seward county to have charge of administering his estate; that as administratrix she filed the necessary reports, which were approved, settled, and allowed.

The testimony of Attorney R. S. Norval as to the entire transaction in reference to the deed and two mortgages is given in the greatest detail. His recitation of his recollection of the conversations of each of the parties is so complete and satisfactory as to tend to explain away all inferences of incompetence and fraud charged in the case at bar.

The evidence of the attorney who prepared the deed alleged to have been obtained by undue influence exerted by the grantee, that the deed was executed by the grantor understandingly and voluntarily, cannot ordinarily be overcome by evidence relating to different occasions. *Little v. Curson,* 114 Neb. 752, 209 N. W. 737.

It is also charged in this case that Emma Schmidt signed the deed and mortgages by reason of the undue influence exercised upon her by her husband. "Undue influence" may be defined as follows: "Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable." 2 Restatement, Contracts, 954, sec. 497.

When we consider this accurate definition of undue influence, it is clear that the husband did not act, or advise his wife to act, in a manner inconsistent with good business judgment, as conditions were in 1925. Therefore, there was no such undue influence exercised by him which requires the instruments they signed to be declared void.

"There is no fraud where there is nothing wrong, and fraud cannot be deduced or inferred from that which the law pronounces honest." 12 R. C. L. 237, sec. 8.

Mental incapacity to avoid a deed must be such that the grantor was so weak and unbalanced that he did not understand and comprehend the purport of what he was doing. *West v. West,* 84 Neb. 169, 120 N. W. 925; *Schley v. Horan,* 82 Neb. 704, 118 N. W. 659; *Hacker v. Hoover,* 89 Neb. 317, 131 N. W. 734; *Keedick v. Brogan,* 116 Neb. 339, 217 N. W. 583; *Broeker v. Day,* 124 Neb. 316, 246 N. W. 490.

The mere fact that a person is unlearned, and ignorant of legal proceedings, affords no ground for relief in equity, unless the person against whom relief is sought misrepresented the facts to him. 12 R. C. L. 235, sec. 6.

A memorandum opinion, signed by the trial judge, is found in the record, setting out the evidence and his conclusions thereon. Here is a paragraph therefrom:

"Cajus Schmidt, the husband of Emma Schmidt, pleads and proves that he spoke for his wife and acted for her, though she was present and fully understood what was being done. Emma Schmidt while not highly educated is

a wholesome pioneer type of woman, with good alert mental capacity for her station of life. She understood the pleadings she signed when explained and read to her by her counsel, and the evidence, coupled with her appearance and demeanor, convinced the court that she understood fully and agreed to the sale and executed the notes and mortgages as consummated on December 11, 1925. She also understood and concedes that the mortgage and note of January 30, 1931, are valid, binding obligations, in default and subject to final decree of foreclosure."

And, again, the trial judge says: "Nowhere in the evidence can we find anything to sustain the defense of mistake, or require reformation. Neither does the evidence show any fraud, either constructive or actual. The facts are simply that the Schmidts made a purchase in good faith at the time it was made. Under the conditions existing December 11, 1925, their bargain was a good one in every respect."

It is known to all that the unfortunate depression and repeated drouths have reduced all farm values in Nebraska to but a fraction of the values prior thereto.

"When the testimony of the witnesses upon the vital question involved is conflicting, this court will, while trying the case *de novo,* 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 other." *Southern Surety Co. v. Parmely,* 121 Neb. 146, 236 N. W. 178. See, also, *Johnson v. Erickson,* 110 Neb. 511, 194 N. W. 670; *Krelle v. Bowen,* 128 Neb. 418, 259 N. W. 48; *Turpin v. State, ante,* p. 389, 281 N. W. 800.

The fact that a deed and mortgages are drawn by an experienced attorney, when all of the interested parties are present, and the proposed settlement between them is deliberately discussed from every angle, and when it is admitted on all hands that the husband of the wife who is claimed to be mentally deficient was a man who was experienced in business matters and understood fully what was being done, and had advised his wife, who was 40 years of

age at the time, to sign the papers, which he joined her in executing, together with the fact that the disposition made would have been, in times of continued prosperity, of advantage to the husband and wife, does not, in the opinion of the court, justify granting the relief sought, even though, after years of continued depression and drouth, the entry of these decrees of foreclosure at this time proves to be very unfortunate.

A careful reading of the record in this case does not support the claim of incompetence on the part of the wife, or the charge of any fraud or overreaching in the execution of the instruments in this case, and the decree of the trial court is hereby

AFFIRMED.

REFRIGERATION DISCOUNT CORPORATION, APPELLEE, V. HENRY G. RICHARDS, APPELLANT.

284 N. W. 343

FILED MARCH 3, 1939. No. 30504.

1. Trial: DIRECTION OF VERDICT. Trial court may properly direct verdict for plaintiff where evidence sustains his cause of action and is insufficient to sustain verdict for defendant.
2. Sales. Where a buyer, relying on advertisements appearing in a trade journal, purchases portable ice cream cabinets, bearing a patent or trade-name, under a sales contract, containing the entire agreement between the parties and not warranting the machines, and where the buyer's evidence shows that he used the machines, paid some instalments thereon and serviced them for the leaking of gas, and did not make the fact of such servicing known to the seller until nearly a year thereafter, such evidence fails to establish the defense of reliance upon a breach of an implied warranty that the machines were reasonably fit for the general purpose for which they were manufactured.

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

Dryden, Dryden & Jensen, for appellant.

M. H. Worlock, contra.

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

MESSMORE, J.

This is an action in replevin. At the close of all the testimony the court directed a verdict in favor of the plaintiff, and entered judgment "That the plaintiff's title and right of ownership and right of possession of the two refrigerators replevined in this action, at the time the same were replevined, was in the plaintiff and the same is hereby confirmed and that plaintiff have and it is hereby given judgment against the defendant and its damages for the illegal detention of property in the sum of one cent." From the verdict and judgment of the court, defendant appeals.

The petition is regular in form and the answer a general denial. The defendant, an ice cream manufacturer, relying absolutely upon certain advertisements, containing the specifications of "Kelvinator-Nash Ice Cream Cabinets," appearing in a magazine known as "Ice Cream Field," purchased three Kelvinator cabinets. Two of the cabinets are involved in this action, one having been returned by the defendant to the Kelvinator company. The two Kelvinator cabinets were purchased under written contract, specifying the amounts, the down-payments and the amounts to be paid in instalments. The 2-hole portable cabinet was purchased under contract dated June 19, 1931, and the 3-hole portable cabinet under contract dated July 2, 1931.

The defendant testified that the cabinets leaked gas, causing the melting of the ice cream contained therein, and that he was required to replace the product, to his damage; that he had expended for servicing the three machines the amount of $75, and on the two involved in this action $35; that he was unable to obtain service for the cabinets and had to rely upon a Frigidaire service man; that agents of the Kelvinator company called on him to collect and promised to "get the machines going," claiming he needed certain parts for them, and the agents did send him a couple of gauges, for which he paid, but did not service the machines

as promised. Most of the testimony of defendant was excluded on the theory that the contracts of purchase contained the entire agreement between the parties.

Section 69-415, Comp. St. 1929, a part of the Uniform Sales Act passed in 1921, is cited, the defendant contending that the court decided the case under subdivision 4 of said section which reads: "In the case of a contract to sell or a sale of a specified article under its patent or other trade-name, there is no implied warranty as to its fitness for any particular purpose;" further contending that subdivision 1 of said section of the statute is the one applicable to the facts in the case at bar, which subdivision reads: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose;" and that the greater weight of authority is that where goods are sold under a patent or trade-name for a specific purpose they come under the section with reference to merchantability; that is, subdivision 1 of section 69-415, Comp. St. 1929.

In the instant case, the defendant had the use of the two refrigerators through the summer of 1931. In the record is a letter from him to the plaintiff, dated January 22, 1932, which is an explanation of his reasons for not keeping up the payments on the cabinets. On June 20, 1932, practically a year after having contracted for one of the cabinets, the defendant, by letter to plaintiff, wrote about his inability to procure the money with which to make the payments, and complained of the servicing of the cabinets, of the leaking of gas, and stating that the cabinets were of no use to him when there was no one to service them; and on July 29, 1932, he again, by letter, complained of the leaking of gas in the cabinets and stated that he would ship back one of the cabinets and wanted credit on two cabinets for the return of one.

The plaintiff on June 23, 1932, responded to defendant's letter of June 20, 1932, stating that the conditional sales contract was binding upon the defendant for the payment of the items, but that plaintiff was "not disposed to take an unnecessarily arbitrary position in the matter," and asked cooperation on the part of the defendant to the extent of turning over to the railroad the cabinets, consigned to the Kelvinator Sales Corporation, and to ship them direct, freight collect, and that it would accept the cabinets in full settlement of the balance due on the three contracts, offering to return the canceled contracts upon receipt of the cabinets. On July 5, 1932, plaintiff wrote defendant, calling his attention to its letter of June 23, 1932, and asking him to advise the company if he had sent the cabinets; that, if they had been shipped, to send the bill of lading; if not, to send the cabinets at once; that it could not continue to hold the offer open if the cabinets were kept over the present season, and asking that the company be advised by telegram of the status of the matter. The two cabinets were not sent, but were retained by the defendant.

To clarify defendant's position, we quote the following from his brief: "If, because of the plan of construction or the character of materials used, the article will not accomplish that for which it purports to be designed, there is a breach of the implied warranty of merchantability, as well as the implied warranty of general fitness, and in this respect it is immaterial that the machine was sold under a patent or trade-name, or as a specific standard article;" citing annotations, 59 A. L. R. 1224, and 90 A. L. R. 422; *West Michigan Furniture Co. v. Diamond Glue Co.*, 127 Mich. 651, 87 N. W. 92; *Parsons Band Cutter & Self Feeder Co. v. Mallinger*, 122 Ia. 703, 98 N. W. 580; *Ideal Heating Co. v. Kramer*, 127 Ia. 137, 102 N. W. 840.

The view has been taken that the law implies a warranty in a contract for the sale of patented machines that they are reasonably adapted to the purpose for which they are made. There is an implied warranty that the machine, when manufactured, will not be unfit for its purpose on account

of defects in workmanship or the materials used by the manufacturer. 24 R. C. L. 202, sec. 475; *Nettograph Machine Co. v. Brown,* 28 Okla. 436, 114 Pac. 1102, 34 L. R. A. n. s. 737; *Rodgers v. Niles,* 11 Ohio St. 48, 78 Am. Dec. 290.

No representation was made by the defendant to any agent of the company as to the use to which the machines were to be put, and the specifications appearing in the magazine, upon which plaintiff relied when purchasing, contained no warranty, but advertised the efficiency and economy of the machine over other types of refrigeration. This is the only evidence on this proposition.

"In case of the sale of machinery as an ordinary article of commerce, whether the seller is the maker or manufacturer or not, there is, according to the better view, no implied warranty that the machine will do work for which it is ostensibly intended in any particular manner. * * * It has also been held that under a written contract to place a patent system of refrigeration in a refrigerator to be sold and furnished to the buyer, with nothing in the contract beyond the name of the system to show that it was anything in the nature of a refrigerating process, or that it was designed or intended to preserve meats, or that the buyer had anything to do with meats, no implied warranty exists that the system will preserve meats for any particular length of time, nor can such a warranty be shown by parol evidence." 24 R. C. L. 202, sec. 475. See *McCray Refrigerator & Cold Storage Co. v. Woods & Zent,* 99 Mich. 269, 58 N. W. 320; *Seitz v. Brewers' Refrigerating Machine Co.,* 141 U. S. 510, 12 Sup. Ct. Rep. 46. In the instant case, the contract expressed no warranty of any kind or nature, but specifically provided that it contained all the agreements existing between the parties.

Assuming defendant's contention to be the rule, the evidence shows that the cabinets were reasonably fit for the general purpose for which they were manufactured, and fails to show that the defendant relied upon an implied warranty, as contended by him. The machines did refrigerate; that was their purpose. The servicing was the de-

fendant's principal objection. As previously stated, he retained the cabinets, paid instalments thereon up to May 4, 1932, and used the cabinets for some period of time, and not until a year later did he make objection. The correspondence between the parties indicates more or less of a controversy relative to the payments made or to be made. An analysis of the defendant's evidence, if admitted, fails to show a reliance upon an implied warranty, if it did exist, as contended by him.

Defendant offered evidence to show the return of the one cabinet and that he asked any amounts accruing to him therefrom be applied to the credit of the two remaining cabinets, citing authority holding that a defendant in a replevin action may, under general denial, prove any act which amounts to a defense. *Securities Investment Corporation v. Krejci*, 132 Neb. 146, 271 N. W. 287. In that case, this court held:

"In a replevin action to foreclose a mortgage on chattels, the defendant under a general denial may prove damages resulting from a breach of warranty in the sale thereof, as an offset to show that plaintiff at the commencement of the action was indebted to her in an amount at least equal to the amount due on the note."

In the instant case, defendant had made payments amounting to $88.83 on the cabinets which he returned to the plaintiff in August, 1932. No further payments were made on the remaining cabinets in his possession. No complaint was made about these two machines, which were subsequently taken in replevin, April 20, 1933. Under the terms of the contract, plaintiff was entitled to interest, and if the defendant had received credit for the payments he had made on the returned cabinet, he would be in default on the two remaining cabinets at the time they were taken in replevin, and upon which there was due at that time the sum of $198.34. Defendant's requested credit on the cabinet returned would have been $88.83, leaving a balance still due of $109.51. Obviously, this evidence would not show that the plaintiff was indebted to the defendant at

the commencement of the action in an amount equal at least to the amount due on the two machines taken in replevin, which is the rule announced in *Securities Investment Corporation v. Krejci, supra.*

For the reasons given in this opinion, we hold that the trial court properly directed a verdict for the plaintiff.

AFFIRMED.

NETTIE A. SHEA, APPELLANT, V. WILLIAM FRANCIS SHIERMAN ET AL., APPELLEES.
284 N. W. 340

FILED MARCH 3, 1939. NO. 30477.

Judgment: RES JUDICATA. Where a settlement agreement, made between the contestants and the beneficiary of a will, is later sought to be revoked by the beneficiary, on fraud and other grounds, but is upheld by the court, and the rights of the contestants in the property involved are specifically confirmed, a subsequent attempt of the beneficiary further to attack the settlement agreement on the ground of mistake, and to remove part of the property from the operation thereof, on the ground that it had been given to the beneficiary prior to the decedent's death and was not properly part of the estate, the facts of such alleged claim being known to the beneficiary at the time of the former proceedings, is *res judicata.*

APPEAL from the district court for Adams county: FRANK J. MUNDAY, JUDGE. *Affirmed.*

J. E. Willits, for appellant.

McNeny & Sprague, contra.

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

JOHNSEN, J.

This action was brought to have plaintiff decreed to be the owner of some shares of capital stock and some real estate. The answer pleaded *res judicata.* The trial court entered judgment for defendants, and plaintiff has appealed.

Plaintiff is a sister of John W. Shierman, deceased, and defendants are his minor children. Shierman's will made plaintiff his sole beneficiary. An order of probate was entered in the county court, but thereafter, within the proper term, application was made, on behalf of the minor children, to set aside the probate and to permit a contest of the will on the ground of mental incapacity and undue influence. Plaintiff then entered into a settlement agreement with the proper representatives of the minor children, by which certain personal and real property was to be transferred and conveyed to them on final settlement of the estate, in consideration of the withdrawal of their application and objections to probate. The probate was thereby permitted to stand. Plaintiff waited until the expiration of the term of court at which this was done, and then attempted to file in the county court a renunciation and revocation of the settlement agreement. Defendants thereupon filed an application to have the contract declared binding on plaintiff and to have it entered as the judgment of the court for purposes of final distribution. On a denial of this application, defendants appealed to the district court where an order was entered giving plaintiff an election to accept the terms of the settlement agreement and permit judgment to be entered thereon, or to have the order of probate vacated and the matter set for trial on the objections of defendants to probate. Plaintiff filed an election to stand upon her revocation of the settlement agreement, and defendants appealed to this court where the settlement agreement was upheld and confirmed, and the judgment of the district court was reversed. *In re Estate of Shierman,* 129 Neb. 230, 261 N. W. 155.

When the mandate was issued, judgment was entered in the district court declaring the settlement agreement binding, quieting defendants' title to the real estate described therein, and directing plaintiff to turn over the personal property covered by the agreement. Plaintiff filed a motion for a new trial, on the hearing of which she sought to claim that some of the property covered by the settlement agree-

ment was not properly part of Shierman's estate, but was her individual property. She attempted to prove, by affidavits in support of the motion, that the deceased had given her deeds to some of the real estate included in the settlement a long time prior to his death, although she had not recorded them until after he died. She attempted to prove further that he had also executed assignments to her of some shares of capital stock. These were still in his lock box at the time of his death, but were contained in an envelope bearing her name. The motion for a new trial was overruled and plaintiff appealed to this court, where the order of the district court was affirmed. *In re Estate of Shierman,* 132 Neb. 45, 270 N. W. 841. In a motion and brief for rehearing filed by plaintiff, it was contended that "the court erred in decreeing title directly to these boys of property the title to which had been transferred by John W. Shierman in his lifetime to Nettie A. Shea, as there was no consideration for same and the county court does not have jurisdiction of such property and cannot determine its title." The motion for rehearing was overruled and mandate duly issued.

Plaintiff then brought this action to have it decreed that the real estate and capital stock in question were her individual property. She alleged that, as to the property involved, "said purported agreement * * * was wholly without any consideration passing to Nettie A. Shea and the same was not intended or made as a gift, and therefore said judgment thereon is not valid and binding on this plaintiff." Whether the property involved had passed from the decedent to plaintiff prior to his death, so that it could have been claimed not to constitute part of his estate, is here immaterial and no longer litigable. The settlement agreement treated it as part of the estate. For purposes of the settlement, it would continue to remain such until the agreement was set aside or reformed.

When plaintiff asserted a right to renounce and revoke the agreement, and defendants asked the court to decree its obligations to be binding and enforceable, plaintiff, in liti-

gating the issue, was required to present to the court every known, material ground in favor of such right of revocation which then existed and on which she intended to rely. If the property involved had been included in the settlement agreement by fraud or mutual mistake, that question was a material consideration in determining whether a right of revocation existed, or whether the agreement should be confirmed and enforced. Plaintiff, as a matter of fact, directly injected the question of her ownership of the stock and real estate at various stages of the proceedings, as has already been pointed out. Whether she is now satisfied with the manner and extent of its injection is unimportant. It was necessarily involved in the proper determination of the issue presented, and the decree confirming the settlement agreement and quieting title to the real estate in defendants and declaring them to be the owners of the capital stock was *res judicata* of the questions now sought to be raised. *Lowe v. Prospect Hill Cemetery Ass'n,* 75 Neb. 85, 106 N. W. 429; *Cromwell v. County of Sac,* 94 U. S. 351, 24 L. Ed. 195.

AFFIRMED.

METROPOLITAN LIFE INSURANCE COMPANY, APPELLEE, V. MARY SUVERKRUBBE ET AL., APPELLANTS.
284 N. W. 342

FILED MARCH 3, 1939. No. 30519.

1. **Mortgages.** The fairness of the price on a foreclosure sale is a question primarily for the trial court. Where there is no irregularity or taint in the proceedings, confirmation will not be set aside on appeal unless the bid is so low as to produce a clear conviction of unconscionableness.
2. ———. A purported motion to set aside a foreclosure sale on the ground that the bid is so inadequate as to be inequitable and to shock the conscience is nothing more than a formal objection to confirmation, and is automatically disposed of by the order of confirmation; and the failure of the trial court to make a separate ruling thereon is not error.

3. ———. It is not error for the trial court to grant a writ of assistance on oral application at the time of confirmation of a foreclosure sale, where the right thereto clearly exists and the parties affected are before the court.

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

Charles W. Haller, for appellants.

Cranny & Moore, contra.

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

JOHNSEN, J.

This is an appeal from an order confirming a mortgage foreclosure sale, on the grounds, (1) that the price was inadequate; (2) that the court entered confirmation without ruling on defendant's motion to set aside the sale; and (3) that it was improper to provide for a writ of assistance in the order of confirmation.

On the first point, defendant contends the bid was unconscionable. The property was sold to plaintiff for $8,095, the amount of its decree, interest and costs. The question of value was tried on affidavits. Five affidavits for plaintiff fixed the value at around $8,000, and five affidavits for defendant at around $15,000. Plaintiff was the sole bidder at the sale. Practically 90 days elapsed before confirmation, but no offer on the part of any one to make a higher bid on a resale was shown. The fairness of the price on a foreclosure sale is a question primarily for the trial court. Where there is no irregularity or taint in the proceedings, confirmation will not be set aside on appeal unless the bid is so low as to produce a clear conviction of unconscionableness. The rule has been repeated so often that citation of authority is unnecessary. The record in this case does not produce such a conviction.

On the second point, it is argued that the court erred in confirming the sale without expressly ruling on defendant's motion to set aside the sale. The basis of the so-called

motion was that the bid was so inadequate as to be inequitable and to shock the conscience. This was nothing more than a formal objection to confirmation which required no separate ruling, but was disposed of automatically by the order of confirmation.

On the third point, defendant insists that the court erred in providing for a writ of assistance in the order of confirmation where there was no express prayer therefor in the petition or in the motion for confirmation. Procedural form is unimportant except as it serves to safeguard the substantive rights of litigants or to avoid confusion and instability in judicial proceedings. There could be no prejudice in granting a writ of assistance on oral application at the time of confirmation, where the right thereto clearly existed and the parties affected were before the court. *Metropolitan Life Ins. Co. v. Heany*, 122 Neb. 747, 241 N. W. 525.

The judgment is affirmed, with leave to redeem before issuance of the mandate.

AFFIRMED.

BEN HANSEN, APPELLANT, V. PAXTON & VIERLING IRON WORKS, APPELLEE.

284 N. W. 352

FILED MARCH 3, 1939. No. 30583.

1. **Workmen's Compensation:** APPEAL. No certified transcript of the pleadings and orders of the workmen's compensation court is required to be filed in the district court in order to give it jurisdiction of an appeal in which a rehearing or retrial has been waived before the compensation court.
2. ———: ———. To give the district court jurisdiction in a compensation case in which a rehearing or retrial is waived before the compensation court, it is only necessary that there be filed, within fourteen days, a waiver of rehearing and a notice of intention to appeal in the compensation court, and an application or petition for a trial *de novo* in the district court, setting out the errors on which it is sought to reverse or modify the award of the compensation court. The statement of errors in

the application or petition does not limit the scope of the hearing in the district court, but merely serves to point out the questions or issues which should be given particular attention on the retrial.

3. ———: ———. No præcipe need be filed or summons issued and served in the district court in order to give it jurisdiction of an appeal from the workmen's compensation court in a case where rehearing or retrial has been waived in the compensation court. In such a case, the clerk of the district court, as a matter of course, is required immediately to serve copies of the application or petition upon the adverse party by mail or otherwise, as provided in section 48-174, Comp. St. Supp. 1937.

4. ———: ———. While a motion for a new trial is unnecessary in a workmen's compensation case, if such a motion is filed in the district court under the general provisions of the Code of Civil Procedure, the time for perfecting an appeal from the district court to the supreme court does not commence to run until the overruling of such motion.

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

McKenzie & Dugan, for appellant.

Rosewater, Mecham, Shackelford & Stoehr, contra.

Kennedy, Holland, De Lacy & Svoboda, Edwin Cassem and *G. H. Seig, amici curiæ.*

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

JOHNSEN, J.

This is an appeal from an order of the district court in a compensation case, sustaining a special appearance and entering a dismissal on the ground of lack of jurisdiction.

Plaintiff instituted proceedings before the workmen's compensation court, and, after a hearing before one of the three judges thereof, his claim was denied and dismissed on its merits. Within fourteen days, he filed a waiver of rehearing and a notice of appeal in the compensation court, and a petition on appeal in the district court. Attached to his petition in the district court, as exhibits, were purported copies of the petition, answer, award, waiver of rehearing,

and notice of appeal in the compensation court. Defendant filed a special appearance, which the district court sustained, objecting to the jurisdiction of the court over its person, on the grounds, (1) that no certified transcript of the pleadings and orders of the compensation court had been lodged in the district court, and (2) that there had been no præcipe for summons filed and no summons issued and served upon defendant out of the district court.

The first question for consideration is whether a certified transcript of the pleadings and orders of the compensation court is necessary to give the district court jurisdiction of an appeal from the decision of one judge of the compensation court, where a rehearing before the full court is waived.

Section 48-174, Comp. St. Supp. 1937, prescribes the general procedure in compensation cases. Subdivisions (1), (2), and (3) make provision for the filing of a petition, issuance and service of summons, and the filing of an answer in the compensation court. Subdivision (4) provides for an initial hearing before one of the judges of the compensation court. Subdivision (5) grants the right to a trial *de novo* either before the compensation court en banc or in the district court. A rehearing or retrial may be had before the full compensation court upon the filing of an application, within fourteen days, "plainly stating the errors on which such party relies for reversal or modification," together with a copy thereof which the court is required to serve immediately upon the other party at interest.

Where such a trial *de novo* has been had before the compensation court en banc, an appeal can be taken to the district court only by filing therein, within fourteen days, "a verified petition setting forth the contention upon which such party relies for reversal or modification, together with a transcript of the pleadings before the compensation court and the orders of said court certified to by the clerk thereof and file within thirty days from the date of said final order a transcribed copy of the testimony and evidence taken before said compensation court, which tran-

script when certified to by the stenographer who made the record and settled by the compensation court as such shall constitute the bill of exceptions." The statute then continues: "Within seven days after the filing of such petition on appeal, a copy thereof shall be served upon the adverse party in the same manner as summons is served as provided in * * * subdivision (2) hereof and return of service shall be made within five days thereafter. Within fourteen days after the filing of the bill of exceptions, the district court * * * shall proceed to hear argument of counsel on the contentions raised in such petition and render judgment thereon according to the form of law: Provided, that a judgment, order or award of the compensation court shall be set aside only upon the following grounds: (1) That the court acted without or in excess of its powers. (2) That the order or award was procured by fraud. (3) That the findings of fact by the court are not supported by the record. (4) That the findings of fact by the court do not support the order or award."

It will be noted that, where a retrial has been had before the full compensation court, the appeal authorized to the district court is limited in scope and is primarily in the nature of an error proceeding. The legislature evidently intended the mode of procedure set out above as the principal channel for disposing of compensation disputes. An alternative but subordinate right to a trial *de novo* in the district court was, however, provided where a retrial before the compensation court is waived. *City of Lincoln v. Nebraska Workmen's Compensation Court*, 133 Neb. 225, 274 N. W. 576. It apparently was a carry over of the right which had existed under the previous statute, in connection with awards of the compensation commissioner, whom the compensation court superseded. While chapter 57, Laws 1935, preserved the right of trial *de novo* in the district court, it abolished the procedure which had been provided therefor by section 48-139, Comp. St. 1929.

The only part of section 48-174, Comp. St. Supp. 1937, expressly dealing with the right to a trial *de novo* in the

district court is in the form of a proviso to a definition of the power of the compensation court to modify or change the findings or award rendered by it on a rehearing, and reads as follows: "Provided, however, that in any case the employer or the injured employee or his dependents, as the case may be, may waive rehearing before the compensation court and in such case any appeal shall be directly to the district court * * * which court shall have the authority to hear and determine the cause as in equity, when the same for all purposes shall be tried as one in equity; and that said appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court, and in such cases the trial in the district court shall be a trial *de novo*." This proviso is independent of the rest of section 48-174, Comp. St. Supp. 1937, except in its reference that "said appeal to the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court."

Defendant argues that the provision for a certified transcript, required on a review by the district court of an award of the compensation court en banc, is intended to apply equally to an appeal to the district court where rehearing or retrial before the compensation court has been waived. All of the provisions of the statute quoted in the fifth paragraph of this opinion clearly are intended to apply only to cases where a rehearing or retrial is had before the compensation court. The requirement for a transcript is dealt with coordinately and in the same sentence with a requirement for a bill of exceptions. The latter obviously has no application except to a retrial before the compensation court en banc. The joint requirement for a transcript and bill of exceptions shows that it was intended to be limited to appeals in the nature of error proceedings, following a trial before the compensation court en banc.

In addition to this, the language of the statute applicable to an appeal to the district court, where a rehearing before the compensation court is waived, is clear, even though the procedure prescribed may seem informal. An "appeal to

the district court shall be taken and perfected in the same manner as provided for appeals to the compensation court." The right to a review or retrial before the compensation court en banc is referred to in the statute as an appeal to the compensation court. In either the compensation court or the district court the proceedings had are trials *de novo*. It was not unnatural for the legislature to term a resort to either of them as an appeal, nor, since the purpose of both proceedings is the same, to provide identical procedure in obtaining a retrial.

The right to a trial *de novo* in the district court where rehearing is waived in the compensation court, and where notice of appeal is given under section 48-157, Comp. St. Supp. 1937, depends, therefore, not upon the filing of a certified transcript of the pleadings and orders of the compensation court, but upon the filing, within fourteen days, in the district court, of "an application for a rehearing (trial *de novo*) plainly stating the errors on which such party relies for reversal or modification." Since the proceedings before both the compensation court and the district court are trials *de novo*, the statement of errors does not limit the scope of the hearing in the district court, but merely serves to point out the questions or issues which should be given particular attention on the retrial. The records of this court indicate that the interpretation of the statute here adopted is that which has been followed generally by the profession in past proceedings.

While, as has been indicated, the procedure on an appeal to the district court for a trial *de novo* is a bit informal, it is nevertheless adequate, especially if there is attached to the application or petition in the district court copies of the pleadings, orders and other pertinent filings in the compensation court, such as was done in this case. In any event, the district court, of course, has the right to require that the issues be clarified in any necessary way, not as a matter of jurisdiction, but for purposes of orderly disposition.

The next question involved is whether it is necessary, in

order to give the district court jurisdiction on an appeal from the award of one of the judges of the compensation court where a rehearing before the full court is waived, to file a præcipe and have summons issued and served in the district court. The statute makes no such requirement. As has been already pointed out, the procedure prescribed for obtaining a trial *de novo* before the compensation court en banc or in the district court is the same. Section 48-174, Comp. St. Supp. 1937, provides that a copy of the application for rehearing or retrial must be filed, and "the said court shall then immediately serve upon such other parties by mail or otherwise, as elsewhere herein provided, a copy of said application for rehearing." It is the clerk's duty to have such service made, without the necessity for a præcipe. *McIntosh v. Standard Oil Co.*, 121 Neb. 92, 236 N. W. 152.

The final point of defendant is that plaintiff failed to perfect his appeal to this court within thirty days from the judgment of dismissal in the district court. Plaintiff filed a motion for a new trial and perfected his appeal within thirty days from the overruling thereof. While such a motion is not necessary in a compensation case, where one in due form is filed, the time for perfecting an appeal to the supreme court commences to run from the overruling of the motion. *Lincoln Packing Co. v. Coe*, 120 Neb. 299, 232 N. W. 92.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

JENNIE H. HAYMAN, APPELLEE, V. CITY OF GRAND ISLAND, APPELLANT.

284 N. W. 733

FILED MARCH 10, 1939. No. 30474.

1. Taxation. Section 77-1923, Comp. St. 1929, authorizes the bringing of an original action to recover taxes paid, where the taxpayer claims that the tax was levied or assessed for an illegal or unauthorized purpose.

2. **Eminent Domain.** It is elementary constitutional law that the only foundation for a local assessment lies in the special benefits conferred by the improvement, and that a local assessment beyond the special benefits conferred is a taking of private property for public use without compensation, and, therefore, illegal. *Cain v. City of Omaha*, 42 Neb. 120, 60 N. W. 368.
3. **Action.** "The premature commencement of an action is not a jurisdictional matter, but is one which may be waived, as by a failure seasonably to interpose an objection upon this ground; and * * * ordinarily * * * if defendant, without objection, appears and pleads to the merits of the action, he cannot thereafter object that it was prematurely commenced." 1 C. J. 1152.

APPEAL from the district court for Hall county: EDWIN P. CLEMENTS, JUDGE. *Affirmed.*

Paul C. Holmberg and *A. G. Abbott*, for appellant.

H. G. Wellensiek, contra.

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

SIMMONS, C. J.

The defendant city of Grand Island levied a special assessment on plaintiff's property in that city to pay for the expenses and damages occasioned by the widening of a street. Plaintiff paid the tax and brought an original action to recover the same, alleging that the assessment was for an illegal purpose. Plaintiff recovered judgment for a part of the tax paid. Defendant appeals.

Prior to the events causing this litigation, Court street in the city of Grand Island was sixty feet wide to the west of Pine street. Sycamore street is immediately east of and parallel to Pine street. As originally platted, Court street did not extend east from Pine to Sycamore street.

In 1914 the owners of what is now the south half of Court street between Pine and Sycamore streets conveyed the same to the city of Grand Island for public street purposes. Court street, west of Pine street, was then sixty feet wide, and east of Pine street, was thirty feet wide.

The plaintiff is the owner of the property to the north

of Court street between Pine and Sycamore streets, upon which were located her home and two rental residence properties. The defendant is a city of the first class. By ordinance passed February 19, 1930, the defendant condemned the south thirty feet of plaintiff's property for street purposes, and thereby widened Court street to sixty feet from Pine street to Sycamore street. The property so taken was appraised, and plaintiff's damage determined to be $1,800. The defendant paid the amount to the plaintiff, and it was accepted by her. No complaint is made as to those proceedings.

The city council of defendant sat as a board of equalization to determine the benefits to plaintiff's property. Plaintiff appeared before said board and objected to the assessment of her property, claiming that no benefits accrued thereto as a result of the widening of said street. Defendant found that benefits did accrue to plaintiff's property, and, by ordinance passed November 19, 1930, levied special taxes to pay for the expenses and damage of widening Court street in accordance with the benefits so found. By that ordinance, defendant assessed a total of $1,053.30 against plaintiff's property. The remainder of the $1,800, paid plaintiff as damages, was assessed in relatively small amounts against several pieces of adjacent property.

On November 29, 1930, the defendant notified plaintiff of such special assessment; that it would become delinquent December 21, 1930, and that it would draw interest at the rate of 1 per cent. per month thereafter. On December 19, 1930, plaintiff paid said special assessments under protest, and so notified the treasurer of the defendant. Plaintiff gave as her reasons, among others, that the special tax levied against her property was in excess of any benefits to said property; that it was a confiscation of said property without due compensation and without due process of law; that said property was not benefited by the widening of Court street; that the city was without legal authority to assess special taxes against the property; that they were invalid, inequitable, and unjust; that they were dispropor-

tionate to other taxes levied on other property so situated; that they were not levied in accordance with the benefits derived by the property, but were arbitrarily assessed; and for those reasons were illegal. Plaintiff demanded repayment within the time provided by law, and notified the city that, if it failed to repay said sum, legal proceedings would be started to recover the same. The defendant did not refund the taxes so paid. On February 7, 1931, plaintiff began this action, and service was had upon the defendant city on February 9, 1931.

Plaintiff did not prosecute her cause with diligence. The defendant did not insist upon a disposition of the action. Exactly seven years after the original petition was filed, the matter was put at issue upon plaintiff's second amended petition, an amended answer, and reply.

The amended petition recited the facts in detail, and concluded that "said special taxes are unauthorized, invalid, illegal, and confiscatory." Plaintiff prayed for the recovery of said special taxes so paid. Defendant's amended answer alleges the benefits it claims accrued to plaintiff's property, the finding of the board of equalization, the assessment, that no proceedings in error were had, and that the assessment thereby became final. The reply was a general denial. The case was tried in March, 1938.

Defendant objected to the introduction of any evidence, on the ground that the petition did not state a cause of action; that the plaintiff's remedy was to take the matter to the district court on error proceedings; that the plaintiff had not proceeded in that manner; that the present proceeding was a collateral attack; that the plaintiff's suit was prematurely brought, and that the petition does not show that the tax was for an illegal or unlawful purpose. Defendant moved for a directed verdict on substantially the same ground. The motion was overruled by the trial court. The jury rendered a verdict for the plaintiff in the sum of $777.44.

Defendant's motion for a new trial was overruled. In that motion, and on appeal in its errors assigned in this

court, defendant raises substantially these propositions: *First,* that the plaintiff should have appealed by error from the assessment of benefits made by the city council, and that an original action cannot be maintained to recover the tax; *second,* that the court erred in instructing the jury that, if they found that the special tax was in excess of the benefits accrued, they should include, in their verdict, interest on the amount of such excess; *third,* that the action was prematurely brought.

Section 77-1923, Comp. St. 1929, provides as follows: "No injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof hereinafter levied, nor to restrain the sale of any property for the nonpayment of any such tax, except such tax or the part thereof enjoined be levied or assessed for any illegal or unauthorized purpose; nor shall any person be permitted to recover by replevin, or other process, any property taken or restrained by the county treasurer for the nonpayment of any tax, except such tax be levied or assessed for illegal or unauthorized purpose; but in every case the person or persons claiming any tax, or any part thereof, to be for any reason invalid, who shall pay the same to the county treasurer, may proceed in the following manner, viz.: First. If such person claim a tax, or any part thereof; to be invalid for the reason that the property upon which it was levied was not liable to taxation, or that the property has been twice assessed in the same year and taxes paid thereon, he may pay such taxes under protest to the county treasurer, or other proper authority, and it shall be the duty of the treasurer, or other proper authority receiving such tax, to give a receipt therefor stating thereon that they were paid under protest, and the grounds of such protest, whether or not taxable or twice assessed, and taxes paid thereon. * * * Second. If such person claim the tax or any part thereof to be invalid for the reason that it was levied or assessed *for an illegal or unauthorized purpose,* or for any other reason except as hereinbefore set forth, when he shall have paid the same to the treasurer, or other

proper authority, in all respects as though the same was legal and valid, he may, at any time within thirty days after such payment, demand the same in writing from the treasurer of the state, or the county, city, village, township, district or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded *within ninety days* thereafter, may sue such county, city, village, township, district or other subdivision for the amount so demanded; and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid, judgment shall be rendered therefor *with interest* and the same shall be collected as in other cases." (Italics ours.)

The provisions of this statute were analyzed in the case of *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb. 393, 69 N. W. 958. This court there held:

"It is very evident that the legislature has, by the foregoing section, provided two separate and distinct modes of procedure to obtain illegal taxes which have been paid under protest,—one by the presentation of a claim for such taxes, by the person paying the same, to the county board for audit and allowance, with the right of appeal from the decision provided for; and the other remedy being by suit at law to recover such taxes. But it will not escape notice that the method of procedure is determinable by the ground or grounds which render the taxes illegal. The first method provided in the section is limited to taxes imposed on property not subject to taxation, or to taxes rendered invalid by the reason of double assessment of the same property, *while suit* against the county, city, or other subdivision *is authorized* when the tax paid under protest was imposed for an *illegal* or unauthorized purpose, or for any reason other than for double assessment, or that the property was exempt from taxation, is invalid." (Italics ours.) That holding was affirmed by this court in *Chase County v. Chicago, B. & Q. R. Co.*, 58 Neb. 274, 78 N. W. 502.

This court had the matter specifically before it in the

case of *City of Omaha v. Hodgskins,* 70 Neb. 229, 97 N. W. 346. The procedure there used has been followed by the plaintiff in the instant case. This court there held that an original action could be maintained under the statute to recover illegal taxes which have been paid.

The case of *Cain v. City of Omaha,* 42 Neb. 120, 60 N. W. 368, is a case strikingly similar to the one at bar. There a street was opened, plaintiff's property taken, and the plaintiff was awarded damages in the sum of $3,010. The city council then assessed benefits in the sum of $2,000 against plaintiff's property, and the remainder was assessed in small sums over a large amount of property in the neighborhood. In that action, plaintiff brought suit for the recovery of the taxes under the provisions of what is now, in a modified form, section 16-628, Comp. St. 1929. The first paragraph of the syllabus of that case is:

"The only foundation for a local assessment lies in the special benefits conferred upon the property assessed, by the improvement to pay which the assessment is made, and an assessment beyond the benefit so conferred is a taking of property for public use without compensation, *and therefore illegal.*" (Italics ours.)

The court further stated: "It is but just that where a portion of one's property is taken under circumstances allowing no deduction for benefits conferred upon the remainder, the remainder, if specially benefited, should bear its fair proportion of the cost of the improvement; but the courts will not permit municipalities to evade the provision of the Constitution, that the property of no person shall be taken or damaged for public use without just compensation, by paying the compensation and then under the guise of taxation taking it back from the person entitled." The rule announced in *Cain v. City of Omaha, supra,* has been repeatedly followed in subsequent decisions of this court.

This court in *Munsell v. City of Hebron,* 117 Neb. 251, 220 N. W. 289, stated: "The owner of property in a municipality cannot lawfully be assessed for a public improve-

ment thereon or adjacent thereto beyond the amount of the present benefit or such reasonably prospective benefit as such owner may derive from the improvement in question."

The plaintiff proceeded properly in filing an original action for the recovery of these taxes.

Defendant next contends that interest should not have been allowed. That contention is specifically answered by the statute itself which provides that the suing taxpayer shall recover judgment for the illegal or unauthorized taxes "with interest."

Defendant next contends that plaintiff's action was prematurely brought. The statute provides that the person claiming the tax to be illegal or unauthorized may make a demand within thirty days after payment for the repayment thereof, and that, if the same shall not be refunded within ninety days thereafter, the taxpayer may sue.

The demand for the refund was made December 19, 1930. The ninety-day period had not expired at the time plaintiff brought her suit. On March 9, 1931, the defendant filed a special appearance herein on the ground that "the court has no jurisdiction over the subject-matter." No ruling thereon is shown. November 6, 1931, plaintiff filed an amended petition. November 20, 1931, defendant filed a motion, and February 18, 1932, filed a demurrer to said amended petition. March 13, 1933, plaintiff filed a second amended petition. April 12, 1933, defendant filed a motion, and February 15, 1937, filed a demurrer. On May 15, 1937, the defendant answered. So far as we can determine from the record submitted, the question of prematureness was not raised until defendant filed its amended answer October 25, 1937, in which it was merely stated "that plaintiff's action is immaturely brought in any event."

"The premature commencement of an action is not a jurisdictional matter, but is one which may be waived, as by a failure seasonably to interpose an objection upon this ground; and it is ordinarily held that if defendant, without

objection, appears and pleads to the merits of the action, he cannot thereafter object that it was prematurely commenced." 1 C. J. 1152.

Without deciding whether or not the action was prematurely brought, we hold that that objection was waived.

We have examined the other assignments of error made by the defendant, and do not find that any substantial right of the defendant has been affected thereby.

The judgment of the district court is

AFFIRMED.

ALFONS HIESTAND, APPELLEE, V. RUDOLPH A. RISTAU ET AL., APPELLANTS.
284 N. W. 756

FILED MARCH 10, 1939. No. 30571.

1. **Workmen's Compensation:** IMMUNITY. The word "requires" means compel or exact, as used in that part of the workmen's compensation law granting immunity from workmen's compensation to an owner who requires his contractor to procure compensation insurance for the latter's employees.
2. ———: ———. Under the workmen's compensation law, an owner who inserts in a contract with his contractor a futile promise by the latter to procure compensation insurance for the workmen he employs to repair a building for the owner does not thus escape liability for their compensable injuries.
3. ———: ———. In the workmen's compensation law, the terms "any scheme, artifice or device" creating a joint and several liability of owner and contractor for compensable injuries to workmen, do not necessarily imply active fraud or evil design.
4. ———: LIABILITY. The making of a contract between owner and contractor for the repair of buildings, including a promise by the contractor to procure compensation insurance for workmen, the failure of the owner to exact compliance with that promise and the making of the repairs by the contractor without such insurance, *held* sufficient to prove a "scheme, artifice or device" making both owner and contractor liable to contractor's employees for compensable injuries, within the meaning of the workmen's compensation law.
5. ———: "EMPLOYEE." In the workmen's compensation law, the provision that the word "employee" shall not be construed

to include "any person whose employment is casual, and which is not in the usual course of trade, business, profession or occupation of his employer," means conjunctively both casual employment and usual course of trade.

6. ———: "CASUAL EMPLOYMENT." Within the meaning of the workmen's compensation law, "casual" employment, exempting employer from liability for compensation, means occasional; coming at certain times without regularity, in distinction from stated or regular. Comp. St. 1929, sec. 48-115.
7. ———: ———. Employment of a carpenter by a contractor for several weeks continuously to repair farm and other buildings for the owner is not "casual;" nor is an accidental injury of the carpenter in such work noncompensable as farm labor, within the meaning of the workmen's compensation law.
8. ———. The repairing of buildings on farms temporarily owned by a life insurance corporation, to make the farms rentable and salable for insurance revenue to meet maturing insurance obligations of the insurance corporation, is in its usual course of business, within the meaning of the workmen's compensation law.
9. ———: "SEASONAL EMPLOYMENT." "'Seasonal employment' refers to occupations which can be carried on only at certain seasons or fairly definite portions of the year, and does not include such occupations as may be carried on through the entire year." *Hogsett v. Cinek Coal & Feed Co.*, 127 Neb. 393, 255 N. W. 546.
10. ———: ———. The trade or occupation of a carpenter may be pursued throughout the year and is not "seasonal" in the sense that it is a defense to the claim of a carpenter for workmen's compensation.
11. ———: AWARD. An award of 20 per cent. for permanent partial disability in the loss of the use of a carpenter's left foot as the result of a fall causing a fracture of the os calcis, *held* not excessive.
12. ———: PENALTIES. Where there is a reasonable controversy over the liability of defendant for workmen's compensation, penalties for "waiting time" are not recoverable.

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

Brown, Fitch & West and *Robins & Yost*, for appellants.

John P. Corbett, Harold M. Shultz and *Cook & Cook, contra.*

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161. While Alfons Hiestand, a carpenter, was engaged in shingling a barn, the scaffolding which had protected him on the roof gave way and he fell to the ground, November 20, 1936, a distance of 14 feet, and broke the os calcis of his left foot. Pleading that the accident and resulting injury arose out of and in the course of his employment, he presented to the compensation court a claim for compensation, joining as defendants Rudolph A. Ristau and the Equitable Life Assurance Society, a corporation owning the farm in Dodge county on which the barn was located. Ristau was the contractor employed by the insurance corporation to furnish the materials and labor and to repair the barn.

In the petition for compensation, it was alleged in substance that the wages of plaintiff were $19.20 a week; that he was totally disabled for three months; that the permanent partial loss of the use of his left foot was 50 per cent.; that the insurance corporation is liable for compensation for failure to require the contractor to carry compensation insurance for the benefit of his employees; that defendants adopted a scheme, artifice or device to have the barn repaired without liability to workmen for compensable injuries.

The compensation court adjudged awards, based on employee's weekly wages of $19.20, in favor of plaintiff and against both defendants, as follows: Total temporary disability of employee from November 20, 1936, to April 16, 1937, 21 weeks, at $12.80 a week; compensation for a 20 per cent. permanent partial disability in the loss of the use of employee's left foot, $12.80 a week for 30 weeks from April 16, 1937. The same awards were made upon appeal by defendants to the district court for Dodge county, where attorney fees of $137.50 were taxed against defend-

ants in favor of plaintiff as costs. From the judgment of the district court defendants appealed to the supreme court.

The Equitable Life Assurance Society, defendant, called "corporation" for brevity, takes the position that it is not liable to plaintiff for compensation, because it required its contractor, Ristau, to procure compensation insurance for his employees pursuant to the workmen's compensation law, which provides:

"Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this article, shall be included in the term 'employer' and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this article. This section, however, shall not be so construed as to cover or mean an owner who lets a contract to a contractor in good faith, or a contractor who, in good faith, lets to a subcontractor a portion of his contract, if the owner or principal contractor, as the case may be, requires the contractor or subcontractor, respectively, to procure a policy or policies of insurance from an insurance company licensed to make such insurance in this state, which policy or policies of insurance shall guarantee payment of compensation according to this article to injured workmen." Comp. St. 1929, sec. 48-116.

The corporation conducts a life insurance business under a charter from the state of New York and has authority to transact business in Nebraska and to invest insurance funds in mortgages on Nebraska lands and to take and hold for five years title to such lands in payment of loans of insurance funds. It temporarily owns in this state 20 farms thus acquired, among them the farm on which plaintiff was injured as the result of falling from the roof of the barn. The evidence upon which the corporation relies to prove that it required its contractor to procure compensation insurance is found in a common form of contract between owner and contractor and providing:

"Contractor shall maintain, in connection with this work, insurance as will protect him from claims under workmen's compensation act of the particular state in which he is operating and from any other claims under personal injuries or otherwise which may arise from this work; contractor shall save the owner harmless and indemnify him from every expense, liability or payment, by reason of any injury to person or persons, or damage to property resulting from an action or operation under this order."

The contractor did not perform the agreement to procure compensation insurance and said he was without means to do so. Did the corporation "require" such protection for employees by the mere unperformed agreement to procure this insurance? The answer depends on what the lawmakers meant and expressed by the use of the word "requires," as it appears in the workmen's compensation law. Compliance with that requirement was a condition of immunity from liability for workmen's compensation. The letting of a contract to a contractor who could not and did not procure such insurance did not accomplish the legislative purpose or comply with the condition for immunity or protect workmen by insurance. The lawmakers intended the requirement to be effective and necessarily used the word "requires" with that end in view. An unperformed agreement for compensation insurance is not the requirement of it within the meaning of the provision quoted from the workmen's compensation law. "Requires," in the sense therein used, means "compel" or "exact," adjudicated definitions. *Kennedy v. Falde,* 4 Dak. 319, 29 N. W. 667; *Meagher v. Van Zandt,* 18 Nev. 230, 2 Pac. 57; *State v. McCord,* 8 Kan. 232; *Vogrin v. American Steel & Wire Co.,* 263 Ill. 474, 105 N. E. 332; *Butler Street Foundry & Iron Co. v. Industrial Board,* 277 Ill. 70, 115 N. E. 122. The contractor did not procure compensation insurance nor pay compensation. The "good faith" of the corporation, therefore, in inserting in its contract with the contractor his futile promise to procure compensation did not amount to a requirement therefor within the meaning of the statute

nor comply with the statutory condition for immunity for compensable injuries to the workmen.

The statutory terms "any scheme, artifice or device" creating a joint and several liability of owner and contractor for compensable injuries to workmen, do not necessarily imply active fraud or evil design. *Sherlock v. Sherlock,* 112 Neb. 797, 201 N. W. 645. The making of the contract obligating the contractor to procure compensation insurance, the failure of obligee to exact performance of that duty, and the action of the contractor in making the repairs without procuring the insurance, amounted to a "scheme, artifice or device" which made both owner of the barn and the contractor liable for compensable injuries of workmen. Comp. St. 1929, sec. 48-116; *Sherlock v. Sherlock,* 112 Neb. 797, 201 N. W. 645.

To reverse the allowances for compensation both defendants invoke the statutory provision that the word "employee" shall not be construed to include "any person whose employment is casual, and which is not in the usual course of the trade, business, profession or occupation of his employer." Comp. St. 1929, sec. 48-115. This means conjunctively both "casual employment" and "usual course of trade, business, profession or occupation." *Sherlock v. Sherlock,* 112 Neb. 797, 201 N. W. 645; *Guse v. Wessels,* 132 Neb. 41, 270 N. W. 665. It is argued by defendants that plaintiff's employment was casual within the meaning of both provisions creating immunity from liability for compensation. The preponderance of the evidence, including the surrounding circumstances, is to the contrary. Plaintiff was a carpenter by trade and was employed by the contractor as such. He was not employed for a single job and reemployed for each of a series of jobs. He testified he started to work for Ristau March 5, 1936, and worked for him until November 20, 1936, the date of his injury; that his employment was continuous; that he was told in advance the work of his employment would last six to eight weeks; that he worked as carpenter for his employer on different contracts, describing them; that Ristau and others

were at work on the same roof at the time of the accident. It was stipulated that plaintiff's compensation was 40 cents an hour, or $12.80 a week for compensable injuries, if any. The statute defines "casual" as used by the lawmakers in reference to compensation, as follows:

"The term 'casual' shall be construed to mean 'occasional; coming at certain times without regularity, in distinction from stated or regular.' " Comp. St. 1929, sec. 48-115; *Bridger v. Lincoln Feed & Fuel Co.*, 105 Neb. 222, 179 N. W. 1020.

Under this definition, the better view of the evidence is that the employment of plaintiff in the case at bar was not casual. Nor was the injury noncompensable as resulting from farm labor. *Guse v. Wessels*, 132 Neb. 41, 270 N. W. 665.

Was the employment of plaintiff within the "usual course of the trade, business, profession or occupation" of the corporation? It was employer of the contractor and was engaged in the life insurance business. In the course thereof it legally invested insurance funds, made loans and secured them by mortgages on farms. For the payment of loans it lawfully took title to land mortgaged in its business and may hold the title for five years for the purposes of sale and conservation of insurance property to meet maturing insurance obligations. The repairing of buildings on such farms to make them salable and rentable for insurance revenue is in the usual course of the insurance business of the insurance corporation. It seems clear from the statute and the evidence that this defense is unavailing.

It is further insisted that the employment was seasonal and that consequently compensation was erroneously allowed under the workmen's compensation law. Comp. St. 1929, sec. 48-126. The law is that " 'Seasonal employment' refers to occupations which can be carried on only at certain seasons or fairly definite portions of the year, and does not include such occupations as may be carried on through the entire year." *Hogsett v. Cinek Coal & Feed Co.*, 127 Neb. 393, 255 N. W. 546. See *Gorham v. Kiewit*

Sons Co., 129 Neb. 277, 261 N. W. 353; *Lincoln Gas & Electric Light Co. v. Watkins*, 113 Neb. 619, 204 N. W. 391. The true import of the evidence is that the trade or occupation of a carpenter may be pursued throughout the year. It follows that it is not seasonal as a defense to workmen's compensation.

Compensation for a 20 per cent. permanent partial disability for the loss of the use of employee's left foot is challenged by defendants as excessive. That there was a permanent partial disability in the use of the ankle is clearly shown, but experts were not in accord on the exact percentage of loss. A physician who made an examination June 4, 1937, found a disability of 25 per cent., with the prognosis there will be "marked improvement." The same physician said later that there was still a 25 per cent. disability in ladder climbing. There is also testimony that the medical advisory board of the compensation court in June, 1937, after an examination and the aid of X-rays showing a fracture of the os calcis with position and alignment normal and slight limitation of motion, found a 20 per cent. disability. One expert testified to the opinion there was no permanent disability, but, on the entire record, defendants insist there is no evidence to sustain a permanent partial disability exceeding 10 per cent. The estimates limited to that loss, however, seem to disregard to some extent the 25 per cent. disability in ladder climbing, an essential activity of a carpenter. Defendants' view of the evidence seems to overlook plaintiff's own evidence of disabling pain and also weakness from continuous use of the left foot. The compensation court and the district court found the permanent partial disability to be 20 per cent. and that estimate is adopted as the proper finding under the evidence.

In addition to compensation, plaintiff seeks penalties for "waiting time" under the workmen's compensation law. Comp. St. 1929, sec. 48-125. There was a reasonable controversy over the liability of defendants for compensation and the claim for penalties was properly disallowed by the

district court. *Updike Grain Co. v. Swanson,* 104 Neb. 661, 178 N. W. 618.

On a review of the whole case, error prejudicial to defendants has not been found. Attorney fees of $100 in favor of plaintiff for services of counsel in the supreme court will be taxed against defendants as costs.

AFFIRMED.

WILLIAM HELGENBERGER, APPELLEE, V. RUDOLPH A. RISTAU ET AL., APPELLANTS.
284 N. W. 761

FILED MARCH 10, 1939. No. 30572.

Rulings sustaining awards for workmen's compensation against contractor and owner of building repaired by former's employees in *Hiestand v. Ristau, ante,* p. 881, 284 N. W. 756, followed.

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

Brown, Fitch & West and *Robins & Yost,* for appellants.

John P. Corbett, Harold M. Shultz and *Cook & Cook, contra.*

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161. The claim arose from the same accident as that for which compensation was allowed in the companion case of *Hiestand v. Ristau, ante,* p. 881, 284 N. W. 756, determined herewith. The facts are the same with the exception of injuries and amount of compensation. While William Helgenberger, plaintiff, a carpenter, was engaged in shingling a barn, the scaffolding which had protected him on the roof gave way and he fell to the ground, a distance of 14 feet, and broke the os calcis of his right foot. Pleading that the ac-

cident and resulting injury arose out of and in the course of his employment, he presented to the compensation court a claim for compensation, joining as defendants Rudolph A. Ristau and the Equitable Life Assurance Society, a corporation owning the farm in Dodge county on which the barn was located.

The compensation court awarded plaintiff against both defendants compensation as follows: For temporary total disability from November 20, 1936, to June 11, 1937, 29 weeks, $12.80 a week; for a 50 per cent. permanent partial disability for the loss of the use of plaintiff's right foot for 75 weeks from June 11, 1937, $12.80 a week. Upon appeal by defendants to the district court for Dodge county the allowances were the same as in the compensation court and attorney fees of $137.50 were taxed against defendants in favor of plaintiff as costs. From the judgment of the district court defendants appealed to the supreme court.

The allowances below are adopted on appeal as proper under the evidence. Upon a review of the entire record, prejudicial error in the proceedings and judgment of the district court has not been found. The material questions presented herein are determined in the companion case and the discussion of them need not be repeated. Similar services were rendered by the same counsel for the two plaintiffs and attorney fees of $100 for each will be taxed against the defendant as costs in the supreme court.

AFFIRMED.

BEN F. CONKEY, APPELLEE, V. HANS KNUDSEN, JR., ET AL., APPELLEES: HANS KNUDSEN ET AL., APPELLANTS: RALPH GEORGE ET AL., INTERVENERS, APPELLEES.

284 N. W. 737

FILED MARCH 10, 1939. No. 30483.

1. Waters: RIPARIAN RIGHTS. "Where the water of a river gradually recedes, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land

belongs to the riparian proprietor." *Topping v. Cohn*, 71 Neb. 559, 99 N. W. 372.

2. **Adverse Possession.** "The plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive and continuous possession under claim of ownership for the full statutory period of ten years." *Ellsworth Corporation v. Stratbucker*, 134 Neb. 246, 278 N. W. 381.
3. **Quieting Title.** When it appears that one who was the owner of lands to which accretions had attached conveys a part of said lands but retains possession of the accretions and the purchaser disclaims any interest therein, such person may properly maintain a suit to quiet the title thereto in himself as against defendants who prove no interest in or title to the accreted lands.

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

Malcolm R. Smith, S. W. McKinley, Jr., and *William P. Warner*, for appellants.

George W. Leamer, W. V. Steuteville, Sidney T. Frum, P. F. Verzani and *D. M. Vinsonhaler, contra.*

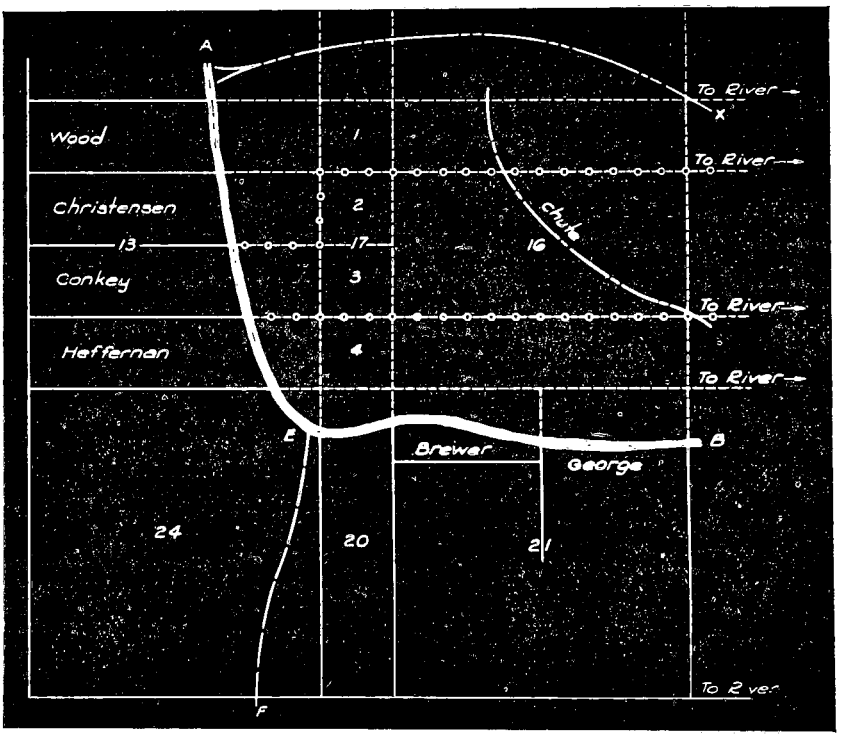
Heard before SIMMONS, C. J., ROSE, EBERLY, PAINE, CARTER, MESSMORE and JOHNSEN, JJ.

CARTER, J.

This is a suit to quiet title to certain accreted lands along the Missouri river in Dakota county. The trial court entered an order quieting plaintiff's title to the lands in question as against the defendants Hans Knudsen, Sine Knudsen, Maggie Leedom, and Otis Wood. From this order all of the defendants appeal.

The record discloses that plaintiff became the owner of the north half of the south half of section 13, involved herein, by the will of his cousin, Frank Conkey. Plaintiff likewise became the owner of the south half of the north half of section 13 and subsequently sold it to one Christensen. The accreted lands in question lie to the east of these two tracts. No claim is made by Christensen to any of the accreted lands other than those contained within the boundaries of the south half of the north half of section 13. Plaintiff claims the accretions lying east of the east

boundaries of the lands owned by Christensen and himself and which are shown in part in the following plat as lots 2 and 3 in section 17 and the south half of the north half and the north half of the south half of section 16. The accreted lands claimed by plaintiff are shown on the plat by the broken lines interspersed with small circles.



The accreted lands involved lie between the Missouri river and what is termed the high bank in the evidence. The high bank is represented by the line on the plat extending from points A to B, and was the west bank of the Missouri river in its former location in 1909. The river shifted its course so that in 1910 and 1911 it ran approximately as represented by the line extending from points A to X. The line designated as A to F represents the course of the river as shown by the government survey of 1858. It must also be borne in mind that the designation of the

accreted lands as sections, or parts of sections, is done only for convenience. The lands originally surveyed as such sections have been washed away and replaced by the accreted lands heretofore described.

It is not disputed that the defendant Otis Wood is the owner of the high bank in the north half of the north half of section 13, designated on the plat by the name of "Wood." Neither is it disputed that he owns the accreted lands east of the high bank represented on the plat as lot 1 in section 17 and the north one-fourth of section 16. The record discloses that Wood moved on the north half of the northeast quarter of section 13 in 1926, and at the same time took possession of the accreted lands immediately to the east of it. This defendant claims also to be the owner of the accreted land designated on the plat as lot 2 in section 17 by adverse possession. When defendant Wood located on the north half of the northeast quarter of section 13, a fence extended east along his south line from the high bank to a point 30 rods east of the east line of section 17. The evidence of the defendant Wood is that there was no gate in this fence between lots 1 and 2 until 1933, at which time he fenced in lot 2. The adverse possession of Wood prior to 1933 is based on the fact that he pastured some cows on that tract in 1926, and subsequent thereto. The testimony of Wood is that the division fence between lots 1 and 2 was in poor shape and that he drove his cattle through where the fence was down. After a consideration of all the evidence we are convinced the trial court rightfully determined that Wood failed to establish title by adverse possession.

The defendant Hans Knudsen claims title to the south half of section 17 and the south half of section 16 as shown on the plat. He went into possession in 1933, and fenced in parts of the land in 1934 and 1935. Clearly, no title was obtained by adverse possession as the statutory period of ten years could not possibly have elapsed. Sine Knudsen claims some interest in this tract by virtue of a quitclaim deed. Title was not shown to be in the grantor and consequently the deed can convey no interest to Sine Knudsen.

Defendant Maggie Leedom claims title to the south half of the northwest quarter and the southwest quarter of the northeast quarter of section 16 as shown on the plat. The record is clear that this defendant did not move onto this land until 1934. She also claims title by a quitclaim deed. No title was shown to be in the grantor and adverse possession was not shown for the statutory period.

All defendants contend, however, that plaintiff has failed to show title in himself and invoke the rule that he must rely upon the strength of his title and not upon the weakness of that of defendants.

The record discloses that Frank O. Conkey became the owner of the south half of the northwest quarter and the southwest quarter of the northeast quarter of section 13 by a deed in 1909. Frank O. Conkey also became the owner of the north half of the southeast quarter of section 13 by deed in 1926. The high bank ran through both of these tracts. All of the accreted lands between these tracts and the Missouri river became the property of Frank O. Conkey by virtue of these deeds. It is true that the sale of the south half of the north half of section 13 to Christensen would ordinarily convey the accretions between this tract and the river to the purchaser. The record shows, however, that Christensen never claimed any accreted land east of the west boundary of section 17 and that Frank O. Conkey's heirs remained in possession of these accretions and claimed them up to the date of the trial of this case. It cannot be questioned that Christensen and plaintiff could agree upon their respective interests in the accretions adjoining their lands regardless of their exact legal rights. *McCoy v. Paxton*, 156 Ia. 194, 135 N. W. 1091.

The following principles of law appear to control the decision of the case: "It is well settled that where, as in this case, the water of a river recedes gradually, changing the channel of the stream and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor." *Topping v. Cohn*, 71 Neb. 559, 99 N. W. 372.

"The plea of title to land by adverse possession, to be effective, must be proved by actual, open, exclusive and continuous possession under claim of ownership for the full statutory period of ten years." *Ellsworth Corporation v. Stratbucker,* 134 Neb. 246, 278 N. W. 381.

It is clear in the record that after plaintiff sold the south half of the north half of section 13 to Christensen, he retained possession of the accretions thereto. The only person who might establish a record title to any of these accretions is Christensen and he disclaims any interest therein. We think plaintiff has a sufficient title to maintain this suit against these defendants under the holding in *Ellsworth Corporation v. Stratbucker, supra,* wherein the court said: "The action is not ejectment but a suit in equity which is maintained to quiet title under the law of Nebraska while plaintiff is in possession. Defendants argue that plaintiff's title fails because a deed from Stevens to plaintiff is missing and that it must rely upon the strength of its own title and not upon the weakness of that of its adversary. In this connection the claims of defendants must be scrutinized. They pleaded adverse possession, but an examination of the record on that issue fails to prove they were in actual, open, exclusive and continuous possession of the strip of land in controversy under claim of ownership for the full statutory period of ten years. Adverse possession by defendants, therefore, was not proved. *Williams v. Lantz,* 123 Neb. 67, 242 N. W. 269. They failed also to prove title or other interest in themselves. Having no defense to plaintiff's cause of action and no valid claim for affirmative relief in equity, plaintiff, as against them, made a *prima facie* case for the quieting of title."

The judgment of the district court is

AFFIRMED.

MARIE E. HILD, APPELLANT, V. GEORGE M. HILD, APPELLEE.
284 N. W. 730

FILED MARCH 10, 1939. No. 30540.

1. **Divorce.** "Whether a divorce from bed and board or an absolute divorce shall be granted is a question vested in the sound discretion of the trial court." *Phillips v. Phillips, ante*, p. 313, 281 N. W. 22.
2. ———: ALIMONY. The trial court, in exercising its sound discretion to allow or refuse to allow permanent alimony, will consider the respective ages of the parties to the marriage, their earning ability, the duration of, and the conduct of each during, the marriage, their station in life, the circumstances and necessities of each, as well as their health and physical condition, whether the property was accumulated before or after the marriage, and all other circumstances pertinent to the case.
3. **Record** examined and *held* to support the findings and decree of the trial court.

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

William R. Patrick, for appellant.

Johnsen, Gross & Crawford, contra.

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

MESSMORE, J.

Plaintiff brought an action for separate maintenance, charging defendant with extreme cruelty. Defendant denied the allegation of cruelty and, by cross-petition, charged the plaintiff with extreme cruelty. The reply was a general denial.

The defendant, a man 62 years of age, previously married and divorced and the father of grown daughters, and the plaintiff, a woman 54 years of age, twice previously married and once divorced, and the mother of a grown daughter, were married April 7, 1937. At the time, plaintiff was a widow living in Oklahoma City, operating a boarding and rooming house, and met the defendant through her sister, a resident of Omaha. The defendant went to Oklahoma City, proposed marriage to plaintiff, and they were married

in Papallion, Nebraska, and went to Omaha, where they lived in a three-room apartment. The evidence is in sharp conflict and a detailed statement thereof would unnecessarily lengthen this opinion. We will, therefore, state the substance of the claims of the respective parties.

The evidence of plaintiff and her witnesses, her daughter, brother-in-law, sister and mother, shows excessive drinking of beer and whisky by defendant and drunkenness two or three times weekly; that he always had a case of beer and some whisky in the home; that his conduct was intolerable, his personal habits vile; he was unclean about his person and in his bed failed to properly attend to the wants of nature; that previous to his marriage he had lived in his own home in Plattsmouth, Nebraska, having a housekeeper to care for it. Two letters appear in the record showing rather close and intimate relations between the housekeeper and the defendant. Plaintiff received one letter and had full knowledge of another to her husband. Plaintiff states that the letters caused her much anxiety concerning the previous moral conduct of her husband and lessened her trust in him; that his attitude changed immediately after receipt and discussion of the letters; that he would leave the apartment and remain away all day, was difficult to get along with, and stated: "Well there is going to be a hell of a change before we get along." Plaintiff testified that defendant wanted to purchase a saloon in South Omaha and have her assist him in the business and live over the saloon, which she refused to do.

Defendant and witnesses in his behalf testified in substance: Plaintiff told defendant that she wanted a divorce, that she could not live with him and did not want to ruin her life or his, which he claims affected him mentally and physically. Very shortly after the marriage the plaintiff, in playing cards with some neighbors, and on many other occasions, stated that she did not intend to live with the defendant, and that when all of her debts were paid she intended to leave. Plaintiff did not bring her furniture to Omaha; most of it had been stored, except what she sold,

receiving therefor about $75, and she stated that she was able to start operation of her boarding and rooming house any time. She sought the services of a schoolteacher, with whom she had played cards and gone riding, to follow her husband, the teacher refusing. She advertised for, but did not employ, a detective for such purpose. She complained that defendant failed to provide for her adequate and proper food, when, in fact, she had been furnished ample food and milk, according to defendant's witnesses. All of the evidence of each party is vigorously denied by the other.

The trial court granted a decree of divorce to the defendant upon his cross-petition, finding that plaintiff should pay her own witness fees, and that the defendant should pay the costs and an attorney's fee fixed at $100. Plaintiff appealed.

Nebraska cases hold generally that the trial court is vested with sound discretion in determining whether a divorce from bed and board or an absolute divorce shall be granted, and in a majority of the cases an absolute divorce is to be preferred, depending upon the facts and circumstances of each case. See *Phillips v. Phillips, ante*, p. 313, 281 N. W. 22; *Sutherland v. Sutherland*, 132 Neb. 558, 272 N. W. 549; *McKnight v. McKnight*, 5 Neb. (Unof.) 260, 98 N. W. 62.

The instant case is one of that class of cases in which an opportunity to both hear and see the witnesses as they testify places the trial court in a much better position to know the weight and credibility that should be given to the testimony than a reviewing court can possibly be from reading a transcript thereof. This court tries this case *de novo*, and yet we have said that, where the testimony of witnesses upon the vital questions involved is conflicting, this court will consider the fact that an experienced trial judge observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. In the instant case, we think the trial court had a very definite advantage over the members of this court by observing the

witnesses and their manner of testifying and determining the truthfulness or untruthfulness of the stories as told by them. See *Clough v. Clough*, 132 Neb. 748, 273 N. W. 31; *Sutherland v. Sutherland, supra.*

Plaintiff further testified that at the time defendant proposed marriage to her he represented that each would dispose of his or her property, and that he would build her a home in Omaha, Denver, or California. There is some evidence that he represented to her that he had considerably more property than he actually owned. For instance, it is contended that he had owned a farm which he had sold for $15,000 to $17,000, and that he had told the plaintiff he had $5,000 in bonds. He did own 160 acres of farm land in Cass county, with a 15,000-dollar mortgage upon it, which farm he sold to his brother 12 years previously, and what he actually received for his equity, if any, is rather vague. The evidence discloses that his property consisted of a note for $330, given by the husband of plaintiff's cousin, which is apparently uncollectible; a note for $2,200, given in 1912 by his brother-in-law and sister, on which no interest had been paid for seven or eight years; $500 in the Murray State Bank; $100 in a South Omaha bank, and a 1936 Dodge coupé; also 80 acres of unimproved land in Perkins county, and he was indebted to one Ed Cecetka in the sum of $600.

The defendant's home in Plattsmouth was sold in November, 1936, a trifle over a year prior to his marriage to the plaintiff, to defendant's brother for $4,500, the brother at intervals paying $2,000 cash and giving a 2,500-dollar mortgage. There was a defect in the title, which had to be corrected before the defendant could give good and sufficient title. The 2,500-dollar mortgage was made in the name of both plaintiff and defendant. Plaintiff's testimony in this respect follows: "Q. What were the circumstances of that mortgage being made to both you and Mr. Hild? A. Well there was a delay in fixing the title. It wasn't just right or something and it was delayed. It took quite a little time to make out the papers. I asked him to have

it made in our names. My name as well as his." On cross-examination she testified: "Q. And before you would sign the deed for the transfer of the property, you had the mortgage made out to you, didn't you? A. To both of us, yes." The trial court quieted title of this mortgage in the defendant, and plaintiff's contention is that the court, by so doing, deprived her of her own property, and she bases this contention further upon the proposition that before the marriage defendant agreed to sell the property and build a home for both of them in Omaha, Denver, or California. However, there is also evidence that both of them were to sell their residences for such purpose. He had sold his property previously; she had not sold hers. While plaintiff does not state that she relies upon an interest in the mortgage as a gift from defendant, she indicates, however, such contention by her brief filed herein.

One of the essential elements of a gift is the intention to make it. A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential element of the gift, and this contention must be inconsistent with any other theory. As previously stated, in the instant case the defendant had disposed of his real estate in Plattsmouth prior to his marriage to plaintiff. She requested the 2,500-dollar mortgage to be made out to both of them before she would sign the deed conveying the title. The evidence does not disclose that the defendant intended to make a gift of an interest in this mortgage to the plaintiff.

The trial court analyzed this evidence and concluded that the property was property in common, to be considered in determining the property rights of the parties, and concluded that the evidence did not show that defendant intended to part with this property so that plaintiff might acquire a half interest therein. The trial court was within its rights in treating the mortgage as common property. While the theory of a gift has been presented and counsel has assumed that the transfer of the legal title might be sufficient to effectuate a gift, still the person asserting it must prove all the essential elements by clear, direct, posi-

tive, express and unambiguous evidence. The evidence of the plaintiff fails in this respect.

The property of the plaintiff, at the time of the marriage, consisted of a half interest in a rooming house in Oklahoma City, value $3,500, paying her $20 a month, half of the rent, as her interest while she lived with defendant; her household furnishings, most of which are in Oklahoma City, and 160 acres of land in Kansas, from which she has received very little, if any, revenue. This marriage lasted for 11 months, and it was consummated between two people, past middle age, both with previous marital experience. Both had raised families, each owning about the same amount of property as the other. It is obvious that they could not live together as man and wife; in fact, the plaintiff was desirous of obtaining a divorce, and the record contains many statements by her to that effect. Defendant's property was accumulated by him before this marriage, and there was no joint effort by plaintiff and defendant in accumulating property. His income is primarily derived from interest that he might receive from the 2,500-dollar mortgage. He is not regularly employed.

In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage, their earning ability, the duration of, and the conduct of each during, the marriage, their station in life, the circumstances and necessities of each, as well as their health and physical condition, and whether the property was accumulated before or after the marriage, and from all of such elements the court, in allowing or refusing to allow permanent alimony, will determine the rights of the respective parties and all other matters pertaining to the case. See *Swolec v. Swolec,* 122 Neb. 837, 241 N. W. 771.

Defendant is to pay all costs necessitated by this appeal. For the reasons given herein, the judgment and decree of the district court are

AFFIRMED.

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8. By failing to make a demand, payee in a note payable on demand cannot do away with the statute of limitations. *Melville Lumber Co. v. Scott* 379
9. In an action by maker to recover from payee amount paid to assignee of note in excess of amount received from payee, evidence *held* to sustain judgment for plaintiff. *Laux v. Batterman* 386

10. To constitute one an accommodation maker of a note, the transaction must be primarily for the benefit of the payee, and without benefit to the accommodation maker. *First Trust Co. v. Anderson* 397
11. An accommodation maker of a promissory note is not liable to the party accommodated. *First Trust Co. v. Anderson* 397

Bridges.

The county bridge act authorizes a border county to purchase a bridge which is already built. *Hansen v. Dakota County* 582

Carriers.

1. The railway commission has the power to regulate the rates and services of, and to exercise a general control over, all common carriers engaged in transportation of passengers within the state. *Marconnit v. Effenberger* 564
2. The railway commission has power to regulate rates and services of, and to exercise general control over, all railroads engaged in transportation of freight or passengers within the state. *Farmers Union Livestock Commission v. Union P. R. Co* 689
3. Rates and charges established by the railway commission have the effect of a legislative enactment until altered or set aside. *Farmers Union Livestock Commission v. Union P. R. Co* 689
4. Where the state railway commission specifically adopts the rates and charges fixed by the interstate commerce commission as its own, they become the regularly fixed rates and charges of the state railway commission until altered or set aside. *Farmers Union Livestock Commission v. Union P. R. Co* 689
5. The statute relating to reparation by carriers for unjust rates does not authorize the railway commission to condemn retroactively as unlawful a rate or charge previously established as lawful by it, and to subject a carrier which has conformed thereto to payment of reparations. *Farmers Union Livestock Commission v. Union P. R. Co* 689

Commerce.

1. An excise tax may be imposed on the use and distribution of motor vehicle fuels without violating the commerce clause of the federal Constitution. *State v. Smith* 423
2. A state cannot impose a tax on interstate commerce. *State v. Smith* 423

3. Where the interstate commerce commission finds disparity in interstate and intrastate rates is resulting in unjust discrimination against interstate commerce and determines what are reasonable rates for interstate traffic and directs removal of the discrimination, the carrier is entitled to put in force the interstate rates found reasonable and to remove the forbidden discrimination by bringing the intrastate rates to the same level. *Farmers Union Livestock Commission v. Union P. R. Co.* 689

Constitutional Law.

1. The statute punishing the issuing of an insufficient funds check *held* constitutional. *White v. State* 154
2. The constitutional guaranties of the Bill of Rights contemplate that every person legally possesses the right of acquiring title to every species of property recognized by law with all rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it at such price as he can obtain in fair barter. *State, ex rel. English, v. Ruback* 335
3. A statute will not be declared unconstitutional unless necessary to proper disposition of pending case. *State v. Smith* 423
4. A retroactive statute authorizing reparation by carriers for unjust rates is inhibited by the due process clauses of the state and federal Constitutions. *Farmers Union Livestock Commission v. Union P. R. Co.* 689
5. The supreme court must be presented with a case where issues and evidence would support a conviction for violation of a statute, if valid, before the court can rule on the question as to whether the statute invades constitutional rights. *Dutiel v. State* 811
6. The right acquired by a valid appropriation of water for irrigation is a vested property right which cannot be curtailed by subsequent legislation so long as water is used by the appropriator for a useful and beneficial purpose. *Enterprise Irrigation District v. Willis* 827
7. A statute limiting appropriation of water for irrigation has no application to valid appropriation which vested prior to its enactment. *Enterprise Irrigation District v. Willis* 827

Contracts.

1. In an action on a construction contract to recover for extra work, evidence *held* to sustain the judgment of the

trial court. *Condon Co. v. Loup River Public Power District* 284
2. It is not every breach of a contract that entitles the other party to rescind; a breach which goes only to a part of the consideration and may be compensated in damages does not warrant rescission. *Klapka v. Shrauger* 354
3. Rescission or cancelation for a mere breach of contract, not so fundamental as to defeat the object of the parties in making the agreement, will not be granted. *Klapka v. Shrauger* 354
4. Where plaintiff breached his contract with defendant, defendant could cancel the contract without liability for damages. *Zelen v. Domestic Industries* 456
5. An alleged contract for the sale of refrigerators which did not obligate the buyer to purchase them was void. *Zelen v. Domestic Industries* 456
6. In determining the meaning of an ambiguous contract, the construction given it by the parties will ordinarily be adopted by the courts. *Dunn v. Mutual Benefit Health & Accident Ass'n* 506
7. The making of a will which violates unperformed obligations of testator under a valid oral contract, after full performance by the other party, does not destroy the contract. *In re Estate of Skade* 712
8. Where a contract is clear, certain, and distinct, it cannot be modified by proof of usage. *James Poultry Co. v. City of Nebraska City* 787
9. The mere fact that a person is unlearned, and ignorant of legal proceedings, affords no ground for cancelation of instrument, unless the person against whom relief is sought misrepresented the facts. *Meyer v. Schmidt* 850
10. "Undue influence" defined. *Meyer v. Schmidt* 850

Corporations.

1. A civil suit to enforce liability of stockholders for failure of corporation to publish notice of its debts is in its nature an action to recover a penalty for nonperformance of a statutory duty. *Hoffman v. Geiger* 349
2. A stockholder who is a creditor of the corporation cannot maintain an action against the other stockholders to recover penalties for failure to publish notice of corporate debts, where his own liability for failure to publish such notice is the same as that of other stockholders. *Hoffman v. Geiger* 349
3. The word "exhausted," as used in the statute imposing

penalties for failure to publish notice of corporate debts, refers to assets of the corporation, and does not necessarily mean, in addition, the exhausting of the entire proceeds of the sale of the assets and also application thereof to corporate debts. *Hoffman v. Geiger* 349

4. In suit to foreclose mortgage, two bankrupt corporate trustees were properly treated as a single corporation, where one owned all stock and kept all records of both, and officers, place of business, and nature of transactions were identical. *First Trust Co. v. Maryott* 679

Costs.

Taxing of costs is within the discretion of the trial court and is not reviewable unless an abuse of discretion is shown. *In re Estate of Nielsen* 110

Courts.

1. A party invoking jurisdiction of a court where the court has jurisdiction of the subject-matter is estopped to object thereto afterward. *McCall v. Hamilton County Farmers Telephone Ass'n* 70
2. The power to correct errors in their own proceedings is inherent in all courts of general jurisdiction. *Gate City Co. v. Douglas County* 531
3. County courts have equity jurisdiction incidental to powers properly conferred by statute. *In re Estate of Jensen* 602
4. The county court of a county having a population of less than 50,000 has jurisdiction to hear and determine a complaint against a child for delinquency, though a district court judge may be in the county at the time. *Henderson v. Gettman* 613

Creditors' Suit.

1. Whenever, on trial of a creditor's suit, it appears that plaintiff has a remedy at law, the equitable proceedings should be dismissed. *Mills v. Heckendorn* 294
2. Petition *held* to be a petition in equity in the nature of a creditor's bill. *Mills v. Heckendorn* 294
3. Before one having a general claim against another can maintain a creditor's suit to enforce the claim, he must have reduced it to judgment. *Mills v. Heckendorn* 294

Criminal Law.

1. An error proceeding in a criminal case does not suspend the sentence, but merely stays its execution. *State, ex rel. Hunter, v. Jurgensen* 136

2. After verdict of guilty and sentence by trial court, presumption of innocence ceases, and the law then presumes that the proceedings were regular and the conviction just. *State, ex rel. Hunter, v. Jurgensen* 136
3. In a prosecution for issuing a no funds check, evidence of like transactions is admissible for the purpose of showing guilty knowledge and intent. *White v. State* 154
4. In a prosecution for forgery, failure to instruct on defense of alibi is not reversible error, in absence of request to so charge. *Hall v. State* 188
5. Section 3 of the unfair practices act (Laws 1937, ch. 137), making it unlawful to sell merchandise below cost, including penalties provided for a violation thereof, *held* unconstitutional. *State, ex rel. English, v. Ruback* 335
6. The supreme court will not interfere with a conviction based on conflicting evidence unless it is insufficient as a matter of law. *Haines v. State* 433
7. Where there is competent evidence to support a finding of intent to defraud, the verdict of the jury will not be disturbed because there is testimony tending to indicate that there was no such fraudulent intent. *Haines v. State* 433
8. Sentence for giving no fund check *held* excessive. *Haines v. State* 433
9. The habitual criminal law does not set out a distinct crime, but provides that repetition of criminal conduct aggravates the guilt and justifies heavier penalties. *Kuwitzky v. O'Grady* 466
10. Habitual criminality is a state rather than a crime, and warrants greater punishment because of past conduct. *Kuwitzky v. O'Grady* 466
11. A verdict unsupported by evidence will be set aside. *Prichard v. State* 522
12. Where the trial court strikes testimony from the record during trial, directs the jury to disregard it, and instructs that it cannot be considered, its admission is not reversible error, in absence of showing of prejudice. *Jurgensen v. State* 537
13. In a prosecution for embezzelment, evidence *held* sufficient to prove venue in county where defendant was tried. *Jurgensen v. State* 537
14. Harmless error is not ground for reversal of a conviction. *Jurgensen v. State* 537
15. Embezzlement is a felony which may be defined in an

instruction in language equivalent to the language of the statute. *Jurgensen v. State* 537
16. All instructions given should be considered in determining whether a particular instruction is prejudicially erroneous. *Jurgensen v. State* 537
17. Where the trial court has instructed generally as to the issues in a criminal prosecution, error cannot be predicated on failure to instruct as to a particular phase of the case, in absence of a request therefor. *Jurgensen v. State* 537
18. One who escapes and remains away from prison during the period of his sentence is not entitled to have the time he was absent deducted from the term of his original sentence. *Goodman v. O'Grady* 612
19. All public offenses are statutory and no act is criminal unless the legislature has in express terms declared it to be so. *Dutiel v. State* 811

Damages.

1. Verdict for assault *held* excessive. *Rich v. Dugan* 63
2. A physical injury resulting from an emotional upset produced by the negligence of another creates liability for damages. *Rasmussen v. Benson* 232
3. Damages for actual injury resulting from fright and shock are recoverable, though not accompanied by contemporaneous injury. *Rasmussen v. Benson* 232
4. Damages *held* excessive and remittitur ordered. *Denison v. Omaha & C. B. Street R. Co* 307

Deeds.

1. A grantor cannot, after delivery, invalidate or alter a deed. *Langan v. Langan* 229
2. The words "blooded heirs" in a deed were words of limitation and not words of purchase, the limitation was void, and the named grantee took an estate in fee simple. *Langan v. Langan* 229

Divorce.

1. Where defendant in divorce action prays for divorce, the court will determine from the evidence which party, if either, is entitled to divorce. *Tway v. Tway* 266
2. Factors in determining amount of alimony stated. *Tway v. Tway* 266
3. Whether a divorce from bed and board or an absolute divorce shall be granted rests in the court's discretion; an absolute divorce, with permanent alimony, being preferable. *Phillips v. Phillips* 313

4. Though a wife's petition for maintenance is denied and an absolute divorce granted the husband, the wife may be granted reasonable alimony. *Phillips v. Phillips* 313
5. In fixing the amount of alimony, the court will consider the estate of each party at time of marriage, their respective contributions since marriage, duration of marriage, and conduct of the parties. *Phillips v. Phillips* 313
6. In fixing amount of alimony, the court may consider all pertinent facts and circumstances. *Phillips v. Phillips* 313
7. In awarding custody of a child of tender years, the law looks to the welfare of the child. *Carlson v. Carlson* 569
8. Award of custody of minor child to the mother approved. *Carlson v. Carlson* 569
9. A hearing on an application to revise and alter an alimony decree is not a retrial of the original case nor a review of the original decree, but the court considers new or changed conditions of the parties and adapts the decree thereto. *McIlwain v. McIlwain* 705
10. On application to revise and alter an alimony decree, the court may consider remarriage as a change of circumstances that may be considered with other changes of circumstances. *McIlwain v. McIlwain* 705
11. Remarriage does not relieve a husband from obligations fixed by an alimony decree. *McIlwain v. McIlwain* 705
12. Where a divorced husband remarries, the court will make such adjustment of finances as the relative necessities of the parties demand and the ability of the husband warrants, giving the first wife first consideration. *McIlwain v. McIlwain* 705
13. An application to change a decree for alimony at a subsequent term must be founded on facts arising subsequently to the decree. *Graham v. Graham* 761
14. Where a decree is rendered against the husband for alimony in a definite sum, in full of all claims on him by reason of the marriage, courts cannot vacate or modify the decree after the term solely because of a change in circumstances of either party. *Graham v. Graham* 761
15. A decree for alimony made without reserve, though payable in instalments, is final and cannot be modified after enrollment of the decree, in absence of statutory authority or reservation of power in the decree. *Graham v. Graham* 761

16. Authority to grant a divorce carries with it authority to adjust rights of the parties to personalty within the court's jurisdiction. *Graham v. Graham* 761
17. Whether a divorce from bed and board or an absolute divorce shall be granted rests in the court's discretion. *Hild v. Hild* 896
18. The court will consider all pertinent facts and circumstances in determining whether to grant permanent alimony. *Hild v. Hild* 896

Drains.

Appeal will not lie from assessment of benefits by county board in creation of a drainage district, the remedy being by proceedings in error. *Loup River Public Power District v. Platte County* 21

Elections.

1. On appeal to district court in an election contest the trial is *de novo*. *Swan v. Bowker* 405
2. In an election contest case, amendments allowed in district court *held* not to exceed in scope the amendment sought in county court. *Swan v. Bowker* 405
3. A student who resides at the seat of a university may vote there if otherwise qualified. *Swan v. Bowker* 405
4. The requirements of the Australian ballot law that signatures of two judges of an election shall be written on the back of each ballot to be used and that a ballot not so indorsed shall be void are mandatory. *Swan v. Bowker* 405
5. The proceeding for contesting an election under statute is a summary proceeding of a political nature in which the terms of the statute are controlling as to all rights claimed thereunder. *Swan v. Bowker* 405
6. The principles of procedure in election contests must be in harmony with the provisions of our Civil Code relating to proceedings under special statutes, provided the practice adopted must be consistent with the specific provisions of the special act under consideration. *Swan v. Bowker* 405
7. Where an election contest did not stand for trial until May 21, or four days after the May term of the county court had closed, contestee was not in default in failing to file his answer during the May term of court. *Swan v. Bowker* 405
8. A county court in an election contest has complete power of amendments of pleadings. *Swan v. Bowker* 405

Embezzlement.

1. In a prosecution for embezzlement, intent to defraud may be proved by circumstances, including methods of business and transactions of defendant in perpetrating the fraud and similar transactions with others at or near the time of the felonious act charged. *Jurgensen v. State* 537
2. The managing officer of a corporation by operating through it in committing embezzlement does not thereby secure personal immunity from the statutory penalty therefor. *Jurgensen v. State* 537
3. Where a principal entrusts property to his agent for a particular purpose and the agent embezzles it, a subsequent offer or agreement to make restitution does not defeat a prosecution for the embezzlement. *Jurgensen v. State* 537
4. A principal's money received and fraudulently appropriated by his agent to his own use in violation of the embezzlement statute includes money which shall have come into the agent's possession or care in any manner whatsoever. *Jurgensen v. State* 537

Eminent Domain.

1. The words "or damaged" in section 21, art. I of the Constitution, include all damages arising from exercise of the right of eminent domain which cause diminution in value of private property. *James Poultry Co. v. City of Nebraska City* 787
2. In determining the amount of damages because of construction of a viaduct, the jury may consider diversion of travel, inconvenience of access and diminution of business, not as independent items of damage, but for the purpose of determining market value of a leasehold immediately before and after construction of the viaduct. *James Poultry Co. v. City of Nebraska City* 787
3. Where property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of the property immediately before and after completion of the improvement from which injury results. *James Poultry Co. v. City of Nebraska City* 787
4. Whatever reduces the market value of property taken for a public use may be considered in determining amount of damages. *James Poultry Co. v. City of Nebraska City* 787
5. In condemnation proceedings, evidence of business trans-

acted on a leasehold may be shown, not as an independent item of damage, but as it affects market value of the leasehold. *James Poultry Co. v. City of Nebraska City* 787

6. A lease, determinable by either party on or after date of fixed term on 30 days' notice, is a lease for a definite term, and damage to the leasehold by construction of a viaduct is based on the unexpired term of the lease. *James Poultry Co. v. City of Nebraska City* 787
7. Anticipated profits from the continued carrying on of the business in an established location cannot be considered in estimating damages under eminent domain. *James Poultry Co. v. City of Nebraska City* 787
8. The only foundation for a local assessment lies in special benefits conferred by an improvement, and hence an assessment beyond special benefits conferred is a taking of private property for public use without compensation. *Hayman v. City of Grand Island* 873

Equity.

Where a person is ignorant or mistaken with respect to his legal rights or duties, and enters into a transaction, the legal scope of which he understands, equity will grant relief, defensive or affirmative, treating the mistake as analogous to a mistake of fact. *Prudential Ins. Co. v. Nuernberger* 743

Estoppel.

1. In an action by the state to recover tax on gasoline, defendants were estopped from denying that they were dealers in the distribution, sale and use of motor vehicle fuels. *State v. Smith* 423
2. "Estoppel" defined. *State v. Smith* 423
3. Whether or not the doctrine of estoppel applies depends on the facts of each case. *State v. Smith* 423
4. Where one of two innocent persons must suffer loss, the one at fault should bear such loss. *Federal Land Bank v. Worley* 493
5. Where one of two innocent parties to a transaction must suffer a loss through misconduct or fraud of a third person, the burden will fall on the one who made the loss possible. *First Trust Co. v. Maryott* 679

Evidence.

1. Parol evidence is admissible to show the true consideration of a written contract. *Barth v. Reber* 25
2. A contractual statement in a written instrument as to

the consideration cannot be varied by parol evidence. *In re Estate of Weitzel* 43
3. Evidence of a contemporaneous oral agreement is not admissible to vary terms of a written contract which is complete and unambiguous. *In re Estate of Weitzel* 43
4. A deed, in so far as it is deemed to be contractual, is subject to the parol evidence rule. *In re Estate of Weitzel* 43
5. The use of moving pictures to prove certain facts before the jury should be left largely to the trial court's discretion. *Denison v. Omaha & C. B. Street R. Co* 307
6. Expressions of present existing pain and of its locality are exceptions to the general rule excluding hearsay evidence. *Turpin v. State* 389
7. A physician who has examined an injured person for the purpose of qualifying himself to testify at a trial may testify to statements of injured person during examination as to subjective symptoms, to show upon what information the physician based his opinion. *Turpin v. State* 389
8. It is not error to submit oral testimony to the jury to show the purpose for which a note was executed, where such note is sued on by the payee. *First Trust Co. v. Anderson* 397
9. Cogent reasons and circumstances which strengthen expert opinion as to a scientific fact in issue may determine the issue. *Welsh v. Platte Valley Public Power and Irrigation District* 441
10. Parol evidence is inadmissible to vary terms of a written contract which is unambiguous and complete in itself. *Zelen v. Domestic Industries* 456
Dunn v. Mutual Benefit Health & Accident Ass'n 506
11. Trier of facts, being judge of credibility of witnesses, may give greater weight to testimony of one witness than to testimony of a greater number of witnesses. *Linch v. Berggren* 530
12. Testimony of witness given at former trial was properly admitted where witness was absent from state. *Wolski v. National Life & Accident Ins. Co* 643
13. Admission of agent may be received in evidence against principal where agent, in making admission, was acting within scope of authority, and transaction to which admission relates was pending at the time. *Wert v. Equitable Life Assurance Society* 654
14. Declaration of agent, not within scope of authority

nor in course of negotiations to which it refers, is inadmissible against principal, unless made under such circumstances that principal's silence made admission his own, or unless principal ratified it. *Wert v. Equitable Life Assurance Society* 654

15. Agent's admission to be admissible against principal must have been made in discharge of agent's duty, must have been based on agent's knowledge, and must be a statement of fact, rather than an expression of opinion. *Wert v. Equitable Life Assurance Society* 654
16. In condemnation proceedings, witnesses acquainted with volume and nature of lessee's business were competent to testify to value of leasehold. *James Poultry Co. v. City of Nebraska City* 787

Execution.

A sale of realty conducted substantially as prescribed by notice and in accordance with the decree will be sustained. *Holferty v. Wortman* 732

Executors and Administrators.

1. The statute vesting the county court with jurisdiction to call before it persons who may have embezzled or concealed property of a deceased person, and to examine such persons, under oath, as to such property, is a mere discovery statute, vesting the county court with no jurisdiction beyond that of discovery. *In re Estate of Bloedorn* 261
2. One dealing in good faith with an administrator of an estate or trustee appointed by a court or attorney at law in good standing may reasonably infer that the fiduciary is acting in a representative capacity in the performance of duty, in absence of knowledge to the contrary or of circumstances indicating fraud. *Federal Land Bank v. Worley* 493
3. The statute requiring notice by publication of administration accounts contemplates final accounts. *In re Estate of Lehman* 592
4. The statute fixes the schedule of fees for personal representatives and provides for allowance of fees for extraordinary services. *In re Estate of Lehman* 592
5. The statute providing for administration of estates contemplates appeals from decrees assigning the estate and directing distribution thereof. *In re Estate of Lehman* 592
6. In a suit to set aside an order directing distribution

of an estate for fraud, evidence *held* insufficient to sustain allegations of fraud. *In re Estate of Jensen* 602

False Pretenses.

1. Intent to defraud is an essential element of the offense of obtaining money by false pretenses. *White v. State* 154
2. The no funds check statute states a complete offense. *White v. State* 154
3. Intent to defraud may be proved by the circumstances surrounding the transaction. *White v. State* 154
   Haines v. State 433
4. The offense of obtaining money by means of an insufficient fund check was completed at time check was uttered and passed, and the fact that defendant subsequently made some degree of restitution did not affect the question of his guilt. *Haines v. State* 433
5. Under the statute making the giving of an insufficient fund check a crime, it is immaterial whether restitution is made. *Haines v. State* 433

Fraud.

1. In an action for fraud in sale of a note, direction of verdict for defendants was affirmed. *Labs v. Farmers State Bank* 130
2. Fraud cannot be deduced or inferred from that which the law pronounces honest. *Meyer v. Schmidt* 850

Garnishment.

1. In garnishment in aid of execution, only the answer and evidence of garnishee are admissible in response to the summons. *Orchard & Wilhelm Co. v. North* 39
2. When the garnishee's answer is such as to give the court jurisdiction over a fund, the court should direct the garnishee to pay the fund into court and, if there be a claimant other than the judgment creditor, enter an order impleading the claimant, require framing of issues, and determine the rights of parties upon evidence. *Orchard & Wilhelm Co. v. North* 39
3. When a court directs an officer to pay to person entitled thereto money in his custody, the money is subject to garnishment. *Orchard & Wilhelm Co. v. North* 39

Gifts.

What constitutes a valid gift *inter vivos* stated. *In re Estate of Nielsen* 110

Guaranty.

1. Instrument in suit *held* to be a guaranty of payment

of bank's creditors in definite amounts at a time certain. *Department of Banking v. Flotree* 416
2. Defense that contract in suit guaranteeing payment of bank's creditors was not effective because not signed by all creditors of the bank *held* waived. *Department of Banking v. Flotree* 416

Habeas Corpus.
1. Where there was substantial conflict in evidence in proceedings in habeas corpus as to petitioner's presence in or absence from the demanding state at time offense was allegedly committed, the petitioner was not entitled to his freedom on that issue. *Bonner v. Pszanowski* 196
2. In habeas corpus proceeding against warden of state penitentiary, the return to the writ is *prima facie* evidence of cause of detention. *Goodman v. O'Grady* 612
3. Where uncontradicted warden's return to writ of habeas corpus set out that relator escaped and remained away from prison for a time, and evidence showed that relator's sentence was not completed, relator was entitled to no relief. *Goodman v. O'Grady* 612
4. An application for a writ of habeas corpus was the proper procedure to review a sentence under the second count of an information, where the sentence under the first count had been served in full. *Kuwitzky v. O'Grady* 466

Homestead.
1. The actual use of a dwelling as a family home is a sufficient selection under the homestead law. *In re Estate of Nielsen* 110
2. A homestead may be selected from property of the wife with her consent, which will be presumed from the use and occupancy of the property as a family home until the contrary is shown. *In re Estate of Nielsen* 110

Husband and Wife.
1. Evidence in suit for accounting by administrator of wife's estate against surviving husband *held* to sustain order of trial court affirming referee's report and dismissing plaintiff's action. *Schultz v. Bleckwehl* 94
2. Where husband and wife execute a note and mortgage on realty to secure husband's debt without inserting in those instruments any provision binding the wife's separate estate, a deficiency judgment against her in a suit to foreclose the mortgage is unauthorized. *Filley v. Mancuso* 403

Indictment and Information.

To charge a statutory offense, the information must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of the statute or its equivalent. *Dutiel v. State* 811

Infants.

Any deed of an infant is voidable only and title passes by it and remains in grantee until some clear act of disaffirmance is done by the infant after coming of age. *Klapka v. Shrauger* 354

Insane Persons.

1. Finding of incapacity authorizing appointment of a guardian will not ordinarily be disturbed on appeal. *In re Guardianship of Blochowitz* 163
2. The words "mentally incompetent," "incompetent," and "incapable," in the statute pertaining to appointment of a guardian, defined. *In re Guardianship of Blochowitz* 163
3. "Mental incompetency" is established by showing an essential privation of reasoning faculties, or incapacity of understanding and acting with discretion in the ordinary affairs of life. *In re Guardianship of Blochowitz* 163

Insurance.

1. In an action on an insurance policy, *held* that the provision for termination of policy on nonpayment of premiums by a third party could not be invoked. *Moore v. Washington National Ins. Co* 29
2. An insurer denying liability for death benefits on the ground of cancelation cannot, after the commencement of action on policy, interpose the defense that the policy terminated for nonpayment of premiums. *Moore v. Washington National Ins. Co* 29
3. The listing of a telephone in a current telephone directory in the name of an insurance company is an implied invitation to a policyholder to use the telephone for the transaction of business relating to his policy, and he may do so, though he does not recognize on the telephone the voice of the person assuming to act for insurer. *Ware v. Home Mutual Ins. Ass'n* 329
4. The holder of a policy of automobile accident insurance on his automobile may, by use of a telephone listed in a current telephone directory in the name of insurer, procure a transfer of his insurance to another auto-

mobile owned by him, if there is no increase in the risk or in the premium paid. *Ware v. Home Mutual Ins. Ass'n* 329
5. The statutory provision that an insured's breach of a condition of his insurance policy may not avail the insurer to avoid liability, unless it contributes to the loss, is by construction a part of the insurance contract. *Ware v. Home Mutual Ins. Ass'n* 329
6. Where industrial life policy contains a clause that the policy shall be incontestable after being in force for two years, except for nonpayment of premiums, or fraud, there is a similar period to contest reinstatement, beginning when reinstatement occurs. *Wolski v. National Life & Accident Ins. Co.* 643
7. Provision in application for reinstatement of an industrial life policy that insured certifies that he is in good health is a condition precedent, without which there is no liability on the policy. *Wolski v. National Life & Accident Ins. Co.* 643
8. Where industrial life insurance policies are indorsed for reinstatement, premiums in arrears accepted, and subsequent premiums collected, there is a presumption that the insured was in good health at time of reinstatement, but this presumption may be rebutted. *Wolski v. National Life & Accident Ins. Co.* 643
9. That insurer had on previous occasion accepted delinquent premiums on lapsed policy, and had reinstated it, without an application for revival, did not establish such a course of dealing or custom as would estop insurer from asserting that applicant for reinstatement was not in good health when he again sought to revive the policy. *Wolski v. National Life & Accident Ins. Co.* 643
10. Where insurer relies on a stipulation in a policy to defeat recovery, he must affirmatively plead a breach thereof as a defense. *Farmers & Bankers Life Ins. Co. v. Mathers* 757
11. Where insurer fails to set up a condition precedent contained in the policy, and fails to allege its breach, such defense is waived. *Farmers & Bankers Life Ins. Co. v. Mathers* 757
12. An insurance agent who fills in an application for life insurance and accepts false answers to questions pertaining to applicant's health, instead of applicant's truthful answers, is insurer's agent. *Farmers & Bankers Life Ins. Co. v. Mathers* 757

Intoxicating Liquors.

Where an officer seizes liquors under a search warrant, it is his duty to hold such liquors until all prosecutions arising out of seizure have been determined. *Picard v. Steinacher* 723

Judgment.

1. The granting of a perpetual injunction to prevent an irrigation district from invading the vested contract right of an irrigator to a specific quantity of water from the natural flow of a river is not a bar to an action at law for damages caused by the wrong enjoined, where damages were not pleaded nor determined in the injunction suit. *Ledingham v. Farmers Irrigation District* 276
2. A judgment notwithstanding the verdict can be rendered only where the pleadings of the party in whose favor the verdict was rendered confess facts entitling the other party to judgment. *Winterson v. Pantel Realty Co.* 472
3. Where there are two judgments, if the equities subordinate an attorney's lien to the right of set-off, it is immaterial that one may be founded on contract and the other on tort. *Dalton State Bank v. Eckert* 500
4. A petition filed more than two years after judgment was entered, seeking to set aside the judgment for fraud, which shows on its face that fraud was discovered within the two-year period, does not state a cause of action. *In re Estate of Jensen* 602
5. Where a settlement agreement between contestants and beneficiary of a will was sought to be revoked by the beneficiary, but was upheld by the court, the decree was *res judicata* of a subsequent attack on the settlement agreement. *Shea v. Shierman* 862

Landlord and Tenant.

1. While violation of a city ordinance prohibiting windows in stairways in order to prevent injury is evidence of negligence, it is not the basis of liability, where the violation was not the proximate cause of injury. *Shramek v. Huff* 173
2. Use of concrete with a smooth finish in the construction of stairway and painting the steps with ordinary paint and use of sweeping compound containing oil while sweeping steps are not evidence of negligence rendering owner of apartment liable to tenant who fell while

descending stairway, in absence of showing that improper material was used, or that it was used in a negligent manner. *Shramek v. Huff* 178
3. A city ordinance requiring protective measures to be taken in constructing apartment houses imposes a mandatory duty, which, if not performed, is negligence *per se*. *Winterson v. Pantel Realty Co.* 472
4. The mere opinion of the parties as to the construction of a lease, not carried into effect by any action, will not amount to a practical construction. *James Poultry Co. v. City of Nebraska City* 787

Libel and Slander.

1. Actionable words imply damage, but many words which are actionable *per se* when published are not actionable when spoken, without alleging and proving special damage. *Nelson v. Rosenberg* 34
2. Words to be slanderous *per se* must not only charge an offense which is actionable, but also the nature thereof. *Nelson v. Rosenberg* 34
3. The innuendo does not add to nor enlarge the slanderous words used, but sets out the meaning intended to be conveyed by showing the application of the words. *Nelson v. Rosenberg* 34
4. The appellation "crook" will not constitute a basis for recovery of damages for slander, in absence of specific allegation of special damage. *Nelson v. Rosenberg* 34

Licenses.

1. An action for failure to pay taxes, as provided in the motor vehicle fuels act, may be brought in any county in which service of process can be had on defendant. *State v. Smith* 423
2. The tax on gasoline is an excise tax on the use and distribution of gasoline within the state. *State v. Smith* 423
3. The increase of gasoline tax one cent a gallon was not such alteration as would release the sureties under a bond requiring prompt payment of the tax on motor vehicle fuels. *State v. Smith* 423

Limitation of Actions.

1. The statute of limitations does not begin to run against a suit to restore beneficial interests in land under a resulting trust until the trustee denies the interests of the beneficiaries. *Windle v. Kelly* 143
2. A cause of action against an officer of a bank for fraudulently diverting its assets must be brought within

four years from discovery of the fraud. *Department of Banking v. Hall* 191
3. A cause of action for fraudulent diversion of bank's assets accrues as soon as the diversion is complete, in absence of concealment of the facts. *Department of Banking v. Hall* 191
4. The running of limitations is not delayed until plaintiff can procure evidence to sustain his cause of action. *Department of Banking v. Hall* 191
5. Where a note was payable on demand after date, payee's right to extend time for payment and thus bind indorsers on the note did not prevent the statute of limitations from running against their obligations as indorsers. *Luikart v. Hoganson* 280
6. Ordinarily, the statute of limitations begins to run when a cause of action accrues. *Luikart v. Hoganson* 280
Melville Lumber Co. v. Scott 379
7. A civil action to recover a statutory penalty must be commenced within a year after the cause of action accrued. *Hoffman v. Geiger* 349
8. The liability of stockholders for the penalties arising from failure to publish notice of corporate debts does not accrue until the assets of the corporation are exhausted. *Hoffman v. Geiger* 349
9. Limitations do not run against the claim of an adult child for services continuously performed under an oral contract for parents during their lives until the contract is terminated by their death. *In re Estate of Skade* 712
10. Actions for accident or mistake, not specifically mentioned in statutes of limitations, are classed with fraud, and the four-year statute of limitations is applied. *Sweley v. Fox* 780
11. The recording of a real estate mortgage will charge all parties with notice of a mistake therein, so as to start running of limitations, when accompanied by circumstances sufficient to put a person of ordinary intelligence and prudence upon inquiry, which, if pursued, would lead to discovery of the mistake. *Sweley v. Fox* 780

Master and Servant.

1. An injury, to be compensable under the workmen's compensation law, must arise out of and in the course of employment. *Sheets v. Glenwood Telephone Co* 56
McCall v. Hamilton County Farmers Telephone Ass'n 70
2. There must be a causal connection between the employment and the injury before recovery can be allowed

under the workmen's compensation law. *Sheets v. Glenwood Telephone Co.* 56
3. Where an employee deviates from her employment and is injured while engaged in her own business or enjoyment, the injury is not compensable under the workmen's compensation law. *Sheets v. Glenwood Telephone Co.* 56
4. Ordinarily, an employer is liable to a third party for assault by an employee acting within the scope of his employment. *Rich v. Dugan* 63
5. An employee's act which is incidental to his authorized duties is within the scope of his employment. *Rich v. Dugan* 63
6. In determining whether an employee's act is incidental to his authorized conduct so as to be within the scope of employment, surrounding facts and circumstances, together with nature of employment and conduct of employee, will be considered. *Rich v. Dugan* 63
7. Employer *held* liable for assault on third party by employee. *Rich v. Dugan* 63
8. A compensation claimant has the burden of establishing that he suffered injury from an accident arising out of and in the course of his employment. *McCall v. Hamilton County Farmers Telephone Ass'n* 70
9. Compensation awards must be based on evidence showing that employee incurred disability arising out of and in the course of his employment, and not on probabilities or possibilities. *McCall v. Hamilton County Farmers Telephone Ass'n* 70
10. Under the compensation act, a compensation case may be heard by stipulation of parties in an appeal from the compensation court by the district court for any county. *McCall v. Hamilton County Farmers Telephone Ass'n* 70
11. Injury to a county employee while leaving the courthouse after her work was ended was an injury arising out of and in the course of her employment. *McDonald v. Richardson County* 150
12. Walking to and from the street and a building where one is employed is a necessary incident to the employment, and an injury sustained in so doing is compensable. *McDonald v. Richardson County* 150
13. "Reckless indifference to safety," as used in the workmen's compensation law, means more than want of ordinary care, and implies a rash and careless spirit, not necessarily amounting to wantonness. *Richards v. Abts* 347

14. Any competent evidence tending to show knowledge by the employee of the dangerous character of an act which subsequently caused his death should be admitted in a compensation action, where the defense is wilful negligence by the employee. *Richards v. Abts*.... 347
15. The workmen's compensation law will be liberally construed. *Ludwickson v. Central States Electric Co*..... 371
16. A workman who because of injury is unable to perform a substantial amount of labor is "totally disabled," within the workmen's compensation law. *Ludwickson v. Central States Electric Co*..... 371
17. "Total and permanent disability," within workmen's compensation law, defined. *Ludwickson v. Central States Electric Co*..... 371
18. Evidence in action for negligence *held* to sustain judgment for defendants. *Gallagher v. Law*..... 381
19. Evidence sustained finding that compensation claimant had sustained a permanent partial loss of use of hand. *Turpin v. State* 389
20. The mere fact that after employee's injury he receives as wages a larger sum in another occupation than his former remuneration does not necessarily preclude recovery of compensation under the compensation act. *Micek v. Omaha Steel Works*..... 449
21. "Daily wages," as used in compensation law, defined. *Carlson v. Condon-Kiewit Co*..... 587
22. Where the contract of hire fixes the maximum number of hours of work for a day or week, they should be considered in reducing the hourly rate to a weekly rate as the basis for an award under the compensation law. *Carlson v. Condon-Kiewit Co*..... 587
23. Under the compensation law, an employee may not recover, in addition to the amount fixed by schedule for loss of an eye, an additional amount for loss of stereoscopic vision. *Carlson v. Condon-Kiewit Co*..... 587
24. Where a reasonable controversy exists as to the amount due under the compensation law, an employer is not liable for the penalty for waiting time. *Carlson v. Condon-Kiewit Co*..... 587
25. The district court has power, on motion of plaintiff, to dismiss without prejudice an action pending before it on appeal from the workmen's compensation court. *Chilen v. Commercial Casualty Ins. Co*..... 619
26. Compensation award *held* to have the force and effect of a judgment between the parties in interest, and also

to be binding on the insurance carrier. *Chilen v. Commercial Casualty Ins. Co*..... 619
27. Under the compensation law, an accidental injury to an employee is not compensable if it does not arise out of his employment or is caused by his intentional wilful negligence. *Moise v. Fruit Dispatch Co*..... 684
28. It is a purpose of the compensation law to shift from employee to modern industry burdens of economic waste arising as a result of his accidental injury or death, and to prevent his dependents from becoming a public charge. *Moise v. Fruit Dispatch Co*..... 684
29. The compensation law will be liberally construed. *Moise v. Fruit Dispatch Co*..... 684
30. An employee's negligence while in the performance of duty, unless intentionally wilful, does not necessarily prevent compensation for his resulting injury or death. *Moise v. Fruit Dispatch Co*..... 684
31. Disobedience of order by a person other than employer, directing employee not to smoke in a gas-filled room, if employee's negligence is not wilful, does not prevent compensation for resulting injury. *Moise v. Fruit Dispatch Co*..... 684
32. The word "wilful," as related to negligence of employee while in performance of duty, means deliberate act; conduct evidencing reckless indifference to safety; more than want of ordinary care, not necessarily amounting to wantonness, but approximating it in degree. *Moise v. Fruit Dispatch Co*..... 684
33. The lighting of a pipe by an employee in a gas-filled room, thus causing an explosion which resulted in his death, was not such negligence as would prevent recovery of compensation by widow. *Moise v. Fruit Dispatch Co*..... 684
34. Whether one is an employee or an independent contractor must be determined from the facts of the particular case. *Lowe v. Chicago Lumber Co*..... 735
35. Independent contractor defined. *Lowe v. Chicago Lumber Co*..... 735
36. One who contracts to supply labor and supervise construction of a barn, and receives a definite amount for the work, is an independent contractor. *Lowe v. Chicago Lumber Co*..... 735
37. Where one party accepts a favorable award by a single judge of the compensation court, he cannot prevent the defeated party from waiving hearing before the compensation court sitting en banc, and appealing

directly to the district court. *Eisenhauer v. Otoe County* 818
38. Claimant *held* to have failed to prove alleged injury. *Eisenhauer v. Otoe County* 818
39. Unless other controlling factors are involved, injury or death from assault occurring during the course of employment is compensable where conditions of employment expose the workman to likelihood of such special risk, or where there is an immediate causal connection between the employment and the assault. *Hopper v. Koenigstein* 837
40. The term "arising out of the employment" in the workmen's compensation law covers all risks of accident from causative acts occurring within the scope or sphere of employment, which includes all acts reasonably necessary or incident to performance of work, including matters of personal convenience and comfort not in conflict with specific instructions. *Hopper v. Koenigstein* 837
41. In determining whether a risk not constituting a direct performance of work arises out of employment, the test to be applied is whether it is reasonably incident thereto. *Hopper v. Koenigstein* 837
42. Death of an employee, who was sent to regulate a beer-cooling system in a beer tavern, and who was struck a fatal blow with the fist by a companion while they were drinking at the bar, was not compensable. *Hopper v. Koenigstein* 837
43. A transcript of pleadings and orders in a case tried before a judge of the compensation court is not required to be filed in the district court to give it jurisdiction of an appeal, where a retrial before the entire court has been waived. *Hansen v. Paxton & Vierling Iron Works* 867
44. Procedure pointed out to give the district court jurisdiction in a compensation case in which a retrial before the compensation court is waived. *Hansen v. Paxton & Vierling Iron Works* 867
45. Petition for trial *de novo* of compensation case in district court does not limit scope of hearing. *Hansen v. Paxton & Vierling Iron Works* 867
46. No præcipe or summons is required to give the district court jurisdiction of an appeal from the compensation court, where retrial in the compensation court has been waived, but the clerk of the district court is required immediately to serve a copy of the petition on

the adverse party. *Hansen v. Paxton & Vierling Iron Works* 867
47. Though motion for new trial is unnecessary in a compensation case, if such motion is filed in district court, time for perfecting appeal from district court to supreme court does not commence to run until the motion is overruled. *Hansen v. Paxton & Vierling Iron Works* 867
48. The word "requires," as used in section of compensation law granting immunity from compensation to an owner who requires his contractor to procure compensation insurance, means "compel" or "exact." *Hiestand v. Ristau* 881
49. An owner who inserts in a contract with his contractor a futile promise by the contractor to procure compensation insurance does not escape liability. *Hiestand v. Ristau* 881
50. The phrase "any scheme, artifice or device," as used in the section of the compensation law creating a joint and several liability of owner and contractor for compensable injuries to workmen, does not necessarily imply active fraud or evil design. *Hiestand v. Ristau* 881
51. Owner and contractor were liable to contractor's employees for compensable injuries, where owner failed to require contractor to procure compensation insurance. *Hiestand v. Ristau* 881
52. Provision of the compensation law that the word "employee" shall not be construed to include any person whose employment is casual, and which is not in the usual course of trade, means conjunctively both casual employment and usual course of trade. *Hiestand v. Ristau* 881
53. "Casual employment" means occasional; coming at certain times without regularity, in distinction from stated or regular. *Hiestand v. Ristau* 881
54. Employment of a carpenter by a contractor for several weeks continuously to repair farm and other buildings for the owner is not "casual;" nor is an accidental injury of the carpenter in such work noncompensable as farm labor, within the compensation law. *Hiestand v. Ristau* 881
55. Repairing of buildings on farms temporarily owned by insurance company *held* in usual course of business of company, within the compensation law. *Hiestand v. Ristau* 881
56. "Seasonal employment" defined. *Hiestand v. Ristau* 881

57. Since occupation of a carpenter may be pursued throughout the year, he is not engaged in "seasonal employment" in the sense that it is a defense to claim for workmen's compensation. *Hiestand v. Ristau* 881
58. Award of 20 per cent. for permanent partial disability in loss of use of foot *held* not excessive. *Hiestand v. Ristau* 881
59. Where there is a reasonable controversy over liability for compensation, penalties for "waiting time" are not recoverable. *Hiestand v. Ristau* 881
60. Award of compensation against contractor and owner of building approved. *Helgenberger v. Ristau* 889

Mortgages.

1. The general saving statute preserves a right of action on a claim for deficiency judgment in a suit to foreclose a mortgage not due nor in litigation at the time the legislature, without a special saving clause, passed the act taking away the court's power to enter deficiency judgment in mortgage foreclosure. *Filley v. Mancuso* 403
2. An order confirming a foreclosure sale will not be set aside for inadequacy of price, unless so low as to evidence fraud, and where the evidence does not show that a resale would produce a better price. *Weir v. Smith* 447
3. Fraud vitiating the transfer of unmatured negotiable paper secured by mortgage may be shown by circumstances proving that transferee took the paper in bad faith, and good faith of a subsequent encumbrancer in reliance upon the fraudulent release of the mortgage of record may be shown in the same manner. *Federal Land Bank v. Worley* 493
4. A foreclosure sale conducted inside the east front door and at the top of a short flight of stairs leading from said door of the courthouse was a substantial compliance with a notice that the sale would be held at the east front door. *Bowman v. Caldwell* 554
5. Where defendants in a foreclosure suit avail themselves of the statutory stay of execution, they are estopped from attacking the judgment. *Bowman v. Caldwell* 554
6. Inadequacy of price will not prevent confirmation of a foreclosure sale, unless the price is so low as to evidence fraud. *Home Owners' Loan Corporation v. Smith* 618
7. A trustee appointed to succeed a bankrupt trustee generally has predecessor's authority to receive payment of matured principal and interest owing on bonds secured by mortgage. *First Trust Co. v. Maryott* 679

8. A partial payment by mortgagor on matured bond secured by mortgage to trustee authorized to receive it for bondholders discharged bond and mortgage to extent of the payment, in absence of fraud or negligence of mortgagor. *First Trust Co. v. Maryott* 679
9. Entering satisfaction of a mortgage and taking a new one does not extinguish a mortgage, but is merely a renewal thereof, where designed by the parties to be a continuation of the first mortgage, and hence does not give priority to an intervening judgment or mortgage creditor of the mortgagor. *Prudential Ins. Co. v. Nuernberger* 743
10. To warrant reformation of a mortgage for mutual mistake, the proof must be clear, convincing, and satisfactory. *Sweley v. Fox* 780
11. Fairness of the price on a foreclosure sale is a question primarily for the trial court, and confirmation will not be set aside on appeal unless the bid is so low as to produce a clear conviction of unconscionableness. *Metropolitan Life Ins. Co. v. Suverkrubbe* 865
12. A motion to set aside a foreclosure sale for inadequacy of bid is merely an objection to confirmation, which is disposed of by the order of confirmation. *Metropolitan Life Ins. Co. v. Suverkrubbe* 865
13. The trial court did not err in granting a writ of assistance on oral application at time of confirmation of a foreclosure sale, where the right thereto clearly existed and the parties were before the court. *Metropolitan Life Ins. Co. v. Suverkrubbe* 865

Municipal Corporations.

1. Where a city council acting within its authority has determined on sufficient evidence that a building is a public nuisance, the courts are without authority to interfere. *Horbach v. Butler* 394
2. A city of the metropolitan class has the power to remove or to order the removal of a building which has become a nuisance because of its dangerous condition. *Horbach v. Butler* 394
3. Levies of special assessments for construction of sewers or drains within a city must be made on realty specially benefited within the improvement district to the extent of benefits to such realty. *City of Scottsbluff v. Acton* 636
4. No tax for improvement within a city can be levied on property outside the improvement district. *City of Scottsbluff v. Acton* 636

5. Where a city properly levies special assessment against realty for sewer construction, and tax sale certificates are foreclosed to collect the special and general assessments against an entire tract of land, the greater portion of which is not benefited by the special assessment, the decree is subject to collateral attack, since the proceedings are void. *City of Scottsbluff v. Acton* 636

Negligence.

1. Evidence in action for negligence *held* to show actionable negligence warranting submission of cause to jury. *Rankin v. J. L. Brandeis & Sons* 86
2. The proprietor of a store is not an insurer against accidents to customers, but must exercise reasonable care to keep the premises safe for use of customers. *Rankin v. J. L. Brandeis & Sons* 86
3. The mere fact that an invitee falls on the floor of a store does not raise a presumption of negligence of owner, but what constitutes due care of the owner is determined by the circumstances and conditions surrounding the transaction under consideration. *Rankin v. J. L. Brandeis & Sons* 86
4. A person in a position of danger may still recover for injuries received, if another knowing the situation is thereafter negligent in failing to utilize with reasonable care his then existing ability to avoid harming him. *Diehm v. Dargaczewski* 251
5. Before the doctrine of last clear chance can apply, one causing injury must have had a chance to have avoided the injury, for the doctrine presupposes time for action. *Diehm v. Dargaczewski* 251
6. "Negligence" defined. *Eaton v. Merritt* 363
7. In an action for negligence, where the evidence establishes that plaintiff was guilty of more than slight negligence, the court should direct a verdict for defendant. *Eaton v. Merritt* 363
8. "Contributory negligence" defined. *Eaton v. Merritt* 363
9. Negligence of husband in driving an automobile cannot be imputed to his wife, who is riding with him, unless the parties are engaged in an enterprise giving the wife the duty to direct operation of the automobile. *Dederman v. Summers* 453
10. Persons entering premises of another are in one of three classes: "Invitees" are those who are expressly or impliedly invited; "licensees" are persons whose presence is not invited, but tolerated; "trespassers" are per-

sons who are neither suffered nor invited to enter. *Haley v. Deer* 459
11. An owner's duty toward an invitee is to exercise reasonable care to keep premises in a safe condition, but a licensee takes the premises as he finds them, for the owner's only duty to a licensee is to give notice of concealed dangers. *Haley v. Deer* 459
12. A person going into a store to use a pay telephone maintained for use of customers is an invitee. *Haley v. Deer* 459
13. An invitee who fell through an unguarded and unlighted trap-door could recover damages for her injuries. *Haley v. Deer* 459
14. In a personal injury action, plaintiff has the burden to establish that some one of the acts of negligence charged in the petition was the proximate cause of the injury. *Winterson v. Pantel Realty Co* 472
15. In an action for damages from fire, in order to entitle plaintiff to recover, plaintiff must show that the defendant's negligence was the proximate cause of the fire and the consequent damages. *Watenpaugh v. L. L. Coryell & Son* 607
16. The gist of an action for damages from fire is negligence. *Watenpaugh v. L. L. Coryell & Son* 607
17. The term "negligence" is merely a convenient term under which to group a failure to conform to standards of conduct insisted on by society. *Watenpaugh v. L. L. Coryell & Son* 607
18. In an action for damages from fire which allegedly started from a stove on defendant's premises, plaintiff's evidence, which failed to show the cause of the fire, was insufficient to justify submission of the case to the jury. *Watenpaugh v. L. L. Coryell & Son* 607

New Trial.

1. In passing on motion for new trial, the court may consider conflicting and improbable evidence and all facts occurring during the trial. *Nesmith v. Clarke* 117
2. An instruction which has a tendency to mislead the jury is ground for a new trial. *Diehm v. Dargaczewski* 251
3. If a court believes that it erred in submitting a case to the jury and that it should have directed a verdict for defendant for insufficiency of plaintiff's evidence to make a case, the proper remedy is to grant a new trial. *Winterson v. Pantel Realty Co* 472
4. To obtain a new trial on the ground of newly discovered

evidence, the evidence must be such that applicant could not with reasonable diligence have discovered and produced it at the trial. *Gate City Co. v. Douglas County* 531
5. The court, during the term at which a judgment was rendered, has inherent power to set aside the judgment if obtained by fraud and to grant a new trial. *Gate City Co. v. Douglas County* 531
6. Where codefendants join in motion for new trial, errors assigned which are not good as to both defendants are not good as to either. *Thomas v. Fundum* 728

Novation.

Where a creditor accepts from his debtor any form of new agreement in place of a prior contract between them, with intent to cancel the former and substitute the new one therefor, novation by substitution of obligation takes place. *American Loan Plan v. Frazell* 718

Officers.

Where the occupant of a public office is found guilty of a felony and sentenced by a court of competent jurisdiction, he has been convicted of a felony within the meaning of that term as used in the Constitution. *State, ex rel. Hunter, v. Jurgensen* 136

Partition.

1. In a suit to partition encumbered land, a subordinate judgment lienor had the burden of proving an oral agreement alleged by it that the holders of the first judgment lien in possession were accountable to a life tenant for rents and profits. *Sutton v. Wood* 120
2. The statute gives one of several tenants in common the right to partition of their realty. *Windle v. Kelly* 143
3. The guardian of an incompetent who is a tenant in common with other owners of land in equal shares may maintain a partition suit in behalf of the ward. *Windle v. Kelly* 143
4. A petition in a partition suit by a named individual as guardian of a named incompetent is not demurrable for want of a competent plaintiff, where the petition specifically alleges that the suit is brought for and in behalf of the ward. *Windle v. Kelly* 143
5. Petition in a suit in behalf of a ward by his guardian to partition land *held* not so indefinite as to require nonsuit. *Windle v. Kelly* 143
6. Equitable owners of land in equal shares, where the

beneficial interests therein are held in trust for them under a resulting trust, are tenants in common within the meaning of the law relating to partition. *Windle v. Kelly* 143

Partnership.

A partner is not entitled to charge the partnership account for his services unless there is an express agreement that he shall be compensated therefor. *Beskas v. Calkins* 323

Paupers.

1. The county board of each county is vested with exclusive superintendence of the poor in the county, with authority to employ a county physician. *Miller v. Banner County* 549
2. A person is chargeable as a poor person in the county in which he has a legal settlement. *Miller v. Banner County* 549
3. A physician, not hired by the county, cannot recover from the county for services rendered to a poor person in an emergency, where there exists a duly appointed county physician. *Miller v. Banner County* 549
4. A physician seeking recovery from a county for services rendered to a poor person is chargeable with notice of appointment of a county physician. *Miller v. Banner County* 549

Payment.

Presumption that lender of money is not indebted to borrower on previous obligation not mentioned by either at time of loan may be overthrown by evidence of pre-existing debt owing from lender to borrower. *In re Estate of Skade* 712

Pleading.

1. The essential character of the cause of action and the relief sought, as shown by the petition, determine whether it is an action at law or a suit in equity. *Mills v. Heckendorn* 294
2. The trial court has a wide discretion in permitting amendments to pleadings during and after trial. *Beskas v. Calkins* 323
3. The allowance of amendment in an appropriate case is not to be denied solely because the trial has progressed to a particular stage, but may be allowed even after the evidence is closed. *Swan v. Bowker* 405
4. A contract incorporated into a pleading as part of a

cause of action or defense controls allegations which it contradicts. *Department of Banking v. Flotree* 416

Principal and Agent.

1. A principal who retains benefits derived from the fraudulent conduct of his agent is chargeable with the agent's acts. *Western Union Life Ins. Co. v. Mayhew* 6
2. The burden of proof is on the party alleging agency to establish same by a preponderance of the evidence. *Schultz v. Bleckwehl* 94
3. "Agency" defined. *Schultz v. Bleckwehl* 94
4. Ratification by purported principal of transaction entered into by purported agent has the same effect on third person's liabilities to principal as an original authorization. *Millett v. Miller* 123
5. A principal may ratify what he could have authorized. *Millett v. Miller* 123
6. Ostensible authority to act as agent may arise if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, allows third persons to act on such apparent agency. *Ware v. Home Mutual Ins. Ass'n* 329

Quieting Title.

Where it appears that the owner of lands to which accretions had attached conveys part of the lands, but retains possession of the accretions, and the purchaser disclaims any interest therein, vendor may maintain suit to quiet title thereto in himself, as against those who prove no interest in or title to the accreted lands. *Conkey v. Knudsen* 890

Rape.

1. To warrant conviction of assault with intent to commit rape, the circumstances must show the intent beyond a reasonable doubt. *Prichard v. State* 522
2. Evidence *held* insufficient to sustain conviction for assault with intent to commit rape. *Prichard v. State* 522

Religious Societies.

In action under statute relating to succession to real or personal property on dissolution of religious societies, evidence was insufficient to show that plaintiff was entitled to defendant's property. *In re Application of Tyler* 667

Replevin.

Where defendants appear, answer to the merits, and

go to trial without making objections to amendable defects in an affidavit in replevin, they waive the defects. *American Loan Plan v. Frazell* 718

Sales.

In an action to replevy ice cream cabinets, defense of reliance on an implied warranty that machines were reasonably fit for the general purpose for which they were manufactured *held* not sustained by evidence. *Refrigeration Discount Corporation v. Richards* 856

Schools and School Districts.

1. Where a school district treasurer succeeds himself to that office, he changes his official personality, each term of office being a separate entity, and hence the delivery of a claim, based on a certificate of deposit in an insolvent bank, to himself as his successor is not a payment which will relieve him or the sureties on his bond from liability. *Thurston County v. Chmelka* 342
2. A school district treasurer is liable on his official bond for school funds coming into his hands which were lost by reason of the insolvency of a bank in which he had deposited them, notwithstanding he acted in good faith in the selection of such bank. *Thurston County v. Chmelka* 342

Specific Performance.

1. Specific preformance of alleged parol contract between plaintiff's mother and father, that father would leave his estate, other than portion due stepmother by law, to plaintiff, disallowed for failure of proof. *Goodwin v. Freadrich* 203
2. Equity will grant specific performance of a parol contract to will property to another, where the terms of the contract are established by evidence that is clear, convincing, and satisfactory, and the contract has been wholly performed by one party so that its nonfulfilment would amount to fraud on that party. *Craig v. Seebecker* 221
3. Evidence *held* to establish parol contract to will property, and to entitle plaintiffs to specific performance thereof. *Craig v. Seebecker* 221
4. In a suit for specific performance of a contract for sale of land, considerable delay in tendering performance does not preclude enforcement of the contract where the delay can be compensated for by interest on the purchase money, unless the contract expressly states that

performance at or within a given time is essential, or enforcement thereof will work injustice. *Klapka v. Shrauger* 354

States.

No set-off, counterclaim or cross-demand may be pleaded in an action by the state for collection of revenue. *State v. Smith* 423

Statutes.

1. Where language of a statute is plain and unambiguous, there is no room for construction. *Cross v. Theobald* 199
2. In construing a statute, effect must be given, if possible, to its several parts. *Hansen v. Dakota County* 582
3. In construing a statute, it is the duty of the court to discover, if possible, the legislative intent from the language of the act. *Hansen v. Dakota County* 582
4. When the legislative intent is in doubt, resort may be had to the title of an act as an aid to construction. *Hansen v. Dakota County* 582
5. In determining legislative intention, all provisions of statute bearing on the point in dispute should be considered. *Chilen v. Commercial Casualty Ins. Co* 619
6. All statutes *in pari materia* must be taken together and construed as if they were one law. *Chilen v. Commercial Casualty Ins. Co* 619
7. Where parts of a statute are in conflict, the last in point of time or order of arrangement prevails. *Chilen v. Commercial Casualty Ins. Co* 619

Street Railways.

1. Bonds of a street railway company, by referring to the mortgage securing them for consequences of default in payment when due, make pertinent provisions of the mortgage a part of the bonds and charge purchasers thereof with notice of such consequences. *Greenwald v. Omaha & C. B. Street R. Co* 183
2. Bonds of a street railway company are nonnegotiable, where they provide that a majority of the bondholders may waive defaults and extend time for payment and inhibit suit on the bonds and mortgage when due. *Greenwald v. Omaha & C. B. Street R. Co* 183
3. An inhibition in a street railway company's bonds preventing suit thereon and on the mortgage securing them when due, unless directed by holders of 25 per cent. of the outstanding bonds, is a reasonable and valid provision. *Greenwald v. Omaha & C. B. Street R. Co.* 183

Subrogation.

1. A surety on a fidelity bond who partially restores loss created by fraud of principal obligor cannot thus acquire by subrogation a greater right than that formerly possessed by the party for whose benefit the bond was given. *Federal Land Bank v. Worley* 493
2. The right of subrogation rests upon some recognized subject of equitable cognizance. *Federal Land Bank v. Worley* 493
3. The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. *Equitable Life Assurance Society v. Person* 800
4. Where plaintiff's assignor, relying on defendant's agreement that loan to defendant would be secured by first mortgage, loaned money, plaintiff *held* entitled to be subrogated to rights of original mortgagee. *Equitable Life Assurance Society v. Person* 800

Taxation.

1. A state, county or city general tax on property exempt from taxation is void. *McDonald v. Masonic Temple Craft* 48
2. A tax on property exempt from taxation is one levied for an unauthorized purpose, and collection thereof may be enjoined. *McDonald v. Masonic Temple Craft* 48
3. A tax levied on property as a whole, part of which is exempt, is unauthorized and the whole tax is void. *McDonald v. Masonic Temple Craft* 48
4. A tax on an aggregate valuation of exempt and non-exempt property is void. *McDonald v. Masonic Temple Craft* 48
5. A city purchasing and foreclosing a tax sale certificate on realty does so as trustee of an express trust for the use and benefit of the state and all other governmental subdivisions entitled to participate in the distribution of proceeds. *City of McCook v. Johnson* 270
6. A city in foreclosing a tax sale certificate is a trustee and the trust property is the tax sale certificate with the rights evidenced thereby. *City of McCook v. Johnson* 270
7. Where a city forecloses a tax sale certificate and purchases the realty at the sale, it must pay the amount of its bid to the sheriff. *City of McCook v. Johnson* 270
8. In the absence of statute or constitutional provision,

taxes voluntarily paid cannot be recovered back, and an original action may be brought to recover an illegal tax only by virtue of statutory or constitutional authority. *State v. Smith* 423
9. An original action lies to recover special assessments paid, where levied for an illegal or unauthorized purpose. *Hayman v. City of Grand Island* 873

Trial. SEE APPEAL. CRIMINAL LAW.
1. A motion for a directed verdict admits the truth of adversary's evidence and entitles him to the benefit of inferences reasonably deducible therefrom. *Rankin v. J. L. Brandeis & Sons* 86
2. Appointment of an interpreter rests largely in the court's discretion. *Labs v. Farmers State Bank* 130
3. On a trial of a law action to the court without a jury, the court on request must separately state conclusions of fact and law. *Condon Co. v. Loup River Public Power District* 284
4. In personal injury action, permitting jury to examine mechanism controlling operation of a street car door alleged to have caused the injury, *held* proper under instructions given. *Denison v. Omaha & C. B. Street R. Co.* 307
5. Instructions are to be considered together. *Gallagher v. Law* 381
6. Failure to define the words "gross" and "slight," as used in an instruction on comparative negligence, is not error, since they are words of common use. *Gallagher v. Law* 381
7. Denial of motion for a directed verdict is proper, where there is substantial conflict in the evidence. *Wert v. Equitable Life Assurance Society* 654
8. Trial court may properly direct verdict for plaintiff where evidence sustains cause of action and is insufficient to sustain verdict for defendant. *Refrigeration Discount Corporation v. Richards* 856

Trusts.
1. The manner in which a trustee shall exercise his power rests ordinarily within his own discretion and judgment, but if he exceeds his powers, acts negligently, or abuses his discretion, courts can grant relief. *In re Estate of Vohland* 77
2. The fact that a court, if discretion had been conferred upon it, would have exercised the power differently is not

ordinarily a sufficient reason for interfering with exercise of power by a trustee. *In re Estate of Vohland*.... 77
3. Endorsement of a note in name of a business trust by its secretary did not impose personal liability on individual trustees. *Plum v. Siekmann*..... 101
4. The name adopted by a business trust and provision in its articles of agreement that such name shall be the collective name of the trustees and used as a convenient designation of the trustees and their successors in trust in their conservative capacity does not make such name the trade or assumed name of the trustees individually. *Plum v. Siekmann*..... 101
5. Failure of cotrustees in a business trust to stipulate against personal liability on note indorsed by one trustee did not make the cotrustees personally liable. *Plum v. Siekmann*..... 101
6. The trustees of a common-law trust are not personally liable on notes indorsed by or on behalf of the trust. *Plum v. Siekmann*..... 101
7. Conveyance of land by absolute deed to serve a specific purpose of grantors and grantee, who are owners in equal shares, creates a resulting trust, where the intention of all the parties is to retain the beneficial interests, and the purpose may be shown by parol, and is not within the statute of frauds. *Windle v. Kelly*..... 143
8. Where one employed as agent to purchase realty for another becomes the purchaser himself, he will be deemed to hold the property in trust for his principal, subject to reimbursement for proper expenditures. *Lamb v. Sandall*..... 300

Usury.

1. An automobile dealer may in good faith sell an automobile on time for a price exceeding the cash price without tainting the transaction with usury. *American Loan Plan v. Frazell*..... 718
2. Where original purchase of automobile on credit was valid, it is immaterial, on question of usury, that a finance company solicited contracts from automobile dealers and furnished schedules. *American Loan Plan v. Frazell*..... 718
3. Purchase of note at discount beyond legal interest does not render transaction usurious. *American Loan Plan v. Frazell*..... 718

Vendor and Purchaser.

1. A covenant by a purchaser to pay and by the vendor to

convey a good title, both to be performed at the same time, are mutually dependent, and neither party can claim a breach without a tender of performance and offer to perform upon due performance by the other, or, at least, proof of readiness and willingness to perform. *Klapka v. Shrauger* 354

2. Where time is not of the essence of a contract for sale of realty, the vendor is entitled to reasonable time to perfect title. *Klapka v. Shrauger* 354
3. If the date of performance of a contract for sale of realty is fixed and not far in the future, courts will be liberal in allowing the vendor reasonable time to perform, where time is not of the essence of the contract. *Klapka v. Shrauger* 354

Waters.

1. The statutory requirement for written notice to an irrigation district of a claim for damages for negligence in delivering or failure to deliver water to an irrigator entitled thereto does not apply to damages for breach of contract to furnish water for irrigation. *Ledingham v. Farmers Irrigation District* 276
2. Evidence *held* insufficient to show that diversion dam and reservoir of defendant caused an ice jam which resulted in flooding plaintiff's lands. *Welsh v. Platte Valley Public Power and Irrigation District* 441
3. An appropriator of water for irrigation purposes who has had his appropriation legally adjudicated secures a vested property right. *Enterprise Irrigation District v. Willis* 827
4. Prior to 1895 an appropriation of water for irrigation purposes was not limited as to quantity except that it must be for a useful and beneficial purpose and within limits of capacity of diversion works. *Enterprise Irrigation District v. Willis* 827
5. The "duty of water" is such a quantity of water necessary when economically conducted and applied to land without unnecessary loss as will result in successful growing of crops. *Enterprise Irrigation District v. Willis* 827
6. In determining the quantity of water that can be put to beneficial use of an appropriator, the policy of the law is to require within reasonable limits the greatest duty of water. *Enterprise Irrigation District v. Willis* 827
7. In determining the duty of water, the amount of water delivered to land and not the amount diverted from the

stream must govern. *Enterprise Irrigation District v. Willis* 827
8. The "duty of water" is a question of fact to be determined in accordance with prevailing customs in the locality where it is used. *Enterprise Irrigation District v. Willis* 827
9. The state may regulate and control irrigation and distribution and use of water therefor by virtue of police power. *Enterprise Irrigation District v. Willis* 827
10. Prevention of wasting of water or diversion of more water than can be put to beneficial use is a proper exercise of police power. *Enterprise Irrigation District v. Willis* 827
11. Where a river gradually recedes, changing the channel and leaving the land which was theretofore covered by water dry, such land belongs to the riparian proprietor. *Conkey v. Knudsen* 890

Wills.

1. Under a will directing the executor to provide all the comforts of life for the widow, he may expend such sums as in his judgment may be necessary without first securing an order of the probate court, since courts only act in such matters when the executor-trustee abuses his discretion or acts in bad faith. *In re Estate of Vohland* 77
2. In determining the meaning of particular parts, the testator's intention is to be determined from the entire will. *Kenfield v. Dudek* 574
3. Generally, a codicil lawfully executed operates as a republication of the will, so far as the will is not altered or revoked by the codicil, and the will and codicil are regarded as one instrument, speaking from date of codicil. *Kenfield v. Dudek* 574
4. Provisions in will for benefit of testator's widow should be liberally construed in her favor, especially when made for her support or accepted by her in lieu of her rights under intestate laws. *Kenfield v. Dudek* 574
5. Provisions of a codicil may have the effect of removing an ambiguity on the face of the will. *Kenfield v. Dudek* 574
6. Will and codicil construed and *held* to vest in widow existing residue of estate. *Kenfield v. Dudek* 574
7. Where a specific legatee and a residuary legatee are the only persons interested, they may agree upon a disposition of the legacy different from that provided for in the will. *In re Estate of Jensen* 602

Witnesses.

1. Testimony of widow with reference to conversations with deceased in regard to an alleged gift of an automobile is not rendered competent by introduction by executor of the note given by deceased in payment therefor and her identification of signature of deceased on same. *In re Estate of Nielsen* 110
2. In a suit for specific performance of parol contract to will property, a brother of plaintiffs who had no direct interest in the result of the suit was competent to testify to conversations with deceased. *Craig v. Seebecker* 221
3. Relationship may affect credibility of a witness, but not his competency. *Craig v. Seebecker* 221
4. Provision in policy that insured might investigate matters on which any claim might be based constituted a waiver of privileged communication by insured. *Wolski v. National Life & Accident Ins. Co.* 643
5. Provision in policy that proofs of death should contain answers to each question propounded to physicians constituted a waiver of privileged communication by insured. *Wolski v. National Life & Accident Ins. Co.* 643
6. Where a witness has made a written statement before trial, and when called as a witness testifies to an entirely inconsistent state of facts, counsel should be allowed to introduce his previous statement. *Mason v. Reynolds* 773

Work and Labor.

Presumption that an adult child who performed valuable services for her parents did so gratuitously may be overthrown by evidence of an oral contract for compensation. *In re Estate of Skade* 712