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FRED HARDT, JR., APPELLEE, V. BENJAMIN F. ORR, APPELLANT.

6 N. W. (2d) 589

FILED DECEMBER 4, 1942. No. 31438.

1. **Equity.** "Equity delights to do justice, and that not by halves," and "when equity once acquires jurisdiction it will retain it so as to afford complete relief." 21 C. J. 198.
2. **Waters.** Grants of land bounded upon rivers in this state carry with them the exclusive right and title of the grantees to the center or thread of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river.
3. ———: BOUNDARIES. "Where title to an island in a nonnavigable stream is conveyed to a grantee by government patent, and the land so conveyed is bounded by the waters of such stream, the grantee's ownership carries with it the bed of the river to the center or thread of each surrounding channel." *Higgins v. Adelson*, 131 Neb. 820, 270 N. W. 502.
4. ———: ———. "The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow." *Higgins v. Adelson, supra.*
5. ———: ———. A specific call for the thread of a stream, whether made expressly or by necessary implication, fixes the thread as the boundary, and in case the stream has two channels the thread of the main channel is the limit.
6. ———: ———. Under the facts disclosed by this record, the legal diversion of the original thread or center of the main channel of the North Platte river from its original location north of Long Island by the acts of the defendant was not accomplished, and his acts and efforts so to do were wholly ineffective to alter or change this boundary line as previously existing.
7. **New Trial.** "A motion for a new trial on the ground of surprise is properly overruled, where a request for a continuance for that reason was not made at the trial." *Hahn v. Doyle*, 136 Neb. 469, 286 N. W. 389.
8. ———. "Newly discovered evidence is not a ground for a new trial, where the exercise of due diligence before the trial would have produced it." *Hahn v. Doyle, supra.*

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

Morrow & Miller, for appellant.

Mothersead & Wright and *Lewis F. Shull, contra.*

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

EBERLY, J.

This is a suit in equity. Plaintiff is the owner of an island in the North Platte river known as "Long Island." The immediate cause for bringing this suit was occasioned by defendant Orr erecting a fence on lands claimed by plaintiff as constituting a part of this island owned by him, and artificially changing the course of the waters flowing in the channel north of the island casting it upon and against the shore line thereof. Plaintiff's amended petition described his ownership of the island; alleged that at the time of the original government survey it contained more than 160 acres of land, and was separately surveyed by the United States, platted and divided into lots, and opened to homestead entry; that plaintiff succeeded to the title thereof by mesne conveyances; that defendant claims part of plaintiff's island and built fences thereon; and that he has dammed up certain channels of the river so as to cast water down on part of plaintiff's island and wash it away. The prayer of plaintiff's amended petition is that plaintiff may be decreed to be the owner of the island as described in his petition; that plaintiff's title thereto may be quieted against defendant and all persons claiming by, through, or under him; that the defendant be perpetually enjoined from going upon said land or erecting any fences thereon or in any manner trespassing thereon; that the defendant be also enjoined from keeping or maintaining any dams or obstructions of any kind, nature, or description in the channel of the North Platte river, and also be enjoined from in any manner diverting the flow of the north channel of the North Platte river so that the same is cast upon the lands of this plaintiff; and that a mandatory injunction issue commanding defendant to remove the

obstructions, car bodies, and dams heretofore placed by defendant in such channel.

The ownership by plaintiff of this island, its survey by the government, and that it is separated from the north bank of the North Platte river by the main channel of that river are admitted by the defendant's answer. The defendant denies the placing by him of dams or obstructions in the main channel of said river lying to the north of the island and causing the waters thereof to be diverted so as to wash the banks of the island. The defendant's answer, as amended during trial, contained the further allegation that, "for more than fifteen years last past, and for more than ten years prior to the commencement of this action, he has maintained a fence along the north edge of what is now the main stream flowing across section 27, township 21 north, range 53 west of the 6th P. M., and has had the open, notorious, and uninterrupted adverse possession of all of the land in said section north of said fence, during all of which time he claimed to be the absolute owner of said real estate."

The defendant as his "further answer, affirmative defense and cross-petition against the plaintiff" sets forth his ownership of lots 1, 2, 3, and 4 in section 27, township 21 north, range 53 west; sets forth the alleged boundaries thereof and the conditions of such lots and the changes therein occasioned by the impounding of the waters of the North Platte river in large reservoirs constructed in the state of Wyoming; and alleges that, "as a result of the changed condition of said river, the boundary between said island and the land owned by this defendant * * * is now, and since plaintiff became the owner of said island, has been in dispute." Defendant prays that the boundary between the land owned by plaintiff and the above described land owned by defendant be ascertained, determined, and be permanently established, and that plaintiff's petition be dismissed, and for other and further relief as may be just and equitable.

To this answer and cross-petition plaintiff replied, ad-

mitting the ownership of the lands described in paragraph 1 of defendant's cross-petition; also admitting the construction many years ago of large reservoirs in the state of Wyoming; denying each and every allegation not in the reply expressly admitted, and renewing the prayer as set forth in his amended petition.

A trial of the issues thus joined was had, and the proof of the parties to the action was received, on consideration of which on July 23, 1941, the district court for Scotts Bluff county found the allegations of plaintiff's petition to be true, and determined such issues as set forth in his answer and in his cross-petition adversely to the contentions of the defendant. The court also adjudged that the defendant had been guilty of repeated trespasses upon the lands of plaintiff, and had also "unlawfully dammed off and diverted and deflected channels and streams" as in plaintiff's amended petition set forth. That court also determined and established the true boundary between the island owned by plaintiff and described in his amended petition and the lands of the defendant in section 27, township 21 north, range 53 west of the 6th P. M., and, as to the lands situated south of the boundary line so determined and established, quieted the title thereof in plaintiff. This decree also enjoined any further trespasses by defendant upon the lands so adjudged to be the property of plaintiff. On July 25, 1941, defendant filed his motion for a new trial. On September 23, 1941, defendant filed his further motion for a new trial on the ground of newly discovered evidence. These motions for a new trial were on January 15, 1942, overruled by the district court, from which order this appeal is prosecuted.

In this court appellant challenged the judgment entered by the district court as unsupported by the pleadings, and not sustained by the evidence; and, in addition, that the trial court erred in the denial of defendant's motion for a new trial on the ground of newly discovered evidence.

In the instant case, however, the ownership of the island and accretions thereto is properly alleged in plaintiff's

pleading, and the quieting of the title thereto constitutes a part of the prayer of his petition. It further appears that one of the primary objects of the litigation in the instant case is to compel the removal of encroachments by defendant upon and against plaintiff's premises and to enjoin his repeated trespasses thereon, which involve only as an incident the determination of the boundary line between the lands of each. *Aborn v. Smith,* 11 R. I. 594; *Caleo v. Goldstein,* 134 App. Div. 228, 118 N. Y. Supp. 859. It also appears that the defendant in this suit in equity, as his "answer and cross-petition" under section 34-301, Comp. St. 1929, to determine a disputed boundary, conformed his pleadings to the requirement of that section, and has asked as affirmative relief that the boundaries of the disputed tract of land be established as set forth in his answer and in his cross-petition. *McDowell v. Carothers,* 75 Or. 126, 146 Pac. 800. In addition, it further appears that defendant in his answer specifically pleaded "open, notorious and uninterrupted adverse possession" of a substantial portion of the *locus in quo* here in suit, and that his answer and cross-petition contains appropriate prayer for relief based on these allegations herein referred to.

The maxim of equity applicable to the situation thus presented by the parties in their several pleadings is that "Equity delights to do justice, and that not by halves." This embraces the well-established doctrine that, "When equity once acquires jurisdiction it will retain it so as to afford complete relief." 21 C. J. 198.

It follows that, in view of the situation presented by the pleadings, the defendant is precluded from objecting to the jurisdiction of equity to fully determine the issues joined thereby including the disputed boundary lines involved. Further, also, defendant is precluded from challenging the sufficiency of plaintiff's pleadings to support the judgment entered by the district court in this cause. It necessarily follows that the judgment entered in the instant case, in view of the issuable facts contained and alleged in the pleadings, must be deemed to be fully supported thereby.

It appears fairly established by the record in this case that in a state of nature the waters carried by the North Platte river past Long Island were regularly subjected to extreme fluctuation. Due to the sandy nature of its bed, the terrain through which its course was situated, and the source of its supply, there annually occurred in this river a season of high water and a season of low water. During the flood water season, which usually occurred during the months of June or July, the waters carried by this stream covered the entire bed of the river between the north bank thereof and the shores of Long Island, even "right up to the tops of the banks." During low water period the waters carried would gradually diminish in volume exposing its bed of sand until only two channels remained, one south of Long Island, the other, the larger and deeper channel situated near and along and parallel to the north high bank of the North Platte river at this point. Defendant's engineer who became acquainted with the North Platte river first in 1893, testifying as a witness, says in part:

"Q. When you first knew the river in this vicinity it was as a boy? A. Yes, sir. * * * Q. At that time in times of high water the river would be full from bank to bank? A. Yes, sir. Q. They had dry years then sometimes? A. Oh, yes, the same as they do now. Q. And there was also dry seasons in the years? A. Yes, sir. Q. After the time of the high water the water would commence going down in the river? A. Yes, sir. Q. And it would no longer be full from bank to bank? A. That's right. Q. So it was only on occasions of extreme high water that was full from bank to bank, isn't that correct? A. Yes, sir. Q. And then in normal times of water it would divide into channels? A. Yes, sir, that is right. Q. So normally at what we might call 'mean water' there was at least two channels in the river, and probably more? A. Yes, sir. Q. Then as the water got lower and lower the number of channels that were flowing water would decrease? A. Yes, sir. Q. Now, in the vicinity of Long Island, which is the island in question, it is your recollection that in extreme

low water it would get down to a channel on the north and one on the south? A. Yes, it would. Q. That was what would happen in extreme low water? A. Yes, sir."

The district court, by its decree entered in this case, in effect determined and fixed the true boundary line between the lands of the parties to this litigation as the middle or thread of the deep water channel as it existed in a state of nature from time immemorial during periods of low water immediately south and parallel to the north high bank of the stream forming the south boundary of the lands of defendant. This line is specifically described in the decree entered. The title of the lands lying south of this boundary is quieted in plaintiff, and defendant is perpetually enjoined from damming up or diverting any of the channels or streams of water on the lands of the plaintiff, and also enjoined from erecting dams, deflecting works, or diversion works that will change the flow of water in any of the streams in or on the plaintiff's land south of the boundary line as by the trial court fixed and determined.

The parties to this litigation are in agreement that grants of land bounded upon rivers carry with them the exclusive right and title of the grantees to the center or thread of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river. *Haney v. Hewitt*, 105 Neb. 746, 181 N. W. 861; *Wiggenhorn v. Kountz*, 23 Neb. 690, 37 N. W. 603; *McBride v. Whitaker*, 65 Neb. 137, 90 N. W. 966; *Kinkead v. Turgeon*, 74 Neb. 580, 109 N. W. 744.

In this connection, this jurisdiction is committed to the view: "Where title to an island in a nonnavigable stream is conveyed to a grantee by government patent, and the land so conveyed is bounded by the waters of such stream, the grantee's ownership carries with it the bed of the river to the center or thread of each surrounding channel." *Higgins v. Adelson*, 131 Neb. 820, 270 N. W. 502. See, also, *Wiggenhorn v. Kountz, supra.*

One of our accepted texts on the law of water rights em-

ploys this language: "The law of riparian rights grows out of this exclusion of nonriparian owners because they have no access to the water. The right of access is, in the end, a determinative factor in all systems of water law." 1 Wiel, Water Rights in Western States (3d ed.) 759.

In *Horton v. Niagara, Lockport & Ontario Power Co.*, 231 App. Div. 386, 247 N. Y. Supp. 741, it is stated, in part:

"In order to determine just where the center of the channel is, it is necessary to determine what constitutes such center line—the *filium acquæ*, as it is so often called in the older decisions. Plaintiffs contend that this line is midway between the banks of the river at the ordinary height of the water, without regard to the contour of the channel. Defendant insists that the thread of the stream is the line to which the water would finally recede, just before it entirely ran out or evaporated. That line would depend upon the location of the low and deep parts of the channel, which many times would be upon one border or the other of the stream, and seldom, if ever, in its exact geographical center.

"Water always seeks its lowest level. If the deepest part of a channel is well to one side, and the equidistant rule is applied, the riparian owner upon the shallow side would, in times of drouth, be shut off from access to the water which is supposed to flow past his door, without trespassing upon the lands of his neighbor, as the exact middle of the stream would be on dry land. In the very nature of things, the thread or center of a stream must be the line which would give to the owner upon either side access to the water, whatever its stage might be, and particularly at its lowest flow. Upon principle, therefore, it would appear that the thread of a nonnavigable river is the line of the water at its lowest stage. The weight of authority, in this state at least, upholds such contention. *Halsey v. McCormick*, 13 N. Y. 296; *Child v. Starr*, 4 Hill, 369, 380; *Ex parte Jennings*, 6 Cow. 518; *People v. Canal Appraisers*, 13 Wend. 355; *Micelli v. Andrus*, 61 Or. 78, 89."

We have, in effect, adopted the foregoing reasoning of

the New York courts and have announced the rule applicable in this state as follows: "The thread or center of a channel, as the term is above employed, must be the line which would give the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow." *Higgins v. Adelson, supra.*

The pleadings in this case admit that the plaintiff became the owner of Long Island by mesne conveyances from the original patentees. There is no contention that the original patents here involved or any of the mesne conveyances through which plaintiff claims contained any provisions denoting "an intention to stop at the bank or margin of the river." It is obvious that the original patentees of Long Island received title to the "thread of the stream" as the meaning of that term is above determined.

As meeting a further contention of defendant, it may be said that patents upon which plaintiff's title is based embody and include in legal effect a call for the thread of a stream as a boundary of the lands conveyed thereby. "A specific call for the thread of a stream fixes the thread as the boundary, and in case the stream has two channels the thread of the main channel is the limit." 11 C. J. S. 575, sec. 31.

It is true that at the time of the trial of this case in the district court the principal channel between Long Island and defendant's lands in which the waters of the North Platte river then flowed was situated south of the boundary line as fixed by that tribunal. It is also true that the construction of irrigation works and other projects of internal improvement has materially diminished the ordinary flow of the North Platte river. But it also appears from a fair preponderance of the evidence that the diversion of the original main channel of this river from its original location north of Long Island to its present situation was accomplished by and through dams and diversion works unlawfully constructed and unlawfully maintained by the defendant in the channels of the North Platte river upon lands owned by plaintiff and without plaintiff's

consent, and that the changes of location thus made occurred within ten years last past and within the statutory period of limitations, and were wholly ineffective to alter or change the boundary line as previously existing. *Courter v. Lincoln Park,* 101 N. J. Eq. 572, 138 Atl. 99.

The evidence as an entirety fails to sustain the defendant's claims of adverse possession as in his pleadings alleged.

We are also unable to accept defendant's contention that the trial court erred in overruling defendant's motion for a new trial based on the ground of newly discovered evidence. The facts relating to this subject disclosed by the record invoke the application of the following rules: "A motion for a new trial on the ground of surprise is properly overruled, where a request for a continuance for that reason was not made at the trial," and also, "Newly discovered evidence is not a ground for a new trial, where the exercise of due diligence before the trial would have produced it." *Hahn v. Doyle,* 136 Neb. 469, 286 N. W. 389. See, also, *Bonacorso v. Camden Fire Ins. Ass'n,* 130 Neb. 203, 264 N. W. 442.

It follows that the decree and judgment as entered by the trial court is amply sustained by the record, and, on consideration thereof *de novo,* the same is, in all respects, affirmed.

AFFIRMED.

GEORGE B. ALLEN, APPELLANT, V. IRA MILLER ET AL., APPELLEES.

6 N. W. (2d) 594

FILED DECEMBER 4, 1942. No. 31469.

1. **Counties.** Members of a county board are not ordinarily liable to individuals for their official acts, unless they have wilfully or negligently caused damage.
2. ———. Statutes imposing liability for such official acts are in derogation of the common law and must be strictly construed.
3. **Officers.** When a member of a county board is vested with dis-

cretion, and required to exercise judgment in deciding matters brought before him, he is usually given immunity from liability to persons injured as the result of an erroneous decision, provided the action taken is within the scope of his authority, and without malice or corruption.

4. **Counties.** A county commissioner acts quasi judicially in passing upon a claim against the county whenever he is required to determine questions of fact and exercise his best judgment and discretion upon the evidence before him.

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

Max Kier, for appellant.

Flansburg & Flansburg and *Peterson & Devoe, contra.*

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

PAINE, J.

This is a law action, brought by George B. Allen, one of 27 precinct assessors in Lancaster county, in his own right and as assignee of the other 26 precinct assessors, to recover damages from Ira Miller and Carl O. Johnson as a majority of the members of the board of county commissioners of Lancaster county. The alleged damages arose because certain warrants, issued on claims duly allowed, were withheld by the defendants from the plaintiff and his assignors from June 4, 1940, when the claims were allowed, until February 7, 1941, when the warrants were finally delivered pursuant to a mandate of the supreme court. The alleged damages sued for in this case consist of the interest on each warrant between the dates mentioned. At the close of all the evidence, the trial court sustained the defendants' motion for a directed verdict, and the jury were discharged and the action dismissed.

The petition alleged that the defendants Ira Miller and Carl O. Johnson were duly elected members of the board of county commissioners of Lancaster county, and constituted a majority of said board, and that the American Bonding Company of Baltimore, Maryland, and the Unit-

ed States Fidelity & Guaranty Company were sureties for the above named commissioners respectively.

Plaintiff alleged he was precinct assessor for the year 1940, and on June 4, 1940, his claim for services rendered was allowed in the sum of $360, but that Ira Miller as chairman refused to sign warrant for said claim, and said Miller and Johnson refused to deliver said warrant, and wrongfully compelled the county clerk to withhold said warrant from plaintiff until February 7, 1941, when an order of the supreme court directed such payment. Plaintiff further alleged that, by reason of such withholding of payment, he was damaged in the sum of $14.40, being interest for the period June 4, 1940, to February 7, 1941, and prayed judgment for said amount, with interest, costs of suit and attorney's fee.

Plaintiff then sets out in some 50 pages the detailed claims of each of 26 other precinct assessors for similar interest damages, which have been each duly assigned to him, and all of whose claims for services were allowed, but payment thereof was withheld by commissioners Miller and Johnson, defendants, for said period of June 4, 1940, to February 7, 1941, and plaintiff as assignee prays judgment for the amount of interest in each case, with interest, costs of suit and attorney's fee.

The bonding companies filed answers, admitting the issuance of the bonds, but denying all other allegations, and the defendant Carl O. Johnson denied all allegations except those specifically admitted, and alleged that all acts by him performed in connection with the subject-matter of plaintiff's petition were performed by him in his official capacity as county commissioner and were performed in good faith.

The amended answer of Ira Miller alleged that at the time the various claims of the precinct assessors were filed they failed and neglected to make out an itemized account giving the date of each day in which they were employed as precinct assessors, and to verify the same under oath; that said claims sought the payment by Lancaster

county of $5 for each 8-hour day allegedly worked by each claimant, irrespective of the number of calendar days actually worked, whereas claimants were, by section 33-129, Comp. St. 1929, entitled to a fee of only $5 a day for the time actually and necessarily employed in the duties of their office.

The answer alleged that on June 4, 1940, at a regular meeting of the board of county commissioners, Ira Miller voted against the allowance of such claims, and on the following day he served notice on the county commissioners that he as a taxpayer intended to file an appeal from the allowance of the claim of one Adolph Lebsack, whose claim was similar to and involved the same factual and legal questions as all other claims in plaintiff's petition, and Miller informed the other members of the board of county commissioners that said appeal was a test case to determine the legality of the claims of all precinct assessors of Lancaster county, and said Ira Miller filed said appeal in the district court for Lancaster county.

Plaintiff, in his reply to answer of Carl O. Johnson, sets out that an appeal was taken in said cause to the supreme court, which on December 13, 1940, entered its opinion, found in *State v. Miller*, 138 Neb. 747, 295 N. W. 279, wherein said court held that the act of the answering defendants was void, ineffective and without the authority or discretion of said Carl O. Johnson and the board of county commissioners of Lancaster county.

Plaintiff alleges that on January 23, 1941, judgment was entered by the district court upon the mandate, and that a peremptory writ of mandamus was issued by the district court ordering the issuance and delivery of the said warrants.

It is alleged further by plaintiff that said judgments and determination conclusively establish that the delivery of warrants to plaintiff and his assignors was a mere ministerial duty, and did not involve the exercise of any discretion, and that the defendant Carl O. Johnson had failed in the performance of his ministerial duties; that said judg-

ment is *res adjudicata* of all said issues and findings of fact. A similar reply was filed to allegations of Ira Miller in his amended answer.

At the conclusion of all the evidence, the defendants moved for a directed verdict, and the court held that the acts of defendants in attempting to secure a construction and interpretation of the application of the statute involved were quasi judicial and not ministerial, and the motions of defendants were sustained, the jury discharged, and the petition of plaintiff dismissed.

The former case of *State v. Miller,* 138 Neb. 747, 295 N. W. 279, was constantly referred to in the trial of this case in the district court and in the argument to this court. The facts in the former case show that in 1940 the board of commissioners of Lancaster county had Ira Miller as its chairman, and Carl O. Johnson and Clinton Mitchell were the other two members of the board of commissioners. The precinct assessors of Lancaster county made assessments of the personal property of individual taxpayers in 1940, and filed their claims for services, and these claims were allowed at a regular meeting of the county board, which was on June 4, 1940. The claims total over $8,000. On June 11, 1940, which was one week later, without notice to any of these claimants, and at a regular meeting of the board of county commissioners, the county board sought to reconsider its action which had been taken in regard to these claims. But prior to that action no notice was given to the claimants that the county board had fixed a certain time to reconsider its action of June 4 in allowing the claims, although each claimant received a letter from the county clerk advising him of the action taken.

It appeared to the objecting members of the county board that, under sections 77-1608 and 77-1612, Comp. St. 1929, precinct assessors shall receive only $5 a day for performing the duties of their office, whereas the claims had been filed on the basis of $5 for each eight hours the precinct assessor had worked, which the defendants claimed made the claims some $2,000 excessive. However, the merits of that

contention were not decided by this court, which held in *State v. Miller,* 138 Neb. 747, 295 N. W. 279:

"A county board may, under the provisions of section 26-122, Comp. St. 1929, once reconsider its action on the allowance of a claim, upon due notice to interested parties.

"A reconsideration of the allowance of a claim by the county board without first fixing a time for a hearing thereon, and giving due notice thereof to interested parties, where notice has not been waived, is without jurisdiction and void."

From an examination of the above case, it appears that the question of the proper basis of pay for precinct assessors was not raised nor discussed by this court in this opinion, which considered only the failure to give sufficient notice before reconsidering claims once allowed.

Constant reference is made in the bill of exceptions and in the argument of counsel to the Lebsack case. It appears from the record that Ira Miller, not as a member of the county board but as a taxpayer, appealed a case against Adolph Lebsack, one of the precinct assessors, for the purpose of determining whether the county board was justified in paying $5 for a day of but eight hours' work. This action was pending in the district court for Lancaster county for more than eight months. The opinion of the supreme court in the case of *State v. Miller,* 138 Neb. 747, 295 N. W. 279, was released on December 13, 1940, which directed that a peremptory writ of mandamus issue to the members of the county board and the county clerk commanding them to deliver said warrants which had been held up. Thereafter the Lebsack case was tried in the district court and determined in favor of Lebsack, from which decision Ira Miller, acting as a taxpayer, and having personally paid the costs up to that time, took no appeal, all of the other precinct assessors having at that time received their warrants.

Ira Miller has insisted that the claims were not itemized or made out according to law. But our court has said: "Though the claim was not, perhaps, in strict compliance

with the law, nevertheless, under our decisions, the board was vested with jurisdiction, regardless of the irregularity of the form in which the claim was presented." *Bartlett v. Dahlsten,* 104 Neb. 738, 178 N. W. 636.

The issue before the court in the case at bar may be narrowed down to the question whether Johnson and Miller, in voting to hold up the delivery of these several warrants, were performing a ministerial act, in which no discretion is involved, or whether it was a judicial act.

Doubtless these members of the county board acted with caution in allowing these large claims filed by these precinct assessors, for the reason that there is a special statute relating to these particular bills, which reads: "Any county board, allowing bills of precinct assessors in cases where the provisions of this section have not been complied with, shall be liable on their bonds for amount of same." Comp. St. 1929, sec. 77-1608. They were required to determine the actual legal number of days worked and then apply the statutory rate of pay to such days, the statutes reading:

"The compensation of the county deputy assessor and the precinct assessor shall be five dollars per day for the time actually and necessarily employed in the discharge of their duties." Comp. St. 1929, sec. 33-129.

"Precinct assessors shall make out their accounts in detail, giving the date of each day which they shall have been employed, which account they shall verify under oath." Comp. St. 1929, sec. 77-1608.

In the early case of *Brock v. Hopkins,* 5 Neb. 231, an action was brought against the clerk of the district court for Otoe county for negligently and carelessly taking insufficient security for stay of execution. Chief Justice Lake was of the opinion that the clerk of the district court does not come within the class of judicial officers who are exempt from liability for damages resulting generally from their acts, but is a ministerial officer, and if he exercises a reasonable degree of care in the performance of his duty he is not liable unless he has wilfully, carelessly or negligently caused damage.

The case of *Hansen v. Cheyenne County,* 139 Neb. 484, 297 N. W. 902, involved the offer of a county surveyor to present mileage claims to the county board for 5 cents a mile instead of the 10 cents allowed him by statute, and this court held that it was contrary to public policy and void for a public officer to agree to perform services for less than the compensation fixed by law. It was held that the ascertainment of the number of miles traveled presented to the county board a question for judicial determination, but that thereafter ascertaining the total amount of the bill by using the rate fixed by law per mile was a ministerial act.

Members of a county board are not ordinarily liable to individuals for their acts in connection with their official powers and duties, for such official acts are not performed in an individual capacity, and statutes imposing liability therefor are in derogation of the common law and to be strictly construed. See 20 C. J. S. 881, sec. 97.

"Where an officer is invested with discretion and is empowered to exercise his judgment in matters brought before him he is sometimes called a quasi judicial officer, and when so acting he is usually given immunity from liability to persons who may be injured as the result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority, and without wilfulness, malice, or corruption." 22 R. C. L. 485, sec. 163.

"County commissioners act quasi judicially in passing upon claims against the county, whenever their action is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed." *Mitchell v. County of Clay,* 69 Neb. 779, 96 N. W. 673. See, also, *Red Willow County v. McClain,* 123 Neb. 209, 242 N. W. 423.

It appears in the instant case that the problem presented to the county board was to decide a disputed question of what was meant by a day, which might be a day of eight

hours, as in some labor contracts, or a calendar day, and this was definitely a judicial question for the board to determine. The members of a county board are not personally liable for damages occasioned by the exercise of their judicial powers except under certain conditions.

The defendants, who were two members of the county board, and a majority thereof, seriously disputed the basis upon which precinct assessors claimed compensation for their work. The claims having been allowed, these defendants attempted to take action for a reconsideration thereof, and this court held they failed to give the proper notice, which did not mean there might not be grounds for a reconsideration on the merits. A case was appealed, and pending that appeal upon this doubtful question the warrants were undelivered, and the precinct assessors brought this action to compel these two defendants to pay as damages the interest accruing during the time this judicial construction of a statute was being submitted to the courts for solution.

This court agrees with the trial court in finding that the question of how a certain statute should properly be construed by the county board was not a ministerial act, but was clearly a quasi judicial act, and for the delay in reaching a solution through the courts the defendants cannot be held liable for the interest on the county warrants held during such delay.

AFFIRMED.

CHARLES M. THOMSON, TRUSTEE, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

6 N. W. (2d) 607

FILED DECEMBER 4, 1942. No. 31449.

1. **Public Service Commissions.** "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. Where the action of the railway commission is not unreasonable or arbitrary and does not exceed its powers or violate a rule of law, this court will not interfere with its findings of fact for the reason that they involve administrative and legislative rather than judicial questions." *Furstenberg v. Omaha & C. B. Street R. Co.*, 132 Neb. 562, 272 N. W. 756.

2. **Railroads.** The matter of time necessary to be devoted to the performance of duties by an agent of a railroad is a matter of importance in determining whether or not the railway commission acted arbitrarily and unreasonably in denying an application for the discontinuance of an agency.
3. ———. Historically and legally a common carrier, in addition to being a commercial and transportation enterprise for profit, is a public service facility with duties owing to the domain it traverses, and to the people resident and commercially engaged in the areas tributary to the carrier, and the necessities, requirements and convenience of the tributary areas must be considered and reasonably protected.
4. ———. While income of a railroad station is an element to be considered in determining whether or not an agency shall be discontinued, it is not in itself controlling. It must be considered along with all other elements bearing upon reasonableness under all the disclosed conditions.
5. ———. The ruling of the railway commission or of this court on the question of discontinuance of an agency at any given time does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application and relates only to the time and conditions presented.

APPEAL from the Nebraska State Railway Commission. *Reversed, with directions.*

Wymer Dressler and *Robert D. Neely*, for appellant.

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

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

YEAGER, J.

This is an appeal by Charles M. Thomson, trustee of the property of Chicago & Northwestern Railway Company, appellant, from an order of the Nebraska state railway commission, appellee, denying the appellant authority to

discontinue the service of an agent at Emmet, Holt county, Nebraska, a station on the line of the Chicago & Northwestern Railway Company, and to substitute therefor a caretaker.

The substance of the reason for the application to discontinue the service of the agent at this point is a claim that the business of the station and the convenience of shippers do not justify the cost of retaining an agent at this point, and that the order appealed from is arbitrary, unreasonable, null and void, and deprives the carrier of its property without due process of law under the state and federal Constitutions. It is pointed out that the cost of maintaining an agent is approximately $1,600 a year, whereas the cost of a caretaker would involve only the furnishing of living quarters in the station with heat, water and light.

On appeal from an order of the state railway commission, the function of this court is to determine the questions of whether or not the action was unreasonable or arbitrary, and whether or not it exceeded any powers or violated any rule of law. The rule is stated in *Furstenberg v. Omaha & C. B. Street R. Co.*, 132 Neb. 562, 272 N. W. 756, as follows:

"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. Where the action of the railway commission is not unreasonable or arbitrary and does not exceed its powers or violate a rule of law, this court will not interfere with its findings of fact for the reason that they involve administrative and legislative rather than judicial questions."

We direct our attention first to a determination of reasonableness of the order, and for this purpose it has become necessary to examine the evidence adduced by the parties relating to this matter.

The record discloses, among other things, that Emmet is a village in Holt county, Nebraska, with an advertised population of 89 inhabitants. It is situated on the line of the appellant and also on state highway 20, which is a main east and west arterial highway. It is 8.2 miles west of O'Neill and 9.8 miles east of Atkinson, which places are also on the line of the railroad. The trade territory of Emmet is estimated to extend 5 miles east, 6 miles west, 25 miles north and 25 miles south. The north half of the territory is generally devoted to farming and the south half to live stock production. The important products forwarded from the station at Emmet have been hay, grain, grass seed, cattle and hogs. The important products received have been coal, feed, gasoline, fuel oil, oil, potatoes, kerosene, cottonseed cake, asphalt, cattle, sheep, oil meal, agricultural implements and flour. The major portion of the shipments have been carload lots. In 1937, 299 carloads were forwarded; in 1938, 135; in 1939, 30; in 1940, 26; and from January to November, 1941, 61. In 1937, 17 carloads were received; in 1938, 25; in 1939, 16; in 1940, 33; and from January to November, 1941, 18. Shipments forwarded from Emmet in less than carload lots for 1937 were 15; 1938, 7; 1939, 2; 1940, 16; and from January to April, 1941, 4. Shipments received at Emmet in less than carload lots for 1937 were 236; 1938, 176; 1939, 202; 1940, 176; and from January to April, 1941, 75.

Computation based on these items shows 567 inbound and outbound shipments were handled through this station in 1937; 343 in 1938; 250 in 1939; 251 in 1940; from January 1, 1941, to December 1, 1941, 79 carload shipments; and from January 1, 1941, to May 1, 1941, 79 less than carload shipments. No information is furnished as to less than carload shipments from May 1, 1941, to October 1, 1941. We have therefore a record of a total of 158 shipments for the period covered in 1941.

It will readily be observed that in no full year set forth in the analysis, except 1937 and 1938, was the agent called on to perform service in connection with forwarding and

receiving freight as often as once per working day even assuming that each carload represented a separate shipment, and this application must be considered in its relation to freight shipments since the matter of passenger service was neither presented nor considered.

While it is not conclusive, we think the matter of time necessary to be devoted to the performance of duties by the agent is of very considerable importance in determining whether or not the commission acted arbitrarily and unreasonably in denying the application to discontinue the agency at Emmet. If this were the only consideration we could not hesitate to say that there was no justification for the retention of this agency. It would not be reasonable to require the carrier to pay the prevailing wage for an agent for the small amount of service required.

Historically and legally a common carrier, in addition to being a commercial and transportation enterprise for profit, is a public service facility with duties owing to the domain it traverses, and to the people resident and commercially engaged in the areas tributary to the carrier. The necessities, requirements and convenience of the tributary areas must be considered and, moreover, reasonably protected.

This application considered in this light brings us to the very definite conclusion that necessity does not require the maintenance of an agent at Emmet. The evidence is conclusive on the proposition that all of the essential service now furnished by an agent may be supplied by a caretaker, however, with a degree of inconvenience.

If abandonment is allowed, no physical facility will be abandoned or changed and no essential service discontinued. The important inconveniences will be that no paper work may be done at Emmet, no freight bills for either incoming or outgoing freight may be paid there, registration of complaints will have to be made elsewhere, incoming freight bills will have to be either prepaid or received at an adjacent station where there is an agent, and cars for loading will have to be ordered direct by the ship-

per or through the caretaker by telephone. There are perhaps other inconveniences, but these are the most important ones. Subject to these inconveniences business would continue as usual at this station.

Taking into consideration the amount of service required of an agent, the saving to be effected by substitution of a caretaker, the limited amount of shipping, the fact that no essential shipping service is discontinued, and the prospective inconvenience to the few shippers concerned, we conclude that the railway commission acted arbitrarily and unreasonably in denying the application to discontinue the employment of an agent at Emmet and to substitute a caretaker.

It is substantially urged that the income of the station for freight charges results in profit to the carrier and therefore the agency ought not to be discontinued. Of course this is an element to be considered along with all other elements, but assuming that the station is highly profitable to the carrier we know of no rule of law or reason which requires the expenditure of earnings from a particular community in that community contrary to the requirements of reasonable service. We, however, do not so assume and we cannot so conclude from the evidence adduced. We could not arrive at a safe and satisfactory conclusion on this proposition without having before us an analysis and accounting of all matters pertaining to operation of this carrier as a system.

It is also urged that with the contemplated increase in railroad transportation this agency should not be discontinued. This argument is purely prospective and speculative and can have no force or influence here. It may well be said that the ruling on this question by the railway commission or this court does not amount to an adjudication for the future. It is only a judgment on the condition presented by the application. If future conditions shall require restoration of an agency that matter may be taken care of by proper order in due course at the proper time and as the occasion requires. *Thomson v. Nebraska*

State Railway Commission, 141 Neb. 697, 4 N. W. (2d) 756.

The order of the railway commission is reversed and the cause remanded, with directions to the railway commission to enter an order allowing a discontinuance of an agency at Emmet, Nebraska, and allowing the substitution of a caretaker in accordance with the application of the appellant.

REVERSED.

JOHN L. CLARK, APPELLEE, V. STATE FARMERS INSURANCE COMPANY, APPELLANT.

7 N. W. (2d) 71

FILED DECEMBER 11, 1942. No. 31420.

1. **Insurance.** The second sentence of section 44-322, Comp. St. 1929, means that a breach of a warranty or a condition which exists at the time of a loss and contributes to a loss may avoid the policy or enable the insurer to avoid liability. It has no application to a breach which could only arise after a loss has occurred.
2. ———. The statute relates to the question of a recoverable loss and not to the question of procedure to be followed in collecting for the loss after it has occurred.
3. ———. The statute does not deny an insurer the right to rely upon conditions of a policy which the insured is required, as a condition of recovery, to perform after the loss has occurred.

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

Abrahams, Frenzer & Hills, for appellant.

Joseph B. Fradenburg and *Henry G. Peterson, contra.*

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

SIMMONS, C. J.

This is a suit upon an "Assessment Association Policy" of insurance, to recover the sum of $700 for loss of household goods by fire. At the close of plaintiff's case in chief,

defendant moved that a verdict be directed for it or in the alternative that the jury be discharged and judgment entered for it. The plaintiff then moved for a directed verdict. Defendant then, notwithstanding its motion, "reserved the right to introduce testimony." Plaintiff had not offered his policy in evidence. It was then stipulated that a copy of a policy offered in evidence on cross-examination contained all of the provisions of plaintiff's policy. Defendant then withdrew its reservation and renewed its motion. The court considered the matter as having been submitted to it, the jury were discharged, the court found generally in favor of plaintiff and rendered judgment for the plaintiff against the defendant for $700 principal sum and $35 interest. Defendant appeals.

The facts of this case are not in dispute so far as the issue here presented is concerned.

The policy of insurance was issued to plaintiff in 1931. He put it in his box at a bank in Valley, Nebraska, where it thereafter remained until 1940 without plaintiff examining it. Payments of assessment were made on statements sent plaintiff by the defendant.

Plaintiff had a loss in 1934 on some live stock, and had at least one other loss by lightning at a time not stated. Without examining his policy he filed notice and proof of loss in those instances and payments were made.

October 3, 1936, fire destroyed his house and household goods. In October, 1940, defendant wrote the plaintiff suggesting changes in the coverage of his policy to include new types of machinery, etc., and advised plaintiff of his then coverage, including "700 household goods." Plaintiff went to the bank, got his policy, went to defendant's office, talked to a lady there, told her he had had a loss of his household goods some three or four years before and asked "was there any chance of recovering?" She said "She didn't think so." He left his old policy to be exchanged for a new one with different coverage. Plaintiff never filed a formal proof of loss. never talked about the loss with the defendant's secretary and never gave the de-

fendant notice of loss, other than as recited herein. The evidence sustains the amount of the judgment if plaintiff is entitled to recover in any amount.

Plaintiff filed his petition April 3, 1941, and the case was tried February 3, 1942.

In his petition plaintiff alleged the issuance of the policy covering his household goods for the sum of $700 against loss or damage by fire, the payment of the premiums, that he does not have the policy, that defendant knows its conditions and terms, his loss, and that he failed to file notice of claim and proof of loss for the reason that he "overlooked the existence of the policy and had no knowledge thereof until several years later," that the failure to give notice and file proof of loss did not contribute to the loss nor place the defendant "in any worse position."

Defendant denied generally; admitted the issuance of the policy, the coverage in the amount claimed, and that notice of claim and proof of loss were not given. Defendant alleged that the policy contained provisions that the defendant should not be held to have waived any of its provisions; that the loss "shall not be payable until sixty days after the notice * * * proof of the loss herein required shall have been received" by the defendant; that "no suit or action on this policy * * * shall be sustained * * * until the insured fully complies with all of the conditions and requirements of this policy;" that "the insured shall give immediate notice in writing * * * of any loss * * * shall protect the property * * * make complete inventory stating the cost and quality of each article, the amount claimed thereon within sixty days after loss;" that the insured shall render a sworn statement covering a variety of matters as to the value, title, condition, etc., of the property and loss claimed to have been sustained; and that an estimate of loss sustained shall be made by the defendant and insured and the sum for which defendant is liable was to be paid sixty days after "due notice, ascertainment or estimate and satisfactory proof of loss" had been re-

ceived by defendant. Defendant, alleging that these requirements had not been complied with, states that they are conditions precedent to recovery, and that plaintiff has been guilty of laches and negligence and is barred from recovery. Defendant further alleges that, because of the failure of the plaintiff to give the notice and file the proofs of loss, it was prevented from investigating the fire, ascertaining the cause and amount of the loss, and otherwise protecting itself under the terms of the policy.

The policy admitted in evidence sustained the allegations of the answer. No reply was filed.

It is apparent that, if the policy is to be enforced as written, plaintiff is not entitled to recover.

Defendant contends that the giving of such notice and proof of loss are a condition precedent to recovery upon the policy, and that plaintiff may not maintain this action because of his failure to furnish such notice and proof.

To sustain its position defendant cites *McCann v. Aetna Ins. Co.*, 3 Neb. 198; *German Ins. Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711; *Western Home Ins. Co. v. Richardson*, 40 Neb. 1, 58 N. W. 597; *Campbell v. Columbia Casualty Co.*, 125 Neb. 1, 248 N. W. 690; *Haack v. Midwest Life Ins. Co.*, 131 Neb. 501, 268 N. W. 360; *Thomas v. Prudential Ins. Co.*, 131 Neb. 274, 267 N. W. 446; 26 C. J. 469; 29 Am. Jur. 824, sec. 1100.

Plaintiff in his brief states that the last three of our decisions above cited are actions upon different types of policies and were governed by section 44-604, Comp. St. 1929, and that those cases are not in point. As to the first three decisions cited, plaintiff states that they were decided before the passage of section 44-322, Comp. St. 1929, in 1913, that they correctly reflected the law of the state of Nebraska at the time they were announced, but that the statute above cited makes them inapplicable at the present time.

Our inquiry then is here directed to the questions of whether or not the statute relieves plaintiff of the requirement that he prove notice and proof of loss as a condition precedent to recovery of benefits under the policy. The statute in full is as follows:

"No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding." Comp. St. 1929, sec. 44-322.

It is not here contended that there was any misinterpretation or warranty made by the plaintiff (insured) in the negotiation for the policy of insurance upon which this suit is based. Clearly the first sentence of the section has no application to this situation. The defendant did not here seek to avoid the policy, but rather sought to avoid liability on the policy because the insured had not complied with a condition precedent to suit thereon.

The second sentence means that a breach of a warranty or condition which exists at the time of a loss and contributes to the loss may avoid the policy or enable the insurer to avoid liability. The sentence relates to those breaches which exist "at the time of the loss." It does not relate to a breach of the terms of a policy which could only arise after the loss has occurred. It does not deny the insurer the right to rely upon the conditions of its policy which the insured is required to perform as a condition of recovery after the loss has occurred. It relates to the question of a recoverable loss and not to the question of procedure to be followed in collecting for the loss after it has occurred. Clearly a notice of loss and proofs of loss can only be given after the loss has occurred.

To construe the statute as plaintiff contends would be to hold that an insurance company could not rely upon any conditions of its contract as a matter of defense unless it be able to show that a breach existed at the time of and

contributed to the loss. To so hold would be to declare many standard provisions of insurance contracts inoperative.

The state of Texas has a somewhat similar statute. Its court in a series of decisions has held that their act refers only to those warranties and provisions in policies the breach of which might contribute to or bring about a fire loss. *Philadelphia Underwriters Agency of Fire Ins. Ass'n v. Driggers,* 111 Texas, 392, 238 S. W. 633.

Section 44-322, Comp. St. 1929, does not relieve an insured of the duty of giving notice and proof of loss to an insurer before a suit for the recovery of benefits under a fire policy may be maintained.

It appears to be conceded here that defendant is a domestic assessment association. Section 44-905, Comp. St. 1929, provides: "Every member of such association who may sustain loss or damage shall, as soon as practicable, thereafter, notify the secretary thereof stating the amount of damage or loss claimed." The record here is that, while the plaintiff knew the secretary of the association, he never at any time gave him the notice called for by this provision. The conversation with the unidentified lady in defendant's office did not purport to be a statement of the "loss claimed." This provision of the statute was a part of the same act passed in 1913 (Laws 1913, ch. 154) that contained the provisions which are now section 44-322, *supra,* upon which plaintiff relies. To accept plaintiff's construction of section 44-322 would be to hold that compliance with section 44-905 was not required. Effect, if possible, must be given to both provisions of the act.

We have examined the cases cited by plaintiff of *Murphy v. Travelers Ins. Co.,* 141 Neb. 41, 2 N. W. (2d) 576; *Security State Bank v. Aetna Ins. Co.,* 106 Neb. 126, 183 N. W. 92; *George v. Aetna Casualty & Surety Co.,* 121 Neb. 647, 238 N. W. 36; *Newman v. National Union Fire Ins. Co.,* 122 Neb. 94, 239 N. W. 464; *Mayfield v. North River Ins. Co.,* 122 Neb. 63, 239 N. W. 197; *Westchester Fire Ins. Co., v. Norfolk Bldg. & Loan Ass'n,* 14 Fed. (2d) 524;

Weiner v. Aetna Ins. Co., 128 Neb. 575, 259 N. W. 507; *Ware v. Home Mutual Ins. Ass'n*, 135 Neb. 329, 281 N. W. 617. Clearly these cases do not determine the question here presented.

The trial court erred in entering judgment for the plaintiff. The motion of the defendant should have been sustained.

The judgment of the trial court is reversed and the cause remanded, with directions to proceed in accord with this opinion.

REVERSED.

EDWARDS S. GOODRICH ET AL., APPELLANTS, V. LUTHER BONHAM ET AL., APPELLEES.

6 N. W. (2d) 788

FILED DECEMBER 11, 1942. No. 31472.

1. **Wills.** In the construction of wills, the basic rule is that the testator's intent must be determined from the language used in the will, and, when so ascertained, that intent must be given effect, if it is not contrary to law.
2. ———. In construing a will, it is presumed that the testator intended to dispose of his entire estate, unless the contrary is apparent from the will itself.
3. ———. The policy of the law being to favor the early vesting of estates, where a will does not show a contrary intention, a remainder will not be held to be contingent, if it can reasonably be held to be a vested remainder.
4. **Remainders.** Where the remainderman is ascertained, a vested remainder is distinguished by the certainty of the right of future possession or enjoyment, and not the certainty of possession or enjoyment if the remainderman lives until the determination of the preceding estate.
5. **Wills.** The words "upon the death of," as used in the will here construed, define the time when the enjoyment of the estate in remainder begins, and do not mean that the remainder estate shall not vest until the death of the holder of the life estate.

APPEAL from the district court for Jefferson county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

W. J. Moss and *Melvin Moss* for appellants.

Hartigan & Skultety, contra.

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

SIMMONS, C. J.

In this action plaintiffs, as heirs of a testator, seek to have a will construed; to have a judgment declaring them to be the owners of certain real estate; to have title quieted as against a deed of record; and to have an accounting of rents and profits. The trial court sustained a demurrer to their petition. Plaintiffs appeal. We affirm the judgment of the trial court.

Plaintiffs' petition alleges, in detail, the following facts: Edwards E. Goodrich made his will on April 27, 1908. There are eight paragraphs in the instrument. *First,* the usual direction for the payment, out of personal property, of funeral and administration expenses and debts. *Second,* a devise to his wife of the family homestead. *Third,* a cash bequest to his daughter.

Fourth. "I give, bequeath and devise to my son Leonard W. Goodrich the following described real estate * * * (city lot, involved in this litigation, and two pieces of farm land) in trust for the uses and purposes hereinafter specified, that is to say, said Leonard W. Goodrich shall out of the income arising from said real estate, pay the taxes and insurance and keep the same in the proper state of repair, and shall pay to my beloved daughter * * * all of the residue of the rents, profits, and income of said real estate as long as she shall live. Upon the death of said daughter, title to said lot * * * shall vest in fee simple in my son, Leonard W. Goodrich. In case my said son shall die before the death of my said daughter, I hereby authorize the proper court to appoint some suitable person as such trustee, for the purpose of continuing said trust, as hereinbefore created, during the life of my said daughter. Upon the death of my said daughter, if the oldest living child of my said son shall have attained the age of thirty-five years,

it is my will that said * * * (farm land) shall go to all of the then living children of my said son, in fee simple, share and share alike, and said trust shall thereupon end; but if at the death of my said daughter, the oldest living child of my said son shall be less than thirty-five years of age, said trust shall continue as to said * * * (farm land), and the net income and profit of the same shall be devoted to the education and maintenance of the children of my said son, until the oldest of said children shall attain the age of thirty-five years, at which time said real estate * * * (farm land), shall go to all of the then living children of my said son, in fee simple, and the control, management and trust of my said son therein shall cease and end."

Fifth. "I further give, bequeath and devise to my son, Leonard W. Goodrich, all the residue and balance of my property both real and personal, not hereinbefore disposed of," with a proviso, made a lien upon the real estate, that he should pay his mother $25 a month during her lifetime. *Sixth.* In the event of the wife's death prior to the testator the homestead was to become the property of the son. *Seventh.* "In case my said son Leonard W. Goodrich shall die in my lifetime, I direct that his share shall not lapse, but that the same shall be paid to his children, share and share alike." *Eighth,* appointed the son as executor.

The testator died March 1, 1911, and his will was duly admitted to probate April 19, 1911. Leonard W. Goodrich was appointed and qualified as both executor and trustee under the will. The estate was appraised for inheritance tax purposes at $66,900. The estate was closed and he was discharged as executor January 21, 1926. He continued as trustee until his death on June 5, 1928.

No application was made for the appointment of a successor-trustee, but after the death of Leonard W. Goodrich the daughter took possession of the property and assumed the duties of successor-trustee. She died October 11, 1940. The defendant Friesen became a tenant of the property under the daughter, and has since her death claimed to occupy the premises as tenant of the defendant Bonham.

September 15, 1922, Leonard W. Goodrich was adjudged a bankrupt. In the bankruptcy proceedings he scheduled as real estate owned by him the "reversionary interest" in the lot in suit. The defendant Luther Bonham purchased the interest of Leonard W. Goodrich in the property from the trustee in bankruptcy, and received a deed therefor, which was recorded March 13, 1923.

Leonard W. Goodrich died leaving as his only heirs the plaintiffs in this action and the defendant Catherine Goodrich Wilson. The daughter died without issue leaving the same parties as her only heirs at law. Plaintiffs allege that any interest which Leonard W. Goodrich had in this lot "was a contingent remainder" and that when he died, prior to his sister's death, his interest therein lapsed, and the plaintiffs and the defendant Wilson became the owners in fee simple of the property and entitled to the possession. Plaintiffs further allege that at the time said remainder lapsed the plaintiffs and the defendant Wilson were the only heirs at law of Edwards E. Goodrich, and that as such they inherited the fee simple title to the lot from him.

Plaintiffs pray for a decree that the life estate of the daughter has terminated, that plaintiffs and defendant Wilson be decreed to be the only heirs at law of Edwards E. Goodrich, that any interest of Leonard W. Goodrich be decreed to have failed, lapsed and terminated; that it be decreed that the fee simple title vested in the plaintiffs and the defendant Wilson as of the death of the daughter; that the title to said premises be quieted in them, and that the defendant Bonham be required to account for rents and moneys received; that Bonham and Friesen be enjoined from claiming any interest in the property and that Friesen be required to pay a reasonable rental for the property since the daughter's death.

To the above petition the defendant Bonham demurred for the reason, among others, that the petition did not state a cause of action. The trial court sustained the demurrer, and the plaintiffs elected to stand on their petition. Upon motion of defendant Bonham the petition was dismissed. Plaintiffs appeal.

The decision here turns upon the question of what title, if any, Leonard W. Goodrich, as an individual, received to this property under the will of Edwards E. Goodrich. That question requires a construction of the will. Plaintiffs here contend that the testator intended that the "fee simple" title to said lot should vest in the son only in the event that he outlive the daughter, and, he not having done so, the title passed to the heirs of Edwards E. Goodrich upon the death of the daughter. They further contend here that "It can make no difference whether the provision for the son is a contingent remainder (which they allege it to be in their petition), or a condition precedent, or a vested defeasible remainder, because in any event his interest therein perished by his death before that of his sister." The defendant Bonham contends that the remainder estate vested unconditionally in Leonard W. Goodrich at the time of the death of his father, as testate property.

This court has long followed certain rules for the construction of wills in this state.

The basic rule is that the testator's intent must be determined from the language used in the will, and, when so ascertained, that intent must be given effect, if it is not contrary to law.

"There is a presumption that a testator intended to dispose of his entire estate and not to die intestate either as to the whole or as to any part thereof, and where a provision of a will is fairly open to more than one construction, a construction resulting in an intestacy as to any part of the estate will not be adopted if by any reasonable construction it can be avoided." 69 C. J. 91. Consistent with this rule this court has held that in construing a will it is presumed that the testator intended to dispose of his entire estate unless the contrary is apparent from the will itself. *Jones v. Hudson*, 93 Neb. 561, 141 N. W. 141; *In re Estate of Zimmermann*, 122 Neb. 812, 241 N. W. 553; *Luenenborg v. Luenenborg*, 128 Neb. 624, 259 N. W. 649.

Plaintiffs' contention here is that it was the intention of the testator, in the event of the death of Leonard W. Good-

rich prior to the death of his sister, that the remainder estate, then having ripened into a fee simple estate, should pass to the heirs of the testator by the laws applicable to intestate estates. The presumption is against that construction. Is such an intent apparent from the will itself?

The testator first provided for his wife. He devised to her the homestead (paragraph Second), and anticipating the contingency of her death prior to his own, he provided that in that event the homestead should become the property of his son Leonard (paragraph Sixth). He devised the residue "not hereinbefore disposed of" to his son Leonard, the real estate to be subject to a lien for the payment of $25 a month to the wife (paragraph Fifth). He bequeathed a cash sum to his daughter. He placed three pieces of real estate in trust, the net income to be paid to his daughter during her lifetime. As to the city property the life estate only vested in the trustee, a trust of the remainder estate was not created. He anticipated the inevitable death of his daughter and provided that "upon" her death title to said lot should "vest in fee simple" in his son. He anticipated that the named trustee might predecease the daughter, and he provided for a successor-trustee to meet that contingency during the lifetime of the daughter. He desired that, after the death of the daughter, the farm lands mentioned in paragraph "Fourth" should become the fee simple property of his then living grandchildren, but anticipating that the daughter might die before the oldest of his grandchildren became thirty-five years of age, he provided for that contingency by continuing the trust as to the farm land until the specified age had been reached by the children. Anticipating the contingency that the son might desire, during the mother's lifetime, to dispose of the personal property, bequeathed in the residuary clause, he provided that the monthly payments to the mother should not be a charge upon the personal property, but desiring to make certain that those payments should be made he placed a lien on the residuary real estate for that purpose. Anticipating that his son Leonard might die dur-

ing the testator's lifetime, he provided that in that contingency the son's share should not lapse but should be paid to his children. In each and every case the testator anticipated a condition that might arise and declared his will in that event. He provided for his wife, his daughter, his grandchildren and his son, giving to the son that which remained after the provisions for the others had been met. The will clearly indicates a carefully thought out and natural disposition of all of the testator's property.

To accept the plaintiffs' construction of the will we must conclude that the testator contemplated and intended that, in the event of the son's death prior to the daughter, the remainder estate in the city lot should pass as an intestate property, and that he contemplated that contingency but did not provide for it. The care with which the will was drawn, the provision for all contingencies that the will contains, and the evident desire of the testator to vest title to all of his estate in the son, subject to specific bequests and devises to other beneficiaries, all negative any such construction as that for which plaintiffs contend. The contrary is clearly indicated by every provision of the will. It is clear from this analysis of the will as a whole that the testator intended to create a life estate in trust for his daughter, and a remainder in fee simple to the son in the lot in question.

When did the remainder estate vest? This court has said: "The policy of the law has always been to look with favor upon the early vesting of estates, and a remainder will never be held to be contingent if it can reasonably be held to be a vested remainder." *Wilkins v. Rowan,* 107 Neb. 180, 185 N. W. 437. In the same opinion we quoted with approval this language: "Whenever it is possible the future interest will be construed as vested, and hence alienable and devisable by the remainderman. * * * A remainder is vested if the remainderman, being alive, will take at once if the life tenant were to die." 2 Underhill, Law of Wills, sec. 860. "* * * the law does not favor the abeyance of estates but estates by way of remainder vest at the

earliest period possible, unless the will shows a contrary intention." 1 Schouler, Wills (5th ed.) sec. 562. "It is not the certainty of possession or enjoyment which distinguishes a vested remainder, but the certainty of the right of future possession or enjoyment if the remainderman who is ascertained lives until the determination of the preceding estate." 2 Alexander, Commentaries on Wills, sec. 1005. Tested by these rules it is clear that the life estate vested in the trustee, and the remainder estate vested in Leonard W. Goodrich, as an individual at the instant of the death of the testator.

But plaintiffs argue that the language of "the Fourth" paragraph, "I * * * devise to my son Leonard W. Goodrich * * * in trust * * * " etc., "Upon the death of said daughter, title to said lot * * * shall vest in fee simple in my son, Leonard W. Goodrich" means that the remainder title was not to vest until the death of the beneficiary of the life estate. This court has answered that contention directly in *DeWitt v. Searles*, 123 Neb. 129, 242 N. W. 370, wherein we said: "Testators are ordinarily and primarily concerned in the commencement, continuance and termination of the enjoyment of property by them devised and bequeathed. Apart from statute, the weight of authority recognizes this fact, and, when a contrary intent is not clearly expressed, construes such expressions as 'upon the death of' as, in effect, related to and affecting the enjoyment of property, rather than establishing and vesting technical estates and involved titles. This court is committed to the doctrine that, under the circumstances here presented, the words last referred to do not mean that the life estate and the estate in remainder shall not vest at the death of the testatrix, but rather that 'upon the death of * * *' refers to time when, subject to the rights of the life tenant, the enjoyment of the estate in remainder begins." See, also, *Davis v. Davis*, 107 Neb. 70, 185 N. W. 442, and text quoted with approval in *Wilkins v. Rowan*, *supra*, and *Drury v. Hickinbotham*, 129 Neb. 499, 262 N. W. 37.

We therefore hold that under the will here construed the remainder estate vested in Leonard W. Goodrich at the same instant the life estate vested in the trustee, to wit, at the time of the death of the testator. There is no contingency, alternative or condition expressed in the will that would reduce or defeat the remainder estate when it so vested.

Granting the correctness of this conclusion, there appears to be no question raised but that the title of Leonard W. Goodrich passed to the trustee in bankruptcy and through him to the defendant Bonham.

The judgment of the trial court is affirmed.

AFFIRMED.

BERTHA E. GILLAN, APPELLEE, V. EQUITABLE LIFE ASSURANCE SOCIETY, APPELLANT.

6 N. W. (2d) 782

FILED DECEMBER 11, 1942. No. 31397.

1. **Insurance.** In an action to recover benefits under a life insurance policy for permanent total disability, where the defense is fraud of insured in making false statements in the application, the burden is on insurer to prove that the statements were untrue, were made knowingly with fraudulent intent to mislead and deceive insurer, were material to the risk and that insurer relied on them.
2. **Evidence.** Parol evidence is admissible to prove that misstatements in an application for life insurance and disability benefits were inserted by insurer's agent instead of truthful statements of applicant who was without knowledge of the discrepancies.
3. **Insurance.** In an action to recover disability benefits under a life insurance contract, the issue of fact is a question for the jury where the defense is fraud of insured in procuring the policy and the evidence is conflicting but sufficient to support a verdict in favor of plaintiff.
4. **Insurance.** In negotiations to procure life insurance, the solicitor and the examining physician are agents of the insurer and misstatements inserted by them in answers to questions in the application, without the knowledge or consent of the applicant, are not binding on the latter.

5. **Trial.** Harmless imperfections in single instructions are not sufficient grounds for the reversal of a judgment, where the entire charge to the jury fairly states the law applicable to the issues and the evidence.
6. **Insurance.** Where plaintiff recovers a judgment in an action on a life insurance policy, the court is authorized by statute to allow a reasonable attorney's fee as an item of costs. Comp. St. 1929, sec. 44-346.

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

Brown, Crossman, West, Barton & Fitch and *Sloans, Keenan & Corbitt,* for appellant.

Waring & Waring and *Perry, Van Pelt & Marti, contra.*

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

ROSE, J.

This action was commenced in the county court of Fillmore county by Bertha E. Gillan, plaintiff, to recover from the Equitable Life Assurance Society, defendant, monthly instalments of disability benefits for April and May, 1941, each for $50. The action was defended on the ground that plaintiff procured the policy for disability benefits by false statements in her application for insurance and by false answers to questions in her examination by defendant's physician.

The county court decided the case in favor of plaintiff and entered judgment against defendant for $100. Defendant appealed to the district court.

Plaintiff in her petition pleaded that, in consideration of quarterly premiums of $21.85, defendant issued to her in January, 1929, a life insurance policy for $5,000. Pursuant to an option therein the policy was converted in January, 1934, into a 20-payment life insurance policy under which plaintiff was entitled to dividends. Each policy contained a provision for disability benefits of $50 a month and for waiver of premiums by defendant in the event of plaintiff's total and permanent disability. It was alleged

that plaintiff became totally and permanently disabled in 1930 and that thereafter defendant paid the monthly instalments of $50 until April, 1941, but refused to make further payments and demanded reimbursement of disability benefits and of dividends previously paid to plaintiff; that the policy remains in full force.

In an answer to the petition, it was alleged that plaintiff procured by fraud the policy issued by defendant to her in January, 1929; that the application therefor, in connection with the medical examination to which she submitted and the history given by her, was the sole basis for the issuance of the policy; that the quarterly premium of $21.85 included quarterly payments of $2.90 for total and permanent disability; that the policy was issued by reason of the application and plaintiff's false statements of material facts; that, after plaintiff signed the application and before the policy was issued, she was required to appear before a medical examiner of defendant, state every physician or practitioner whom she had consulted or who had treated her during the past five years and to answer the following: Have you ever had or been treated for any disease or disturbance of the stomach, liver, intestines, kidney, bladder, or genito-urinary organs?

It is alleged in the answer that these questions were propounded by the medical examiner to plaintiff who answered "none" or "no" to each of them; that the answers were written by him in the part of the insurance contract containing the examination and that the statements were signed by her in his presence. It is further alleged by defendant that the answers to the foregoing questions were material to insurance and disability risks, were parts of the contract and were false in the following particulars: Prior to 1918, plaintiff had a disturbance or disease of the right kidney, which was anchored by a surgical operation, and submitted to an operation for the removal of the right fallopian tube and ovary. On May 14, 1928, she submitted to a surgical operation for the removal of the uterus containing tumors.

It is alleged in the answer that plaintiff agreed in writing as a part of her application that "the foregoing answer shall also become part of any policy contract that may be issued on the strength thereof."

It is also alleged in the answer that the original policy lapsed for nonpayment of a premium and was reinstated and converted into the new policy in reliance on a false certificate by plaintiff that she was in good health and on her false statements in her application and medical examination; that, so relying upon plaintiff's misrepresentation of material facts, defendant approved her application for total and permanent disability and paid her $50 a month from May 9, 1930, to April 9, 1941, or $6,550, and waived payment of premiums from the date of disability; that defendant did not discover the fraud until April, 1941. In a cross-petition defendant prays for judgment against plaintiff for $6,550, interest and costs.

In a reply to the answer plaintiff denied defendant's charges of fraud and alleged that defendant furnished its examining physician with blanks for answers to printed questions for the purpose of the examination; that plaintiff answered truthfully, in the presence and hearing of defendant's soliciting agent, all of the questions read to her by the examining physician; that the answers alleged by defendant to be false were not the answers of plaintiff but were answers inserted in the blanks by the examining physician; that plaintiff signed the application without reading it, and did not then know any of her answers had not been correctly reduced to writing and did not discover the discrepancies until her deposition was taken in this case; that she was in good health when the policies containing the provisions for disability benefits were issued.

Upon a trial of the issues, the jury rendered a verdict in favor of plaintiff for $102.40. From judgment therefor, and from dismissal of the cross-petition, defendant appealed to the supreme court.

The principal issue of fact arose on the traversed plea of defendant that insurer was induced by false and mate-

rial statements of plaintiff to enter into the contracts and that otherwise the risks for disability benefits would not have been assumed. On this issue the burden was on defendant to prove that the statements were untrue, that they were made knowingly with the fraudulent intent to mislead and deceive insurer, that they were material to the risks and that the insurer relied on them. *Pollard v. Royal Highlanders,* 128 Neb. 790, 260 N. W. 399.

Defendant adduced evidence to prove plaintiff falsely stated that she had not consulted physicians within five years; that, contrary to her application and examination, she submitted to an operation for the removal of the right fallopian tube and ovary and to a surgical operation for the removal of the uterus containing tumors. Evidence to this effect came from physicians who performed the operations and from hospital records, plaintiff having waived the protection of confidential relations between physician and patient. Defendant also produced the application and the record of the physician's examination, signed by plaintiff, containing misstatements of material facts. In addition, officers of defendant testified in effect that, according to custom, the policies would not have been issued, if plaintiff had told the truth in her preliminary statements to procure insurance and disability benefits.

It is argued by defendant that plaintiff is bound by the answers in the application and in the statements which she signed, that they are parts of the insurance and disability contracts, that they cannot be contradicted by parol and that there is no competent evidence to sustain a verdict in favor of plaintiff. There are precedents for the propositions thus stated. *Metropolitan Life Ins. Co. v. Alterovitz,* 214 Ind. 186, 14 N. W. (2d) 570, and cases cited in 117 A. L. R. 790 *et seq.* The weight of authority, however, seems to be to the contrary as shown by the annotator of that case.

Plaintiff testified, in harmony with the allegations of her reply to defendant's answer, that she did not falsely answer questions in her application, history and medical ex-

amination; that the false answers therein were not her answers but were such as were inserted therein by the examining physician or soliciting agent. The evidence in her behalf tended to prove that her disability was caused by tuberculosis of the lungs and that the physical disorders requiring operations had no connection with her lung trouble. On the issue of fraud therefore the evidence was conflicting and presented a case for the jury. *Towle v. New York Life Ins. Co.*, 121 Neb. 175, 236 N. W. 439, and cases cited in opinion. Parol evidence was admissible to prove that, in the application, false answers were inserted by insurer's agent or physician to questions pertaining to the risks instead of the truthful answers given in good faith and without insured's knowledge of the discrepancies. *German Ins. Co. v. Frederick*, 57 Neb. 538, 77 N. W. 1106; *Scott v. New England Mutual Life Ins. Co.*, 128 Neb. 867, 260 N. W. 377; *Farmers & Bankers Life Ins. Co., v. Mathers*, 135 Neb. 757, 284 N. W. 286; *Busboom v. Capital Fire Ins. Co.*, 111 Neb. 855, 197 N. W. 957; *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554, 63 N. W. 860. The insurance solicitor and the insurer's examining physician were agents of the insurer and their acts as such, if misstating the answers of insured in the application, did not bind the insured. *Farmers & Merchants Ins. Co. v. Wiard*, 59 Neb. 451, 81 N. W. 312; *Farmers & Bankers Life Ins. Co. v. Mathers*, 135 Neb. 757, 284 N. W. 286; *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554, 63 N. W. 860. The credibility of the witnesses and the weight of their testimony were questions for the jury. The evidence is found sufficient, in view of the rules of law stated, to support the verdict and to settle the issue of fraud in favor of plaintiff.

Some of the instructions given by the court to the jury are criticized by defendant as erroneous, but when the charge is considered as a whole, as it should be, it conformed to the rules of law applicable to the issues and the evidence, properly submitted the case to the jury and fully protected the rights of defendant. Imperfections in single instructions were harmless. Assigned errors in the refus-

al of the trial court to give instructions requested by defendant are not, therefore, sufficient grounds for the reversal of the judgment.

In the district court plaintiff was allowed as costs for services of her counsel a fee of $500, under authority of statute. Comp. St. 1929, sec. 44-346. This allowance is vigorously assailed as excessive in the present action, where the limit of plaintiff's recovery is $100 with interest and costs. The record consists of three large volumes. The case was tried in the county court and in the district court. The vigor and skill of eminent counsel for defendant in their defenses imposed on counsel for plaintiff onerous services and responsibilities. Defendant alleged in its answer to the petition that the provision in the policies for disability benefits never went into effect, owing to alleged fraud of plaintiff. Had this defense been established, plaintiff might have been deprived of $50 a month for the rest of her life. A cross-petition for reimbursement of $6,550 was interposed. There was therefore more involved in the action than $100. Defendant took depositions in Denver and produced clinical records of surgical operations not disclosed by plaintiff's application for insurance. Plaintiff was confronted with intricate details of her physical disorders as far back as 1910. While the 500-dollar fee seems liberal, the long record does not prove an abuse of the trial court's discretion in allowing it.

A fee of $200 for services of counsel for plaintiff in the supreme court is allowed as costs.

Failing to find in the record error prejudicial to defendant, the judgment below is affirmed.

AFFIRMED.

GEORGE E. PARISH, APPELLANT, V. COUNTY FIRE INSURANCE COMPANY, APPELLEE.

6 N. W. (2d) 786

FILED DECEMBER 11, 1942. No. 31453.

Insurance. Where the evidence is conflicting as to the amount of damages sustained as the result of a loss covered by a policy of hail and windstorm insurance, it presents a question to be determined by a jury.

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

George Evens, for appellant.

Ritchie, Swenson & Welpton, contra.

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

CARTER, J.

This is an action on an insurance policy to recover damages to a residence property alleged to have been caused by wind and hail. At the close of plaintiff's evidence the trial court entered judgment for the plaintiff for $125, the amount for which defendant had offered to confess judgment, taxed the costs to the plaintiff and discharged the jury. From this judgment the plaintiff appeals.

This case has been before this court on three previous occasions. The facts are generally stated in the previous opinions and will not be repeated here. On its first appearance here, 134 Neb. 563, 279 N. W. 170, it was held that the evidence was insufficient to sustain a judgment for $2,000 for plaintiff, and the case was reversed and the cause remanded for a new trial. On the second appeal, 137 Neb. 385, 289 N. W. 765, this court held that the trial court erred in entering judgment on the mandate for an amount certain, thereby depriving the plaintiff of the right to have his case submitted to a jury. The case was again reversed and the cause remanded. On the third appeal, 139 Neb. 726, 298 N. W. 702, it was held that the evidence of damage by wind and hail was sufficient to require the submis-

sion of the amount of such damage to the jury. The action of the trial court in directing a verdict for the defendant was held erroneous and the case reversed and the cause remanded for another trial.

The case is now here for a fourth time, the plaintiff again complaining of the action of the trial court in directing a judgment for the plaintiff for the amount of defendant's tender, the taxing of the costs to the plaintiff and the withdrawal of the case from the jury.

It must be conceded that on a retrial new and additional evidence might be offered which would be a complete justification of the trial court's action, even though the case had been reversed and the cause remanded for a new trial on the theory that a jury question was presented. At the trial involved in this appeal additional evidence was produced and this evidence was before the court for the first time. The question here presented must be determined from the evidence in the present record and not from any previous order of this court which of necessity was based upon evidence which might well have required a different result.

The record in the present case shows conclusively that damage was caused to plaintiff's residence by hail, wind, rain and flood. The policy of insurance protected against hail and windstorm only. While additional testimony was produced, the evidence is so conflicting as to the amount of damage caused by hail and windstorm that it is clearly a question for the jury to determine. A recitation of the facts which leads us to this conclusion would apparently be as futile as those contained in our previous opinions. We content ourselves with saying that there is competent evidence in the record of damage by hail and windstorm which if believed by the jury would warrant a verdict in excess of the amount tendered by the defendant. Consequently, the trial court erred in not submitting the question of the amount of the damages, if any, to the jury. The judgment is reversed and the cause remanded for a new trial.

REVERSED.

LETITIA V. SWANSON ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF FILLMORE COUNTY ET AL., APPELLEES.

6 N. W. (2d) 777

FILED DECEMBER 11, 1942. No. 31454.

1. **Taxation.** Section 77-201, Comp. St. 1929, as amended by chapter 102, Laws 1939, held in *Homan v. Board of Equalization*, 141 Neb. 400, 3 N. W. (2d) 650, to "provide a method for fixing the valuation of real property different from that prescribed for other tangible property, contrary to the uniformity provision of section 1, art. VIII of the Constitution, and it is consequently void," which results in leaving section 77-201, Comp. St. 1929, without the amendment of 1939, valid.
2. ———. Section 77-201, Comp. St. 1929, provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. 'Actual value,' as used in this act, shall mean its value in the market in the ordinary course of trade." The legislature, by amendment of section 77-201 (Laws 1939, ch. 102), in view of the holding in *Homan v. Board of Equalization*, 141 Neb. 400, 3 N. W. (2d) 650, has not abrogated the rule laid down in *Schulz v. Dixon County*, 134 Neb. 549, 279 N. W. 179, holding: " 'Farm lands,' for the purpose of taxation, shall be valued and assessed at their actual cash value—their value in the market in the ordinary course of trade."
3. ———. Section 77-1702, Comp. St. 1929, authorizes the board of equalization to correct evident errors of assessment or apparent gross injustice in overvaluation or undervaluation of real property, at any of its annual meetings, whether such errors or injustice be due to some act of the assessor or to that of the board itself. The act is remedial and intended to reach cases where, because of evident errors of assessment, or because of overvaluation or undervaluation, a taxpayer would pay more or less than his just share of taxes.
4. **Evidence.** In adducing evidence to determine an assessment for taxation purposes of a farm which shall be valued and assessed at its actual value, that is, its value in the market in the ordinary course of trade,—its fair market value,—evidence of the sale price of other farm lands in the immediate vicinity is not competent to prove the fair market value of a farm which shall be valued and assessed at its actual value for taxation purposes.
5. **Taxation.** Evidence in the instant case examined, and *held*, that for taxation purposes the actual fair market value of the farm in question, in the market in the ordinary course of trade, is

$14,000, and that an assessment of $15,775 constitutes an overvaluation.

6. ———. An erroneous and excessive valuation of real property for taxation purposes may be corrected on appeal by the owner to the district court and likewise to the supreme court.

APPEAL from the district court for Fillmore county: STANLEY BARTOS, JUDGE. *Reversed, with directions.*

Charles F. Adams, for appellants.

John C. Gewacke and *Robert B. Waring, contra.*

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

MESSMORE, J.

The plaintiffs' petition alleges ownership of a 320-acre farm near Fairmont, Nebraska, described in the petition; that said real estate was valued and assessed for taxation for the year 1941 at $15,775; that on June 11, 1941, the plaintiffs and Erma E. Gorham filed a written complaint with the board of equalization of Fillmore county, praying that the valuation and assessment of such real estate for taxation for the year 1941 be reduced to $9,600; that on June 28, 1941, the board of equalization entered its decision, refusing to reduce the valuation, and ordered the same to remain as assessed; that said valuation and assessment of $15,775 is exorbitant and excessive and is greatly in excess of the actual value of the real estate as the term "actual value" is defined and used in the revenue laws of Nebraska; an appeal was perfected, and plaintiffs pray that the district court enter a decree finding, determining and adjudging the actual value of the real estate.

An answer was filed and a motion to withdraw the answer for the purpose of filing other pleadings; a motion to dismiss was filed and subsequently a demurrer, both of which were overruled. An amended answer was filed, denying every allegation of the plaintiffs' petition except that the plaintiffs were the record owners of the real estate described in the petition, that it was valued and assessed for

taxes in the amount of $15,775, and alleging that the same is not exorbitant and excessive and is not in excess of the actual value of the real estate, as contemplated by the revenue laws of Nebraska; that said valuation and assessment are not disproportionate to other property situated in the county and assessment district, but are properly equalized; that such real estate was valued for assessment as provided by law during the fiscal year of 1940; that said assessment was legally made by the proper public authorities during said year; that no complaint was made in 1940 by the owners as to the assessed valuation, and the only complaint made as to the assessed valuation was during the year 1941. The reply was a general denial.

The court dismissed plaintiffs' appeal, holding that the burden of proof to establish the actual value is undoubtedly with the plaintiffs; that an examination of the record discloses insufficient evidence as to the actual value, and that plaintiffs failed to establish their case by competent evidence, and the court adjudged costs against the plaintiffs. From this order of dismissal the plaintiffs appeal to this court.

The principal assignments of error are that the findings and judgment of the trial court are contrary to the evidence and the law, and that the court erred in finding that the plaintiffs had failed to adduce competent evidence to sustain the allegations of their petition.

The plaintiffs' evidence discloses the fair market value of the real estate, as of April 1, 1941, to range from $35 an acre, or $11,200, to $37.50 an acre, or $12,000; $30 an acre, or $9,600, and $40 an acre, or $12,800. The defendants' testimony discloses the fair market value of the land in question to be $15,400, $16,000 and $15,775. The map of the school districts and the soil survey of the county appear in the record; almost the entire half-section is tillable and one of the best productive farms in the county.

The defendants present the following question: Can the board of equalization in an off year entertain objections by an owner of real estate, relative to the valuation and as-

sessment for taxation purposes, made by the state board in an even year? The defendants rely on section 77-1601, Comp. St. 1929, as amended by chapter 130, Laws 1933. Said section, as far as applicable here, provides as follows: "All real property in this state subject to taxation shall be assessed on the first day of April, 1933 and 1934 and every second year thereafter, which assessment shall be used as a basis of valuation for taxation until the next regular assessment;" and on that part of section 77-1503, Comp. St. 1929, which provides: "The total assessed value of any real property, including the interests of the mortgagor and mortgagee, shall not be changed except when all the real property of the county is assessed, unless its value is changed by reason of altered conditions." Citing *Sloan v. Fillmore County,* 126 Neb. 524, 253 N. W. 869, in which this court held:

"Under sections 77-1503 and 77-1601, Comp. St. 1929, the board of equalization of Fillmore county was right in refusing to reduce the assessments upon 16 tracts of farm land in June, 1932."

In *Sloan v. Fillmore County, supra,* William J. Sloan and 15 other farmers, who owned property within school district No. 75, which embraces the city of Geneva, filed complaints before the county equalization board, alleging that their farms were assessed for taxation at an excessive valuation. The opinion recites that the case was founded upon the assessed value of the farm lands for the single year of 1932. Complaints were filed before the board of equalization June 16, 1932, hearings had thereon June 24, 1932, and the claims rejected. The evidence was confined to the year 1932, and there was no evidence showing a reduction in value over a period of years. The equalization board having turned down the complaints, the matter was appealed to the district court, with the same result; then appealed to this court, which held as above stated, and that under section 77-1601, Comp. St. 1929, it was provided that all real property should be assessed in the year 1926 and each four years thereafter, and in the opinion it was stated that

section 77-1503, Comp. St. 1929, provided: "The total assessed value of any real property * * * shall not be changed except when all the real property of the county is assessed, unless its value is changed by reason of altered conditions," the court stating that section 77-1601, *supra,* provided that "all real property should be assessed in 1926 and each four years thereafter. Therefore, the year 1930 was the year when all the assessed values could be changed by law. 1932 was not the proper year to seek to change the assessed valuation upon these 16 farms, and the board of equalization, finding no altered conditions which required relief in 1932, properly refused to grant any relief that year;" even though section 77-1601 was amended in 1933 (Laws 1933, ch. 130) "that could not affect the plaintiff's relief hereunder."

This court in the *Sloan* case refers to *Power v. Jones,* 126 Neb. 529, 253 N. W. 867, for "a further discussion of the points involved;" the court saying: "It is clear that the law contemplates an appeal to the board of equalization by landowners only in the year when all the real property of the county is assessed, except in the case of new improvements, or destruction thereof, or other special circumstances, which are not shown in the record before us. There being no error in the record, the judgment of the trial court is affirmed."

In *Power v. Jones, supra,* it was said in the opinion: "The assessing authorities are required to make valuation once in four years of all real estate, as of April 1, by section 77-1601, Comp. St. 1929." Then followed an explanation of the provision of the statute and the amendment thereof in 1933, as herebefore stated, and section 77-1503, Comp. St. 1929, was cited, providing that such valuation "shall not be changed except when all the real property of the county is assessed, unless for altered conditions, which is not alleged in this case." The court held: "Where the claim is made that real property is assessed too high, the taxpayer should first apply for relief to the board of equalization, as provided in section 77-1702, Comp. St. 1929, and

if relief is there denied, he should appeal to the courts," and the holding in the case with reference to the subject-matter was: "The claim that real property is assessed too high cannot be made for the first time in a collateral attack against the collection of the tax." A careful reading of the above case indicates clearly that the language quoted, as to sections 77-1601 and 77-1503, Comp. St. 1929, could have been eliminated from the opinion without doing violence to the holding. We think the foregoing distinction between the *Power* and *Sloan* cases and the subject-matter in the case at bar is sufficient.

The plaintiffs rely on section 77-201, Comp. St. 1929, as amended by chapter 102, Laws 1939, which provides: "All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. In arriving at the 'actual value' of property, as used in this act, there shall be taken into consideration its value in the market in the ordinary course of trade and in arriving at the 'actual value' of real property there shall also be taken into consideration the proximity of such property to markets, the school facilities and other advantages and other facilities afforded by the governmental subdivision or subdivisions in which the real property is situated, the tax burden upon the real property, and every other element or factor affecting the actual value of said real property," and plaintiffs rely on section 77-1702, Comp. St. 1929, the second portion of which is material for consideration. It reads: "Second. At its meeting in 1912 and every second year thereafter equalize the valuation of real property of the county by raising the valuation of such tracts and lots as are assessed too low, and lowering the valuation of such tracts and lots as are assessed too high; but in cases of evident error of assessment or of apparent gross injustice in overvaluation or undervaluation of real property, the county board of equalization may at its annual meetings consider and correct the same by raising, after due notice has been given to the interested party or parties, or by lowering the assessed val-

uation of such real property. In cases where farm lands or real property consisting of city, town, or village blocks or lots have been assessed as entities and after time of such assessment part or parts of such entities have been transferred by the owner or owners thereof to another party or to other parties by sale or otherwise, then the county board may at such annual meeting as board of equalization apportion the just and equitable proportion of the assessed valuation of such entities to the various parcels of lands into which such entities have by transfer of title been divided, upon notice given to the parties of such transfer." Citing *State v. Grow*, 74 Neb. 850, 105 N. W. 898.

The trial court based its judgment on the failure of the plaintiffs to produce sufficient evidence to show the elements necessary in arriving at the actual value as set forth in section 77-201, Comp. St. 1929, as amended by chapter 102, Laws 1939.

This court, subsequent to the time of trial of the instant case, in *Homan v. Board of Equalization*, 141 Neb. 400, 3 N. W. (2d) 650, held: "The provisions of chapter 102, Laws 1939 (amending section 77-201, Comp. St. 1929), provide a method of fixing the valuation of real property different from that prescribed for other tangible property, contrary to the uniformity provision of section 1, art. VIII of the Constitution, and it is consequently void."

Therefore, the amendment to section 77-201, Comp. St. 1929 (Laws 1939, ch. 102), is void, leaving section 77-201, Comp. St. 1929, without such amendment, the law. The trial court did not have the advantage of the decision in the *Homan* case when it passed upon the question involved in the instant case. The sole contention in the case at bar is the objection to the valuation and assessment of one tract of land by the owners, and it is not based on comparative tax burdens imposed on the land in question and on adjoining lands, as was contended for in the case of *Sloan v. Fillmore County, supra*. The *Sloan* case was brought by and in behalf of all the landowners in the school district similarly situated, and asked for the reassessment and re-

valuation of all the farm land included in said school district.

Section 77-1503, Comp. St. 1929, prohibits a change in the total assessed valuation of real estate except in even years, unless there are altered conditions. Section 77-1702, *supra,* expressly provides that the board of equalization shall be in session every year, and at such sessions is given the power to act in five different situations, and one of those situations is presented when there is apparent a gross injustice in the overvaluation or undervaluation, and then the board at its annual meeting may consider and correct the same. On a reading of the two statutes, it would seem that, in connection with section 77-1503, *supra,* section 77-1702, Comp. St. 1929, would be conflicting.

The history of section 77-1503, Comp. St. 1929, discloses the following: It was originally enacted in 1911 (Laws 1911, ch. 105, sec. 3) under the title: "An Act to provide for the taxation of mortgages of real property and to prevent double taxation on encumbered property in the state." It became section 6351, Rev. St. 1913, which was amended in 1919 (Laws 1919, ch. 138, sec. 2) with reference to the duties of officers. The original act provided "that the total assessed value of any real property, including the interest of the mortgagor and mortgagee shall not be changed excepting when all the real property of the county is assessed, unless the value of said property is changed by reason of a change in the improvements thereon" (Laws 1911, ch. 105, sec. 3), while the amendment of 1919 provided: "The total assessed value of any real property, including the interests of the mortgagor and mortgagee, shall not be changed except when all the real property of the county is assessed, unless its value is changed by reason of altered conditions." Laws 1919, ch. 138, sec. 2. The act then became section 5952, Comp. St. 1922, and was amended by chapter 178, Laws 1927, the title to the act reading: "An Act to amend section 5952 * * *, relating to revenue, to declare an emergency and to repeal said original section." The amendment contained the same provision as heretofore set out. The act is now section 77-1503, Comp. St. 1929.

It is clear that the title of the act, and the legislative intent to be gathered therefrom, was to provide for the taxation of mortgages on real property, and to prevent double taxation on encumbered property in this state. The foregoing explanation of the history of section 77-1503, *supra*, is to show that said section, as originally enacted, is not conflicting with section 77-1702, Comp. St. 1929, which was amended in 1911 just subsequently to the passing of said section 77-1503 (Laws 1911, ch. 104, sec. 14), which is further evidence of the legislative intent with reference to the two sections herein discussed.

In *State v. Grow, supra,* the court held that section 77-1702, *supra,* therein referred to as section 121, art. 1, ch. 77, Compiled Statutes 1903, "authorizes a county board to correct 'evident errors of assessment, or of apparent gross injustice, in overvaluation or undervaluation of real property,' at any of its annual meetings, whether such errors or injustice be due to some act of the assessor or to that of the board itself." This court said: "The act is remedial, and was intended to reach cases where, because of 'evident error of assessment or of apparent gross injustice of overvaluation or undervaluation,' a taxpayer would bear more or less than his just share of the burden of taxation." The petition in the foregoing case alleged that there were evident errors of assessment and gross injustice in overvaluation of the real estate described in the petition, as valued and equalized by the board for the purpose of taxation in 1904. The petition in the instant case alleges that the valuation and assessment of the board of equalization is $15,775; that the actual valuation of the real estate on April 1, 1941, was $9,600. If the allegations are true, then there is the question as to whether or not there is gross injustice in the real estate as assessed, and whether or not there is overvaluation, as contended for by the plaintiffs.

The cases of *Edgerton v. Board of Equalization,* 140 Neb. 493, 300 N. W. 413, *Aurora Hotel v. Board of Equalization,* 140 Neb. 511, 300 N. W. 419, and *Wilson & Co. v. Otoe County,* 140 Neb. 518, 300 N. W. 415, are cited. In the

Edgerton case the court held: "Under the provisions of section 77-201, Comp. St. Supp. 1939, the legislature has set out certain elements to be considered in determining the actual value of property, as well as requiring that every other element affecting the actual value be considered." In *Wilson & Co. v. Otoe County, supra,* the court held: "Property for taxation purposes shall be valued and assessed at its actual value, that is, its value in the market in the ordinary course of trade;" in other words, its fair market value. The latter case was decided under section 77-201, Comp. St. 1929, before it was amended in 1939. The *Homan* case places the instant case in the same catagory as *Wilson & Co. v. Otoe County,* and makes applicable the same rule therein. This brings us to the question of the fair market value to be determined from the record in a trial *de novo* in this court.

Considering a case of this character, where valuation of land ranges from $30 to a little better than $50 an acre, depending on the witnesses for either the complaining party or the county, we believe from the evidence that the fair market value of the land involved herein on April 1, 1941, would be $14,000. This being true, it was overvalued for taxation purposes in the amount of $1,775. We remand the case, with instructions to the court to enter the proper order fixing the plaintiffs' property for valuation in the amount of $14,000, as constituting the proper sum under the evidence adduced.

The legislature, by the amendment of section 77-201, Comp. St. 1929 (Laws 1939, ch. 102), in view of the holding in the *Homan* case, has not abrogated the rule as set forth in *Schulz v. Dixon County,* 134 Neb. 549, 279 N. W. 179, as follows: "'Farm lands,' for the purpose of taxation, shall be valued and assessed at their actual cash value —their value in the market in the ordinary course of trade." See, also, *Kennedy v. Buffalo County,* 134 Neb. 744, 279 N. W. 464.

The defendants offered evidence of the value of other lands in the immediate vicinity and the sale price thereof.

While this question has not been directly before the court in cases of this character, we have recently passed upon the admissibility of such evidence in condemnation proceedings, in the case of *Rushart v. Department of Roads and Irrigation, ante,* p. 301, 5 N. W. (2d) 884, wherein we held such evidence to be incompetent, sustaining the holding in *State v. Wright,* 105 Neb. 617, 181 N. W. 539, and giving the reasons therefor in the opinion. Such evidence in some states is admissible only to test the credibility of the knowledge of the expert witness. Such evidence in the case at bar consists of the sale of 757½ acres of land in the immediate vicinity for the amount of $37,878.50, or for an average of $50.03 an acre.

We have not undertaken to detail the evidence, but have analyzed the record, to ascertain what we believe to be the true market value of this farm and the right of the plaintiffs to have the matter considered, under the provisions of the statute, as presented by the plaintiffs.

The judgment of the district court is reversed and the cause remanded, with directions in conformity with this opinion.

REVERSED.

LEONARD A. JOHNSON, APPELLANT, V. FRED WEBORG, APPELLEE.

7 N. W. (2d) 65

FILED DECEMBER 18, 1942. No. 31456.

1. **Action.** If a statute commands or prohibits certain things, the person for whose benefit the statute was enacted has a remedy under the statute. It is not necessary to the maintenance of such an action that the statute in terms expressly imposes a civil liability.
2. **Negligence.** The rule that a failure to perform a mandatory duty enjoined by statute is negligence *per se,* and if a 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, has been followed by this court in construing safety statutes, such as is here considered.

3. ———. The legislature in enacting section 48-421, Comp. St. 1929, made the employer an insurer that a place furnished the employee to work was "safe, suitable and proper."
4. **Statutes.** When the legislature reenacts a law, it thereby adopts the judicial construction which has theretofore been placed upon it. The legislature is presumed to have known the effect which such statute originally had, and by its reenactment to have intended that that same effect should again be had.
5. **Master and Servant.** Under the provisions of section 48-421, Comp. St. 1929, when a scaffold is constructed by an employer to be used in repairing a building, the scaffold must be safe, suitable and proper for the purpose for which it is used. The employer is liable if it does not meet that requirement. This construction is applicable regardless of the knowledge or negligence of the employer.
6. ———. In the absence of evidence of other producing cause, the collapse of a scaffold, while an employee is working upon it, is sufficient evidence to take the case to the jury on the issue of whether or not the scaffold was constructed in a safe, suitable and proper manner.

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

C. O. Stauffer and *McKenzie & Dugan,* for appellant.

Walter M. Hopewell and *John L. Barber, Jr., contra.*

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

SIMMONS, C. J.

Plaintiff here seeks to recover damages for personal injuries caused by a fall from the roof of a barn upon which he was working for the defendant. At the close of plaintiff's case, the court sustained the defendant's motion for an instructed verdict. Plaintiff appeals. We conclude that the trial court erred.

The issue here presented is whether or not the plaintiff offered evidence sufficient to sustain a verdict for some amount.

Defendant undertook to place a corrugated iron roof on his barn. The barn was about 60 feet long with sides about

22 feet in height. The barn had a gambrel roof. The lower, and more perpendicular, slope was about 10 or 12 feet wide. The upper slope about 8 feet wide. Defendant first employed one Carl Johnson, a carpenter. He built a scaffolding along the south side of the barn. The uprights, placed 8 to 10 feet apart, were of 2″ by 4″ or 2″ by 6″ material and extended up to about the eave of the barn. A 2″ by 4″ was nailed from the barn to the uprights at about 18 feet from the ground. Upon these horizontal timbers were placed "planks" forming a platform. Upon the outer edge of the plank was placed a 2″ by 4″. Plaintiff, in his brief here, sets out a more detailed description of the construction of the scaffold, and the manner in which it was fastened to the barn. We are unable to find evidence in the record further than that above set forth.

To do the work on the lower section of the roof, a ladder was placed on the platform, its base against the 2″ by 4″ and in that position resting on the lower slope of the roof. A second ladder was hooked over the ridge of the roof and rested on the upper slope. The pieces of iron, 30 inches in width and from 8 to 12 feet in length, were then handed up to the workmen who, working on the ladders, put and nailed the iron in place.

The scaffold had been built and a part of the roof put on when Johnson, the carpenter, asked the plaintiff to assist in the work. Plaintiff was not a carpenter. He weighed over 200 pounds. He went to defendant's farm to begin work. He at that time saw the scaffold. He did not "know anything was wrong" with it; it "looked sound" and "all right" to him.

The two men worked during the forenoon. In the afternoon four men were working. Johnson, the carpenter, was working from the ladder on the upper slope of the roof, the plaintiff and another man were on the ladder on the lower slope and defendant was on the ground passing up the pieces of iron roofing. Plaintiff was nailing on a piece of iron when he heard the scaffold "creak," the ladder moved slowly, then "went over fast," and the scaffold went

"down" also. Plaintiff testified that he does not "know just what happened." There is no evidence as to what caused the scaffold to "creak" and "go down." Plaintiff fell to the ground, sustaining the injuries for which he seeks to recover his damages. Plaintiff states, in his brief here, that "the evidence does not disclose that there was any apparent defect in the erection or construction of the scaffold." Plaintiff's theory appears to be that the weight of the two men on the ladder was a force pushing the scaffold away from the barn, and that the horizontal timbers upon which the platform rested were pulled loose from the barn causing the scaffold to go down. There is no evidence that the accident happened that way.

Plaintiff in his petition alleged his employment requiring him to work upon the ladder on the roof of the barn, that the ladder rested upon the scaffold, that the scaffold was erected before his employment, that while working the scaffold gave way, resulting in his fall and injury. He alleged that his injuries were caused "by the carelessness and negligence" of the defendant in several particulars which plaintiff summarized in his brief as follows: "The negligence complained of consisted in requiring the plaintiff to perform his services upon the ladder which rested upon the scaffold, when the scaffold had not been securely fastened to the barn, and had not been erected in a safe, suitable and proper manner."

Defendant for answer denied generally, admitted plaintiff's employment, alleged that plaintiff and his fellow servant Carl Johnson were carpenters of experience; that the risk of injury was incident to the employment; that plaintiff knew or should have known of the materials and manner of construction of the scaffold; that he had ample time to examine and test the scaffold and had assumed the risk of being injured; that if the scaffold was negligently constructed the negligence was that of the coemployee Carl Johnson; and that the scaffold gave way as a result of an "Act of God," to wit, a "terrific gust of wind."

Defendant gave as his reasons for requesting a directed

verdict (1) that plaintiff was guilty of negligence more than slight, (2) plaintiff assumed the risk, (3) negligence of a fellow servant, (4) contributory negligence of the plaintiff.

The factual situation may be summarized as follows: Johnson, the carpenter, built the scaffold for the defendant; it was used in placing some of the iron on the roof; after the scaffold was built the plaintiff was employed to assist in the work; the plaintiff, using the scaffold, worked for one-half a day without incident; in the afternoon two men were on the ladder which rested on the scaffold when something caused the scaffold to go down and plaintiff to be injured. Is this evidence sufficient to require submission of defendant's liability to a jury?

Plaintiff rests his case upon section 48-421, Comp. St. 1929, which provides: "All scaffolds * * * ladders, supports or other mechanical contrivances used in the erection, repairing, alteration * * * of any house, building * * * shall be erected and constructed in a safe, suitable and proper manner."

This is a part of the statute enacted originally as a part of section 1, ch. 65, Laws 1911, in an act providing "for the protection and safety of persons in and about the construction, repairing * * * of buildings * * * ," etc. The original act set up a comprehensive code of requirements and provided for criminal penalties for its violation, and further provided that for any injury to persons or property, occasioned by any violation of or failure to comply with any of its provisions, "a right of action shall accrue to the party injured, for any direct damages sustained thereby," and provided who should be liable in such an action. Laws 1911, ch. 65, sec. 11.

This act was subsequently repealed by chapter 190, Laws 1919, and reenacted (pages 562 to 567, inclusive) with many changes, and in particular section 11 of the original act was amended so as to provide only that: "The continuance by any person in the employ of any such operator shall not be deemed an assumption of the risk of such em-

ployment." Laws 1919, ch. 190, title IV, art. IV, sec. 31. The legislature has therefore repealed the specific provision providing that a cause of action accrues for the violation or failure to comply with provisions of the act. The act, as so reenacted, is now sections 48-421 to 48-431, Comp. St. 1929.

Two questions then arise: (1) Considering the repeal of the provision in section 11 above cited, does a cause of action exist where injury results from a failure to comply with the mandatory provisions of section 48-421, *supra?* (2) What facts must a plaintiff establish to support a verdict in his favor?

We early adopted the rule that, when the legislature reenacts a law, it thereby adopts the judicial construction which has theretofore been placed upon it by this court. *State v. Cornell,* 54 Neb. 647, 75 N. W. 25. And, as subsequently stated, the legislature will be presumed to have known the effect which such statute originally had, and by its reenactment to have intended that that same effect should again be had. *Shandy v. City of Omaha,* 127 Neb. 406, 255 N. W. 477.

Strahl v. Miller, 97 Neb. 820, 151 N. W. 952, was decided after the passage of the act in 1911 and before the passage of the 1919 act. We there said: "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. The fact that the statute does not in terms impose civil liability is immaterial. It is not necessary to the maintenance of an action that the statute so expressly provide."

It follows that the legislature, in reenacting in 1919 the cited provisions from section 1 of the original act, and in omitting the provisions of section 11 to which reference has been made, did not thereby deny a remedy to the employee upon the statute.

It further follows that the legislature by reenacting the provisions of the original act adopted the judicial construction which had theretofore been placed upon it.

From this record there can be no question but that plaintiff's injury resulted from the collapse of the scaffold. Does the fact that the scaffold creaked and went down "fast" carrying the ladder and the plaintiff with it establish that the scaffold was not "erected and constructed in a safe, suitable and proper manner," or must the plaintiff in addition thereto offer evidence as to the particulars in which the scaffolding was defective and show what caused the scaffold to collapse?

In construing legislation of the class herein considered, this court has long followed the rule that a failure to perform a mandatory duty enjoined by statute 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. *Tralle v. Hartman Furniture & Carpet Co.,* 116 Neb. 418, 217 N. W. 952, and cases there cited.

In *Butera v. Mardis Co.,* 99 Neb. 815, 157 N. W. 1024, decided in 1916, we had for consideration the right of an employee to recover against the contractor and the owner of a lot upon which a building was being erected. Action was brought under the provisions of the original act, and in particular sections 1 and 11. We there held "the intention of the statute is that the employer is to be an 'insurer as to furnishing such a place as it requires,' " and that "the employee may confidently rely upon the performance of this duty by his employer." It was there pointed out that statutes such as ours appear to have originated in New York.

In *Caddy v. Interborough Rapid Transit Co.,* 195 N. Y. 415, 88 N. E. 747, decided in 1909, the court, in discussing their similar statute, said that the obvious purpose of the legislature was "to impose upon the employer the affirmative and imperative duty to furnish to his employees stagings and scaffoldings for certain purposes that are safe,

suitable and proper, regardless of the employer's knowledge or negligence in the matter. This is absolute and unequivocal. Whenever a scaffold is furnished or caused to be furnished by an employer to be used in erecting, repairing, altering or painting a house, building or structure, it must be safe, suitable and proper, or the employer is liable."

Likewise, in *Butera v. Mardis Co., supra,* citation was made to the Wisconsin case of *Koepp v. National Enameling & Stamping Co.,* 151 Wis. 302, 139 N. W. 179.

In *Bruce v. Northern Boiler & Structural Iron Works,* 152 Wis. 188, 139 N. W. 729, the Wisconsin court in referring to the *Koepp* case, said: "It was there held that if an employer personally furnished, or through another caused to be furnished, any of the prohibited articles for the purposes specified in the statute, he was liable to the employee for the damages proximately resulting therefrom to such employee, unless it appeared that the employee assumed the risk or was guilty of contributory negligence."

In *Olson v. Whitney Bros. Co.,* 160 Wis. 606, 150 N. W. 959, the court, referring to the Wisconsin statute, said: "It prohibited an employer in certain kinds of labor from furnishing scaffolding, hoists, stays, ladders, or other mechanical contrivances that were 'unsafe, unsuitable or improper.' The statute did not define the words * * * and the court * * * held that if an unsafe appliance of the kind mentioned was furnished and an accident to an employee resulted while engaged in the labor specified in the statute, the employer was liable unless he would show assumption of risk or contributory negligence or both. It mattered not that he might himself be free from negligence. In that sense he was an absolute insurer of the safety of the appliance."

In *Stewart v. Ferguson,* 164 N. Y. 553, 58 N. E. 662, the court construed section 18 of their act (which is similar to our section 48-421) and section 19 of their act setting out the requirements as to the amount of weight a scaffold should be constructed to bear and said, the scaffold's fall,

"in the absence of evidence of other producing cause, points to the omission of the duty enjoined by the statute upon the defendant to the plaintiff in its construction, and points to it with that reasonable certainty which usually tends to produce conviction in the mind in tracing events back to their causes, and thus creates a presumption. It is circumstantial evidence, and if it does convince the jury, it justifies their verdict." The same rule was applied when construing their section 18 in *Huston v. Dobson,* 138 App. Div. 810, 123 N. Y. Supp. 892. These cases have been repeatedly followed by the courts of that state.

The decision in *Caddy v. Interborough Rapid Transit Co., supra,* and *Stewart v. Ferguson, supra,* had been made by the New York court before the passage of our original act. The Wisconsin decisions to which reference has been made were made after the passage of our original act, but before its reenactment in 1919. Likewise, before the 1919 act was passed the attention of the legislature was called to the construction placed upon similar acts by those states, which we reviewed in *Butera v. Mardis Co., supra.* We think it proper to hold that the legislature, under these circumstances, by reenacting the statute accepted the construction placed upon the act by those states.

In *Minneapolis & St. Louis R. Co. v. Gotschall,* 244 U. S. 66, 37 S. Ct. 598, the court had before it a case where plaintiff's intestate, a brakeman, was killed. The train separated because of the opening of a coupler on one of the cars, resulting in an automatic setting of the emergency brakes and a sudden jerk which threw the employee off the train and under the wheels. The jury were permitted to infer negligence on the part of the employer from the fact that the coupler failed to perform its function, there being no other proof of negligence. The employer insisted that this was error. The court, conceding "in the fullest measure" the correctness of the rule "that negligence may not be inferred from the mere happening of an accident except under the most exceptional circumstances," held that such rule was not controlling of the case "in view of the posi-

tive duty imposed by the statute upon the railroad to furnish safe appliances for the coupling of cars." And here there was a positive duty imposed by statute upon the defendant to furnish a scaffold "constructed in a safe, suitable and proper manner."

Defendant cites to us decisions of this and other courts not based upon the mandatory provisions of safety statutes. Obviously, they are not controlling. Plaintiff likewise cites *Fryer v. St. Louis-San Francisco Ry. Co.*, 333 Mo. 740, 63 S. W. (2d) 47, wherein recovery was sought under the federal boiler inspection act. There the evidence indicated not faulty equipment but faulty handling of the equipment by the servant. In that opinion the court in discussing the federal safety appliance act referred to the provision requiring secure handle-holds on the ends and sides of each car and said: "If a grab-iron does not hold a man it is not secure. Therefore, if it is shown that a grab-iron gave way with a man who attempted to use it, that would be sufficient to show that it was not secure." So here, if a scaffold gives way with a man who attempts to use it, that would be sufficient to show that it was not constructed in a safe, suitable and proper manner. The Missouri court further cites *Minneapolis & St. Louis R. Co. v. Gotschall, supra,* with approval and distinguished that case from the one it was considering.

Holding that the denial of the benefits of the rule of *res ipsa loquitur* to a servant, simply because he is a servant, was unreasonable and unjust, the supreme court of Washington in *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888, applied that rule in a scaffolding case and likewise adhered to it in *Penson v. Inland Empire Paper* Co., 73 Wash. 338, 132 Pac. 39.

The supreme court of California said in *Nolen v. F. O. Engstrum Co.*, 175 Cal. 464, 166 Pac. 346: "Scaffolds built for such purposes do not usually break or fall with the weight of the workmen, if properly constructed. The fact that while the plaintiff was at work upon the scaffold it fell and precipitated him to the ground was of itself sufficient

evidence that the scaffold was defectively constructed. The plaintiff testified that he felt the supports giving away at the time of falling. From this there would be a reasonable inference that the supports were insufficient, either because they were too weak to sustain the weight or because they were not sufficiently nailed. The doctrine of *res ipsa loquitur* applies."

In *Rocha v. Payne,* 108 Neb. 246, 187 N. W. 804, it was urged that the doctrine of *res ipsa loquitur* was not applicable to an action for personal injuries by a servant against his master. This court there said: "We are unable to concur in this contention. The doctrine * * * is frequently applied to cases of this character." In *Miratsky v. Beseda,* 139 Neb. 229, 297 N. W. 94, temporary bleachers collapsed. No actual negligence was proved. The plaintiff contended that negligence could be implied from the collapse of the structure itself. We there held: "Where a structure, the collapse of which causes an injury, is shown to be under the management of a defendant, and the collapse is such as in the ordinary course does not happen if those who have its management use proper care, the collapse affords reasonable evidence, in the absence of explanation by the defendant, that it arose from want of care." Paraphrasing the language used by us in that opinion, and in full accord with the authorities herein cited, we hold that plaintiff had a right to rely upon the safe condition of the scaffold provided for him. In the ordinary course of things, such scaffolds do not collapse if proper care is used in their construction and maintenance. The collapse of the scaffold affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose because the scaffold was not constructed in a safe, suitable and proper manner.

It follows that the trial court erred in directing a verdict in defendant's favor.

REVERSED.

W. T. RAWLEIGH COMPANY, APPELLANT, V. PETER E. SMITH ET AL., APPELLEES.

7 N. W. (2d) 80

FILED DECEMBER 18, 1942. No. 31498.

Limitation of Actions. Payments by the principal debtor without the authority or consent of the surety do not prevent the statute of limitations from running against the latter.

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

Lee Card, for appellant.

Charles A. Fisher and *R. R. Wellington, contra.*

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

ROSE, J.

This is an action to recover from Peter E. Smith, defendant, as surety, a balance of $342 on an account for merchandise sold by the W. T. Rawleigh Company, plaintiff, to Francis J. Budroe. The contracts for the sale and purchase of merchandise were on printed forms and were executed by both seller and buyer. Following these contracts on the same instruments were executed agreements of George Sandercock, C. M. Sandercock and Peter E. Smith, sureties, for payment of the merchandise purchased by Francis J. Budroe from plaintiff. The only defendant in court is the surety, Peter E. Smith. His obligations as surety were dated January 2, 1931, and January 2, 1932. The action was brought in the county court of Dawes county and there dismissed. Plaintiff appealed to the district court. Upon a trial therein the action was dismissed on the ground that the claim of plaintiff against the surety was barred by the statute of limitations. Plaintiff appealed to the supreme court.

The petition which plaintiff filed in the district court on appeal states that the indebtedness of Budroe under his contracts to purchase merchandise was $1,164.50 on July 1, 1932; that he then acknowledged in writing an unpaid

balance for that amount and promised to pay it according to his contracts; that he reduced his debt to $342 by payments from July 7, 1932, until April 19, 1934; that Budroe purchased merchandise under his contracts to the extent of $318.74 from July 7, 1932, until November 16, 1932. The contracts of the purchaser and sureties and the date and amount of each item of debit and credit for the periods mentioned were pleaded in full in the petition.

In an answer to the petition the surety, Smith, sole defendant in court, alleged among other defenses that more than five years elapsed between the date on which the cause of action accrued and the date on which the action was brought and that the claim against the surety was barred by the five-year statute of limitations. Comp. St. 1929, secs. 20-204, 20-205.

The parties waived a jury and the case was tried before the district court. Plaintiff proved the contracts and the items of debits and credits pleaded in the petition, showing a balance of $342 due from Budroe who purchased the merchandise. In addition plaintiff introduced in evidence an exhibit showing that Budroe paid $5 on his account March 3, 1937. The transcript of the proceedings in the district court shows that the case was pending therein May 10, 1941. A cause of action accrued on the account against Budroe when he acknowledged an unpaid balance of $1,164.50 July 1, 1932, and promised to pay it.

After plaintiff rested, Smith, surety, moved for judgment on the pleadings and evidence on the ground they are insufficient to support a judgment in favor of plaintiff. The motion was sustained and the action dismissed.

The pleadings and the evidence show on the face of the record that a cause of action for a balance due on the account accrued July 1, 1932, and that more than five years elapsed before plaintiff filed its petition. There is nothing in the record to show that Smith did anything to prevent the statute of limitations from running against his obligations as surety. The law is that payments by the principal debtor without the authority or consent of the surety do

not prevent the statute of limitations from running against the latter. *In re Estate of Soukup, ante,* p. 456, 6 N. W. (2d) 615. Since the action was properly dismissed as to the surety, because barred by the statute of limitations, the determination of other questions presented becomes unnecessary.

AFFIRMED.

The following opinion on motion for rehearing was filed April 23, 1943. *Judgment of district court reaffirmed.*

1. **Limitation of Actions.** The statute of limitations commences to run against a surety when his obligation to pay accrues.
2. ———. Partial payments made without the authority or consent of a surety or joint obligor do not toll the statute of limitations as to such surety or joint obligor.
3. **Principal and Surety.** The liability of a surety is measured by, and will not be extended beyond, the strict terms of his contract.
4. **Limitation of Actions.** In order for a part payment to operate to toll the statute of limitations as to a surety, the payment must have been made by the surety in person, or for him by his authority, or for him without authority and subsequently ratified by him.
5. ———. A waiver of "all notice of any nature whatsoever" in the suretyship agreement does not operate to supply the surety's consent and authority to the making of partial payments in the future.
6. ———. Knowledge of the making of partial payments by the principal does not of itself affect the liability of the surety, nor operate to toll the statute of limitations as to him.

CARTER, J.

The record in this case shows that on January 2, 1932, the plaintiff company entered into a written contract with one Budroe whereby the plaintiff agreed to sell and Budroe to purchase at wholesale such reasonable quantities of its products as the said Budroe may order during the year 1932. On the same date the defendant Smith and two others signed another instrument appearing on the same page whereby they jointly and severally promised, guaranteed and agreed to pay for all merchandise sold under Budroe's

contract with the company and all prior indebtedness that was due the company when the contract was signed. The instrument also contained the following provision: "We hereby expressly waive notice of the acceptance of this contract, and of the shipment of goods to the buyer, and extension of credit to the buyer, and of the extension of time in which to pay for the goods so purchased, and waive all notice of any nature whatsoever."

The evidence shows that on July 1, 1932, Budroe was indebted to the plaintiff company in the amount of $1,164.50. Subsequently, and during the life of the contract, Budroe purchased merchandise of the value of $318.74, the last item of which was bought on November 16, 1932. Payments were made by Budroe on the account as follows: In 1932 $712.58, in 1933 $110.66, in 1934 $150, in 1935 $115, in 1936 $48, and on March 3, 1937, the last payment of $5. The balance due on March 3, 1937, was $342. On December 21, 1940, plaintiff commenced this action to obtain a judgment against the defendant Smith. The five-year statute of limitations (Comp. St. 1929, sec. 20-205) is pleaded as a bar to a recovery by the plaintiff.

As we have before stated, the last purchase of merchandise under the contract sued on was made on November 16, 1932. Payments were made on the account to and including March 3, 1937. There is no evidence that defendant Smith had consented to the making of these payments and he invokes the rule that payments made without the authority or consent of a surety or joint obligor do not toll the statute of limitations as to such surety or joint obligor. *Hall v. Rogers,* 113 Neb. 290, 202 N. W. 908; *Kuhse v. Luther,* 130 Neb. 623, 266 N. W. 66; *In re Estate of Soukup, ante,* p. 456, 6 N. W. (2d) 615. See, also, 71 A. L. R. 378. This is clearly the rule in this state, and consequently the rights of the defendant Smith were not prejudiced by the payments made by the prinicpal without his authority or consent.

Plaintiff urges, however, that notice to the defendant of payments made by Budroe was waived under the provisions

of the contract hereinbefore quoted and that the payments made thereby operate to toll the statute of limitations.

That the contract was accepted by the company is not disputed. There is no dispute as to the amount and value of the merchandise shipped to the principal. No extension of credit was given except as provided in the principal contract; nor is there evidence of any extension of time of payment for the goods purchased. The only question remaining, therefore, is whether the words in the suretyship agreement, "and waive all notice of any nature whatsoever," were sufficient to show an intention on the part of defendant Smith to absolutely assume payment of the principal's obligation during any time in which recovery could be had against the maker. The words of the contract which we have quoted are not sufficient to express such a purpose.

A surety cannot be held beyond the precise terms of his contract. Any intention on the part of the surety to assume a further and continued liability must be found in the words of the contract made. It is not a matter of inference, but of express statement. The liability of a surety, therefore, is measured by, and will not be extended beyond, the strict terms of his contract. *Hopewell v. McGrew,* 50 Neb. 789, 70 N. W. 397.

In order for a part payment to operate to toll the statute of limitations as to a surety, the payment must have been made by the surety in person, or for him by his authority, or for him without authority and subsequently ratified by him. *Pfenninger v. Kokesch,* 68 Minn. 81, 70 N. W. 867. A waiver of "all notice of any nature whatsoever" in the suretyship agreement does not operate to supply the surety's consent and authority to the making of partial payments in the future which would have the effect of tolling the statute of limitations as to him. *Shores-Mueller Co. v. Knox,* 160 Ia. 340, 141 N. W. 948. The mere fact that the surety has knowledge of partial payments being made by the principal is not sufficient to accomplish that result. *McMullen v. Rafferty,* 89 N. Y. 456; *Littlefield v. Littlefield,* 91 N. Y. 203. As the waiver contained in the suretyship

contract purports to waive notice only, it would be ineffective to waive a want of consent by the surety to the making of partial payments by the principal.

The statute of limitations commences to run against a surety when his obligation to pay accrues. *Cummins v. Tibbetts*, 58 Neb. 318, 78 N. W. 617. Liability accrued in the instant case on November 16, 1932. The payments made by the principal not being effective to toll the statute of limitations as to the defendant surety, it operates as a complete bar to a suit against the surety commenced after November 16, 1937. The trial court therefore correctly held that plaintiff's cause of action was barred by section 20-205, Comp. St. 1929.

Our former opinion, *W. T. Rawleigh Co. v. Smith, ante*, p. 527, 7 N. W. (2d) 80, therefore arrives at the correct result. In so far as it conflicts with this opinion, however, it is vacated and set aside.

AFFIRMED.

Rose and Eberly, JJ., not participating.

MILTON PREBYL, APPELLANT, V. PRUDENTIAL INSURANCE COMPANY ET AL., APPELLEES.
6 N. W. (2d) 881

FILED DECEMBER 18, 1942. No. 31521.

1. **Bankruptcy.** The bankruptcy court may authorize a mortgagee to foreclose in a state court a mortgage on real estate of the bankrupt mortgagor.
2. ———. A debt secured by a mortgage on real estate of the bankrupt mortgagor is not canceled by his discharge in bankruptcy.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Milton Prebyl, pro se.

Perry, Van Pelt & Marti, J. P. O'Gara and *Vasey & Mattoon, contra.*

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

ROSE, J.

Plaintiff, Milton Prebyl, claims to be the owner of 400 acres of land in Gage county. His petition is in the form of two causes of action. In the first, he prays for the cancelation of alleged void deeds and liens of defendants, the Prudential Insurance Company and John S. Callan, and for quieting in himself the title to the land. In the second, he seeks a decree dispossessing the terre-tenant, John S. Callan, defendant, and restoring possession to himself and requiring restitution from defendants for their wrongful possession and use of the land. Each designated "cause of action" depends on title in plaintiff. Defendants assailed each alleged cause of action by general demurrer. The demurrers were sustained. Plaintiff refused to plead further and the action was dismissed. Plaintiff appealed.

Among other allegations the petition states in substance: Plaintiff acquired title to the land by warranty deed January 12, 1920, borrowed from the Prudential Insurance Company $14,500 November 2, 1923, and secured the loan by a mortgage on the land. Plaintiff was adjudged a bankrupt March 22, 1930. The mortgage was listed as a debt in the bankruptcy proceeding and plaintiff's provable debts were discharged by decree of the federal court November 28, 1930. The referee in bankruptcy made an order June 14, 1930, granting mortgagee permission to foreclose its mortgage in the district court for Gage county, Nebraska. Under a decree of foreclosure therein for an unpaid debt of $16,629.99, mortgagee purchased the land for $11,000 at a judicial sale and procured a sheriff's deed therefor. The purchaser dispossessed plaintiff by a writ from the district court for Gage county pursuant to the judicial sale and took possession of the premises March 3, 1932. John S. Callan, defendant, asserted title and right of possession in himself under a recorded deed from the purchaser at foreclosure sale and mortgaged the land for $7,500 to secure a note payable to the Prudential Insurance Company.

Plaintiff contends that the decree of foreclosure, the judicial sale and the sheriff's deed did not deprive him of his title and that the debt secured by the 14,500-dollar mortgage was discharged by the decree of the bankruptcy court. The petition, however, does not state facts sufficient to support plaintiff's view of his pleadings. The trustee in bankruptcy took the title and the interests of the bankrupt in the latter's property but did not take the insurance company's mortgage lien on the 400 acres of mortgagor's land. The bankruptcy court may authorize a mortgage to foreclose in a state court a mortgage on real estate of the bankrupt mortgagor. *Prudential Ins. Co., v. Prebyl,* 124 Neb. 295, 246 N. W. 351; *Prebyl v. Prudential Ins. Co.,* 98 Fed. (2d) 199; *First Trust Co. v. Baylor,* 1 Fed. (2d) 24, and cases cited in opinion. It is settled law that a debt secured by a mortgage on real estate of the bankrupt mortgagor is not canceled by his discharge in bankruptcy.

The petition shows on its face that plaintiff lost his title to the mortgaged land by the decree of foreclosure, the judicial sale and the sheriff's deed and that he is not entitled to any relief for which he prays. The demurrers were properly sustained and the action properly dismissed.

AFFIRMED.

KATHERINE NICHOLS, SPECIAL ADMINISTRATRIX, APPELLEE, V. LUMIR HAVLAT, APPELLANT.

7 N. W. (2d) 84

FILED DECEMBER 18, 1942. No. 31188.

1. **Negligence.** Voluntary intoxication does not relieve one from contributory negligence, or serve to relax the requirement which is imposed upon a person to exercise due care for his own safety.
2. ———. The fact that a person when injured was intoxicated is not of itself contributory negligence, but it is a circumstance to be considered by the jury in determining whether his intoxication contributed to his injury.
3. **Death.** In a personal injury action, where there is evidence tending to show contributory negligence on the part of plaintiff's de-

cedent, that question should be submitted to the jury, under the provisions of section 20-1151, Comp. St. 1929.

APPEAL from the district court for Douglas county: WILLIAM A. DAY, JUDGE. Opinion on motion for rehearing of case reported in 140 Neb. 723. *Former judgment of affirmance vacated and judgment of district court reversed.*

Brown, Crossman, West, Barton & Fitch, for appellant.

Boyle & Boyle, contra.

L. R. Doyle, amicus curiæ.

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

PAINE, J.

This is an action by Katherine Nichols, widow, as special administratrix of the estate of George Nichols, deceased, against Lumir Havlat, for the death of George Nichols, who was killed when struck by the defendant's truck. The first time the case was tried to a jury in the district court they were unable to agree, and were discharged. The second trial occurred in October, 1940, and the jury returned a verdict for $7,000 in favor of the plaintiff, for which amount a judgment was entered. Defendant appealed.

This case was first argued to this court on September 19, 1941, and the opinion is found in 140 Neb. 723, 1 N. W. (2d) 829, which opinion was released January 9, 1942.

A very full and complete statement of the case and of the facts, including extensive quotations from the evidence, is set out in the first opinion, to which reference is hereby made. Before discussing the law, a brief synopsis of facts which are practically undisputed will be set out.

George Nichols, the husband of the plaintiff, was 63 years old when he was killed on April 17, 1940. He was a common laborer at the Armour packing house, but had been on a vacation for a few days. He lived at 3628 Y street, South Omaha, which was about two and a half miles from the place where he was killed. He left home that afternoon

about 3 o'clock, his family expecting that he would return for supper. When he did not return, the wife sent one of the children down three or four blocks from home to a couple of taverns to inquire if he was there, but he was not. His family could give no reason why he was out at the place where he was killed, on Q street near Sixty-first.

The defendant Havlat owned and operated a large farm Chevrolet truck, with a standard trailer attached, the two weighing about 31,000 pounds, and the truck was going west. It was loaded with 375 bushels of corn, which he was taking to Dorchester, where he lived. Havlat, the owner of the truck, was riding in it, and was sound asleep in the cab until after the accident, his truck being driven by his employee, Lumir Belohlavy.

The accident happened about 10 p. m., west of the city limits of Omaha, on an arterial highway known as Q street, the main highway into South Omaha from the west. The pavement is 18 feet in width, with a 10-foot cindered shoulder on each side of the brick. There was considerable traffic at this point on the night of the accident. The lights of oncoming cars blinded the driver of the truck, and he did not see Nichols until he was just a few feet ahead of him and directly in front. The driver made a sudden turn, and upset the truck and trailer in the ditch on the left side of the highway, but did not avoid hitting Nichols, who was killed.

Russell Meacham, a bus driver, driving a passenger bus east from Ralston to South Omaha over Q street, said that he saw Nichols standing on the highway about 125 feet west of the intersection of Sixtieth street and Q street, and as he turned out and passed him he was urinating approximately in the middle of the road. He was at a staggering stand-still, sort of maneuvering around, facing southeast. The last time Meacham saw him he was going towards the north side of the road. Within four or five seconds the bus stopped at Sixtieth and Q to take on a passenger, and the defendant's truck and trailer passed, and looking in his rear vision mirror he saw the tail-lights on the truck zigzag and turn a somersault. He immediately backed his bus

up a way and ran to the body of the deceased, which was on the highway. The truck was upside down in the ditch on the south side of the road. He remained at the place of the accident over 15 minutes. Nichols wore dark clothing, and there were no street lights along Q street at this place.

William Malverd testified that he was waiting for the bus at the corner of Sixtieth and Q. He first saw Nichols east of Sixtieth street on Q street, walking west towards him. It was a dark night. "A. The only time I would see him was when there was a car coming from behind him. * * * Q. And what did he do then? * * * A. Well, he was off and on to the north side of the pavement. Q. And describe to the jury what you mean by that? A. Well, I would say he was staggering in a way. * * * Q. Now, where was he on the pavement and where was he off the pavement, as you have stated? A. You mean what part of the block? Q. Yes, that's right. A. Well, it was a short distance east of 60th. Q. And did you see any cars pass Mr. Nichols east of 60th? A. Yes, sir. Q. And what took place, just what did you see when these cars were passing him? A. Well, one in particular, I would say, skidded about ten yards and came to a stop. * * * Q. What did Nichols do with reference to these cars? A. Well, he said something to them, but I didn't really hear, I couldn't definitely say what he said. * * * Q. How far were you from Mr. Nichols when he crossed 60th street? A. About the width of the pavement. Q. And about how far would that be? A. About twenty feet. Q. And tell the jury just what he did then as you saw it, describe his condition? * * * A. Well, he stopped and looked at me, and, as I said before, he was off and on the pavement as he walked down. Q. Did he go onto the north shoulder and then back onto the pavement? A. Yes, sir. Q. Well, describe to the jury just what you observed as to his condition. * * * A. I saw him staggering off and on the pavement. * * * Q. And describe to the jury what he was doing with reference to going down that highway up to the time you saw the bus pass

him? A. Well, as I said before, he was off and on the pavement, and was staggering, and just as the bus was coming up, he stopped in the north half of the pavement and was urinating, and as the bus passed him, well, that's the last I saw of him."

The witness testified that after Nichols was killed he went down there, and his legs and hips were on the pavement and his head and the top part of his body were over on the north shoulder.

An examination of the pleadings shows that the sixth paragraph of the amended answer reads as follows:

"Defendant further alleges that at the time of the collision between this defendant's truck and the deceased, the deceased was in an intoxicated condition, had been staggering around on the road in the presence of other vehicles, and that at the precise time of the collision between this defendant's truck and the decedent, the decedent was urinating on the pavement and was so intoxicated that he was staggering from place to place on the pavement, which circumstances made it impossible for this defendant's driver to have avoided a collision with the plaintiff's decedent.

"Defendant further alleges that the gross negligence of the plaintiff's decedent, as above set forth, was the sole and proximate cause of the injuries and death of plaintiff's decedent and that such gross negligence of plaintiff's decedent at said time and place is and was sufficient to bar any recovery herein to the plaintiff from this defendant."

Further, that instruction No. 1 tendered by the defendant and refused by the court reads as follows: "You are instructed that if you find from the evidence that the decedent George Nichols was under the influence of intoxicants or was intoxicated at the time of the collision and that said intoxication prevented him from exercising care for his own safety and protection and that he did not use ordinary care, then his failure to use such care contributed directly to his injury and your verdict will be for the defendant."

The plaintiff's amended reply is a general denial.

However, all question of the decedent's negligence was withdrawn from the jury, even though it was in the pleadings, and evidence relating to it covered many pages in the bill of exceptions. The trial judge, instead of beginning his instructions with a brief synopsis of the petition, amended answer and amended reply, to set out the claims made by each party as the reason why each should prevail, gave as instruction No. 1:

"In a case of this kind, when the defendant alleges that the plaintiff's decedent was guilty of contributory negligence, the burden is upon the defendant to establish such defense by a preponderance of the evidence.

"You are instructed, as a matter of law, that the defendant has failed to establish his defense of contributory negligence, and such defense is withdrawn from your consideration. You are further instructed that the defendant's own testimony in this case makes him liable as a matter of law, under the rules laid down in cases of this kind by the supreme court of the state of Nebraska. Therefore, you are instructed that the defendant is liable to the plaintiff in some amount, and you are hereby instructed to return a verdict in favor of the plaintiff and against the defendant in some amount. In determining the amount of the plaintiff's damages you will be guided by instructions 2 and 3 following."

The trial judge thereby decided that defendant was guilty of actionable negligence, and that plaintiff's decedent was not guilty of contributory negligence "as a matter of law or fact." This left as the only question submitted to the jury, how much in damages do you think the plaintiff is entitled to under the evidence?

It is contended by plaintiff that not one single witness said George Nichols was drunk. This may be true, but many testified to his uncertain course and his constant staggering.

Under the subject "Intoxication," as treated in Negligence in 38 Am. Jur. 883, sec. 203, it is said: "Voluntary intoxication does not relieve one from contributory negli-

gence, or serve to relax the requirement which is imposed upon a person to exercise due care for his own safety. * * * A person threatened with a peril caused by the negligence of another is bound to exercise his intelligence and activity in full measure to avoid injury therefrom, and if it appears that from voluntary drunkenness he has deprived himself of the capacity so to do and as a result has suffered an injury, he will be denied legal redress therefor on the ground of contributory negligence. Thus, where one, by reason of his own voluntary intoxication, exposes himself to danger, and receives injuries which he could, and by the exercise of ordinary prudence would, have avoided if sober, he is guilty of contributory negligence and cannot recover for such injuries. However, the plaintiff's voluntary intoxication is not negligence *per se,* and will not of itself prevent a recovery; hence, it is error to enter a nonsuit or give a binding instruction to find for the defendant for the reason merely that the plaintiff was intoxicated. Intoxication defeats a recovery by the plaintiff for negligence only in so far as it affects the care which he takes for his own safety. Thus, evidence of plaintiff's intoxication is admissible, not as establishing contributory negligence in itself unless it shows that the drunkenness was in such degree as to cause loss of control of the muscles and senses, but as a circumstance to be weighed by the jury in their determination of the issue whether or not the plaintiff exercised ordinary care for his own safety."

Let us examine a few statements from the courts of other states:

"Whether the plaintiff suddenly staggered out in front of the car, or was walking in front of the car, in the middle of the lane of traffic where he was struck, in such a condition as not to be able to realize the danger, he was guilty of contributory negligence." *Jackson v. Cook,* 176 So. (La. App.) 622.

"The fact that a person when injured was intoxicated is not in itself evidence of contributory negligence, but it is a circumstance to be considered in determining whether

his intoxication contributed to his injury. If it did, he cannot recover. If it did not, it will not excuse the defendant's negligence. Ordinarily, it is a matter to go to the jury." *Coakley v. Ajuria,* 209 Cal. 745, 290 Pac. 33.

"There can be no doubt of the rule that negligence may be inferred from circumstances, and while, as a matter of law, intoxication is not contributory negligence, or conclusive evidence of such negligence as will prevent a recovery, still such intoxication is evidence of negligence from which the jury are at liberty to infer such negligence as will bar the action, if the attendant facts so warrant." *Rhyner v. City of Menasha,* 107 Wis. 201, 83 N. W. 303.

"Pedestrian who, while intoxicated, on a dark, wet night, completely covered with dark clothing, entered arterial boulevard without looking other than to take one look before entering boulevard, held contributorily negligent, precluding recovery against motorist who struck him when he was about 20 feet from the curb." *Gibb v. Cleave,* 55 Pac. (2d) 938 (12 Cal. App. (2d) 468).

"A pedestrian who was walking on the highway in the country in the nighttime while under the influence of intoxicating liquor was required to exercise the same degree of care as that required of a sober person, as respects liability of motorist who struck and killed pedestrian." *Olstad v. Fahse,* 282 N. W. 694 (204 Minn. 118).

"Much of defendants' argument concerning plaintiff's case relates to the evidence of his intoxication at the time. The evidence about this was conflicting and its extent in affecting his conduct was for the jury to find." *Carr v. Orrill,* 86 N. H. 226, 166 Atl. 270.

In 10 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed. 1935) 366, sec. 6628, it is said: "The rule that the question of contributory negligence should be submitted to the jury where the evidence is conflicting has been applied in cases * * * where a person suddenly steps in front of a motor vehicle, or is injured at an intersection, or is struck while walking on public thoroughfare at night, or * * * where at the time he was struck the pedes-

trian was intoxicated, standing on the sidewalk or in the path of a truck."

In the 1941 pocket parts to this Blashfield Cyclopedia, referring to section 6628, it is said: "As previously mentioned in this section, the contributory negligence of an intoxicated person has been submitted to the jury, as has the question whether the pedestrian was in fact intoxicated or under the influence of liquor."

In the bill of exceptions we find a statement made to the jury by the court before argument, as follows: "The Court: Now, gentlemen, we have reached the conclusion of this case, and it is now up to the lawyers to argue it. Prior to this time a motion has been made by the plaintiff to withdraw from the jury consideration of all evidence except the amount of damages, for the reason that the testimony shows that the defendant, by his own testimony, was liable in this case, and that no evidence has been introduced to show that the plaintiff's decedent was guilty of any contributory negligence. Now this motion has been sustained by the Court, so the only question that will be submitted to this jury will be the amount of the damages, if any, of the plaintiff, that the plaintiff is entitled to recover. The argument will be limited to that phase of it, so I am just announcing that ruling, so that you will know why the evidence is not discussed except that phase, the amount of the plaintiff's damages, if any."

In our opinion, this ruling of the court and the written instructions to the same effect were erroneous. The evidence shows that the deceased had left his home in the afternoon and was expected to return for supper. When he did not, they sent to two taverns to find him. At 10 o'clock that night he was staggering along a road ouside the city limits, going farther away from home. Cars proceeding in orderly fashion along this road had to turn out to go around him, or slide their wheels to avoid hitting him. When a bus was approaching, he stopped near the middle of the road to respond to a call of nature, maneuvering unsteadily around while so occupied.

With this evidence, and much more to the same effect, the ruling of the district court that the deceased as a matter of law was not guilty of contributory negligence was clearly erroneous, and that issue should have been submitted to the jury under the usual instructions.

The former opinion of this court in this case, found in 140 Neb. 723, 1 N. W. (2d) 829, is hereby set aside in so far as it conflicts herewith.

In a personal injury action, where there is evidence tending to show contributory negligence on the part of plaintiff's decedent, that question should be submitted to the jury under the provisions of section 20-1151, Comp. St. 1929. See *Sgroi v. Yellow Cab & Baggage Co.*, 124 Neb. 525, 247 N. W. 355.

The judgment of the district court is hereby set aside and the cause remanded for a new trial in accordance herewith.

REVERSED.

EBERLY, J., dissenting.

I respectfully dissent from the conclusions stated in the opinion of the majority of this court, both as to law and fact.

The territorial legislature of 1855 passed an act entitled, "An Act to put into force in this territory the common law of England," which common law of England, under conditions stated therein, was then by that act expressly "adopted and declared to be law within said territory." 1 Complete Session Laws, 1855-1865, p. 144.

This language was reenacted and continued in force by the territorial legislature of 1866 as section 1, ch. VII of the Revised Statutes of 1866. In the General Statutes of 1873 it was continued without substantial change, there being substituted under legislative authority to conform to the fact of Nebraska's admission to the federal union the words, "Inconsistent with * * * the Constitution of this state, or with any law passed or to be passed by the legislature thereof," for the words, "Inconsistent * * * with the organic law of this territory, or with any law passed or to

be passed by the legislature of this territory." As thus changed this statute was reenacted as section 3697 of the Revised Statutes of Nebraska for 1913, and again as section 3085, Comp. St. 1922, and still again as section 49-101, Comp. St. 1929.

As to the effect of these various reenactments see *Pinn v. State,* 107 Neb. 417, 186 N. W. 544; *In re Estate of Berg,* 139 Neb. 99, 296 N. W. 460; *Munch v. Tusa,* 140 Neb. 457, 300 N. W. 385.

Valid statutes by use of appropriate language may enact or reenact definite laws, even though unwritten, by proper reference thereto, and such acts so framed shall have the same operation as if they had enacted all such laws in terms. *Tramp v. United States,* 86 Fed. (2d) 82; *State v. Moorhead,* 100 Neb. 298, 159 N. W. 412; *Sheridan County v. Hand,* 114 Neb. 813, 210 N. W. 273; *Richardson v. Kildow,* 116 Neb. 648, 218 N. W. 429; *In re Estate of Mathews,* 125 Neb. 737, 252 N. W. 210; *Kinkead v. Turgeon,* 74 Neb. 573, 580, 104 N. W. 1061, 109 N. W. 744; *Meng v. Coffee,* 67 Neb. 500, 93 N. W. 713; *Drummond Carriage Co. v. Mills,* 54 Neb. 417, 74 N. W. 966; *St. James Orphan Asylum v. Shelby,* 60 Neb. 796, 84 N. W. 273; *Brooks v. Kimball County,* 127 Neb. 645, 256 N. W. 501; *Roberts v. Rogers,* 129 Neb. 298, 261 N. W. 354; *Osterman v. Central Nebraska Public Power and Irrigation District,* 131 Neb. 356, 268 N. W. 334; *State v. Barney,* 133 Neb. 676, 276 N. W. 676; *Drainage District No. 1 v. Suburban Irrigation District,* 139 Neb. 460, 298 N. W. 131.

"Public statutes of a state are judicially recognized by all courts of that state." 31 C. J. S. 525, sec. 16.

This necessarily includes as being within the requirements of judicial notice the terms of the common law of England as thus enacted and reenacted, and particularly that part thereof pertaining to the law of highways and torts relating thereto so far as invoked by the facts in the instant case.

In this connection, the accepted rule appears to be that, "In ascertaining matters of fact or of law to be judicially

noticed, the judge may resort to, or obtain information from, any source of knowledge which he feels would be helpful." 31 C. J. S. 516, sec. 12.

It is quite obvious that the rule of our Civil Code relative to the proof of foreign laws, apparently twice adopted, that "the unwritten law of any other state or (foreign) government *may be proved* * * * by the books of reports of cases adjudged in their courts." (Italics supplied.) Sections 20-1293 and 20-1269, Comp. St. 1929, make books of English reports of cases adopted by the courts of England authoritative as a safe and proper source of judicial information as to the terms and interpretation of the English common law as lawfully adopted by our legislature and applicable in the instant case.

Our English common law was essentially composed of customs of the people, which, followed and observed from time immemorial, have by common consent crystallized into a rule of civil conduct. Thus, in Chaucer's (about 1340-1400) Canterbury Tales we have depicted a pilgrimage to the then ancient English Shrine by pilgrims representing the various social orders then existing. Some were equestrians. Some were pedestrians who carried staffs. All were pursuing their pilgrimage over a highway of immemorial antiquity which then and now continues to be properly described as a public road over which all persons have full right of way, walking, riding or driving. 13 Encyclopedia Brittanica (14th ed.) 792.

But, in addition, under the English common law it has long been determined that "A foot passenger is not bound to keep on the foot pavement; he has a right to walk in the carriage-way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it." Addison, Law of Torts (7th ed.) 631. See, also, Boss v. Litton, 5 C. & P. (Eng.) *407.

In 1842 the case of *Davies v. Mann,* 10 M. & W. (Eng.) 545, was decided. This interpretation of the English common law was made 13 years before our first legislative adoption of the common law of England, and was before

the legislators when that act was passed. The *Mann* case was determined under the practice that prevailed at common law, of which Morrissey, C. J., in *Morrison v. Scotts Bluff County,* 104 Neb. 254, 177 N. W. 158, says, in part: "At common law, contributory negligence on the part of plaintiff, no matter how slight, was an absolute bar to recovery." In this *Mann* case, the plaintiff having fettered the forefeet of a donkey belonging to him, turned it into a public highway where the donkey was grazing, when the defendant's wagon, with a team of three horses, coming at what the witnesses said was a smartish pace, ran against plaintiff's animal, knocked it down, and the wheels passing over the animal, it died soon after. A recovery by plaintiff was sustained, Parke B., stating: "Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there."

Even in our own jurisdiction, not only are the principles announced by the *Mann* case accorded full recognition, but the fact that they are applicable and controlling in cases similar to what is presented in the instant case must also be conceded.

Stating the substance of the opinion of a learned justice, we repeat the following: Many years ago the English cases summarized the law which rules this case as follows: If a man is lying drunk on the road another is not negligently to drive over him. If that happened the drunkenness would have made a man liable to injury but would not have occasioned the injury. Recoveries by such injured were therefore sustained at common law. These cases thus referred to are but proper applications of the principles laid down in the maxim, *causa proxima non remota spectatur.* This imposes on plaintiff the requirement that he must prove that the defendant's negligence was the proximate and not the remote cause of the damage. Clearly a defendant is not liable, if, although he was negligent, it was

the negligence of the plaintiff and not his own that caused the accident. All of the foregoing principles clearly constituted a part of the common law of England as it was adopted by the legislature of 1855, and, by virtue of that, reenactment by reference should be deemed in effect a statutory declaration of our own legislature and binding upon us as such a statute. Of course, the acceptance of this proposition in effect is a denial of defendant's claim of contributory negligence. However, the weight of authority generally sustains the foregoing principles and their binding force, irrespective of whether they are derived from the common law of England by formal legislation adopted, or due solely to judicial recognition of the same. The general rule is properly expressed in the following quotation: "On the other hand, conditions (remote causes) must not be confounded with proximate causes. The mere fact that a person or his property is in an improper position, when, if he had not been there, no damage would have been done to him, does not preclude him from recovering. Such circumstance is only a condition to the happening of the damage, not a cause of it. * * * The fact that the person or property was in the particular situation is not in contemplation of law a cause of the damage. A man may in the daytime fall asleep in the country highway, or leave his goods there, and recover for injury by another's driving carelessly over him or them; since, though the position occupied is a condition to the damage, the damage is not the natural result of the act." Bigelow, Elements of the Law of Torts (5th ed.) 340.

"In determining liability for a tortious injury, the law looks only to the act or omission from which the result follows in direct sequence without the intervention of a voluntary independent cause and declines to permit further investigation into the chain of events, and unless the act complained of is the proximate cause of the injury, there is no legal liability." 62 C. J. 1115.

One fundamental error of the majority opinion is its failure to distinguish "proximate cause" from "occasion" or "condition" created.

Even if we wrongfully assume that the lawful exercise of the right by Nichols to travel longitudinally over the highway on foot as disclosed in the instant case amounted to negligence, still this evidence would not sustain the majority opinion; for we are clearly committed to the rule: "Two acts (of negligence) of independent source are not concurrent in causing an injury, if one of them merely furnishes a condition by which such injury is made possible, and later such injury occurs through the efficient, self-acting and independent operation of the other." *Johnson v. Mallory,* 123 Neb. 706, 243 N. W. 872. See, also, *Bergendahl v. Rabeler,* 131 Neb. 538, 268 N. W. 459; *Wentink v. Traphagen,* 138 Neb. 41, 291 N. W. 884.

The evidence adduced on the trial of this case is set out at length in the original opinions filed in this case and reported in 140 Neb. 723, 1 N. W. (2d) 829, and also, in part, in the present majority opinion, and will not be repeated in this dissent.

"Q street" highway, so far as involved in this suit, is comparatively a straight road bordering the city of Omaha, extending from east to west. The traveled portion is paved with brick, and constructed with an 8-inch shoulder of cement on either side thereof; these together make up a roadway 18 feet in width. On this highway between its intersection with "60th" street and its intersection with "61st" street, and situated on the north side thereof, are seven buildings, four of which appear to be dwellings, and all of which face "Q street" and are approximately from 24 to 63 feet distant therefrom. No permanent sidewalks are constructed in front of these houses, and the only accommodation for foot passengers along this street is the grade upon which the paved highway rests, and along which a dirt shoulder parallels the paved portion of the traveled highway. South of this road at this point are no buildings, but the country is an open field devoted to agriculture. The road bed is substantially level, with a slope to the west, not excessive but gradual. On the night of the accident no permanent natural objects obscured the view of the traveler passing over it to the westward.

On the night of April 17, 1940, at about 10 o'clock p. m., defendant Havlat was proceeding westward over this highway, engaged in transporting 375 bushels of corn in his 1939 Chevrolet truck, with an Omaha Standard trailer attached thereto, to the town of Dorchester, Nebraska. There is no evidence that the defendant, or his driver in actual charge of the conveyance, were familiar with the highway over which they were passing, or had ever passed that way before. The undisputed evidence is that, as these parties approached and passed over the Sixtieth street intersection with the street over which they were proceeding, the defendant, Lumir Havlat was asleep in the driver's cab of the truck, and his employee, Lumir Belohlavy, was at the wheel and in full charge of the operation of the truck. It appears that Havlat never awoke until the accident was entirely over. Belohlavy, defendant's alter ego, testified, in effect, that the truck and trailer combined, under his control, from the Sixtieth street intersection to the point of collision of the truck with the deceased, was proceeding at the rate of from 25 to 30 miles an hour; that as he passed over the Sixtieth street intersection he was totally blinded by the dazzling headlights of an approaching automobile, which condition of total blindness continued uninterruptedly until that approaching car was passed, a distance of 450 feet from the intersection where his blindness commenced. During that time he could see nothing. As the dazzling lights of the approaching car passed the truck and as he passed beyond the area of the dazzling light, in the middle of the north traffic lane of this highway two feet immediately in front of his truck was a living form, Mr. Nichols, who was thus discovered by Belohlavy for the first time, and in less than the twinkling of an eye was then run down and killed. The testimony of the driver of the truck is that, as soon as Mr. Nichols was seen, the brakes of the truck were "slammed on" and the truck swerved sharply to the left. Thereby the course of the truck was diverted from the north traffic lane into the south lane and from there onto the adjoining dirt shoulder of the high-

way, and though the brakes thereof were kept constantly applied, the truck was finally stopped by being overturned in what appears to be in the nature of a road ditch or a borrow pit south of the paved roadway. In its passage over the pavement, after the brakes were applied, skid marks were left by the truck tires. The north skid mark extended along the paved surface of this highway for a distance of 119 feet to the place where it left the pavement. The actual measurements made and testified to indicate that the truck and trailer continued from that point 250 feet to the place it was overturned. There is no dispute in the evidence that this upset occurred west of a manhole situated south of the roadway.

From the time the truck crossed the Sixtieth street intersection until after the deceased was collided with, the driver of the truck neither decreased the speed nor sounded an alarm, but the conveyance proceeded down grade at the rate of 25 to 30 miles an hour.

The following is the uncontradicted testimony of a witness duly qualified as an expert on the subject to which his testimony relates:

"Q. Do you mean, Sergeant, that if the average, ordinary individual was confronted with a sudden emergency, like the looming up of an object before him, that it would be three-quarters of a second before the mind could telegraph it to the feet, and the feet to put on and apply the brakes? A. That's right. Q. How far would a car travel in feet going twenty-five miles an hour, in three-quarters of a second? * * * A. Approximately twenty-eight feet. Q. How far would a car travel in feet before the average person could complete the reaction period, going at thirty miles an hour? * * * A. Thirty-one and a half feet."

It is obvious that these distances are to be considered in determining the distances in which defendant's driver could bring his truck to a full stop.

Belohlavy, defendant's driver, and alter ego, further testifies in substance, that the headlights of the truck were defective in that the range of their beams was limited from

100 to 125 feet. The statutory requirement then in force was that motor vehicles were required to be equipped with headlights which "under normal atmospheric conditions and on a level road produce a driving light sufficient to render clearly discernible a person two hundred feet ahead." Comp. St. Supp. 1939, sec. 39-1176. It thus appears that the area lighted by these defective headlights did not exceed 125 feet. The driver was driving this truck at such a rate of speed at the time of the accident that the distance of more than twice the range of his defective headlights was required in which to bring this vehicle to a complete stop.

We are committed to the view that a motorist who drives his automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within an area lighted by his headlights is negligent as a matter of law. *Redwelski v. Omaha & C. B. Street R. Co.*, 137 Neb. 681, 290 N. W. 904; *Roth v. Blomquist*, 117 Neb. 444, 220 N. W. 572; *Cotten v. Stolley*, 124 Neb. 855, 248 N. W. 384; *Most v. Cedar County*, 126 Neb. 54, 252 N. W. 465; *Hendren v. Hill*, 131 Neb. 163, 267 N. W. 340; *Fischer v. Megan*, 138 Neb. 420, 293 N. W. 287.

In this case, even the fact, if we assume *arguendo*, that plaintiff's intestate was negligent in passing along this highway in the manner disclosed by the record immediately prior to his death, still the utter gross negligence of defendant's driver in his management of defendant's truck in conducting it when its condition rendered it wholly incapable of being stopped within the range of its headlights for more than 450 feet over a city street while the driver was in a blinded condition and incapable of discerning persons and things upon the traveled portion thereof clearly brings this controversy within the rule announced by this court in *Carnes v. DeKlotz*, 137 Neb. 787, 291 N. W. 480, as follows:

"Although a person may have negligently exposed himself or his property to an injury, nevertheless, if the defendant, after discovering his exposed situation, negligent-

ly injures him *or is guilty of negligence in not discovering his dangerous position in time to avoid the injury,* and injury results because thereof, he may still recover." (Italics supplied.) See, also, *Wilfong v. Omaha & C. B. Street R. Co.,* 129 Neb. 600, 262 N. W. 537; *Omaha Street R. Co. v. Martin,* 48 Neb. 65, 66 N. W. 1007.

But the assumption of the plaintiff's negligence, just indulged *arguendo,* is wholly without warrant in the record, in view of the issues made and presented by the pleadings on which the case was tried and determined.

The defendant's charge of contributory negligence is limited to the sixth paragraph of his answer, where, after charging deceased was intoxicated, he further says, "that *at the precise time of the collision between this defendant's truck and the decedent,* the decedent was urinating on the pavement and was so intoxicated that he was staggering from place to place on the pavement, which circumstances made it impossible for this defendant's driver to have avoided a collision with plaintiff's decedent." (Italics supplied.)

The word "precise," as here employed by the pleader, is thus defined by Webster's New International Dictionary (2d ed.): "a. Having determinate limitations; exactly or sharply defined or stated; definite; exact;" etc.

To the allegations of this paragraph of the answer the plaintiff filed his reply expressly denying the same.

It cannot be gainsaid that the question of contributory negligence must be determined on the basis of the issues thereon as made by the pleadings of the parties. The doctrine adhered to in this court is, without question, that, "Contributory negligence is an affirmative defense, and cannot be proved unless alleged in the pleadings." *Reed v. Chicago, B. & Q. R. Co.,* 98 Neb. 19, 151 N. W. 936. See, also, *Mercer v. Omaha & C. B. Street R. Co.,* 108 Neb. 532, 188 N. W. 296.

We have also announced as a rule of procedure:

"Plaintiff, in an action based on specific acts of negligence resulting in personal injuries, is not entitled as a

matter of right to prove entirely different acts of negligence during the trial without amending his petition or giving defendant an opportunity to plead or prepare a new defense." *Scharf v. Frontier County,* 113 Neb. 688, 204 N. W. 516.

As a corollary to the foregoing proposition, it naturally follows that, "Where defendant sets forth facts claimed to show contributory negligence on the part of plaintiff, his proof is confined to the particular facts alleged." 20 Standard Ency. of Procedure, 322.

We have likewise announced the rule that, "Contributory negligence as a defense must be proximate to plaintiff's injury in the same sense in which defendant's negligence must have been proximate to the injury giving rise to the cause of action." *McCulley v. Anderson,* 119 Neb. 105, 227 N. W. 321.

To prove the charges of intoxication, defendant produced the driver of the Ralston bus, who, at 9:45 p. m. on the night of the accident, was proceeding over the Ralston-Omaha road traveling eastward. His final evidence was that, when he first saw Nichols, the deceased, he was standing on the north half of the road urinating; that he was standing at a "staggering standstill, sort of maneuvering around the middle of the road" while he was urinating. This place where Nichols was urinating was about 125 feet from the Sixtieth street intersection; and further witness states that he never saw Nichols alive after he passed him in the Ralston bus, and that Nichols was still urinating at that time, facing southeastward.

Another of defendant's witnesses, standing at the southwest corner of Sixtieth and Q streets, first discovered the deceased approaching over Q street about a block east of witness' then position, coming from the east, and staggering off and on the pavement. These movements caused certain cars coming from the east to slow up, and caused one car to stop. Nichols spoke to the people in the car that stopped, but what was said by him is not known by this witness. As Nichols was crossing the Sixtieth street inter-

section he looked to this witness. This witness further testified: "Well, as I said before, he was off and on the pavement, and was staggering, and just as the bus was coming up, he stopped in the north half of the pavement and was urinating, and as the bus passed him, well, that's the last I saw of him."

Nichols is dead. He cannot explain or extenuate. He is charged by the defendant with being intoxicated. It was sought to be shown by establishing a visit by him to taverns (poor men's clubs) during the day of his death. The attempt was a failure. No witness testified to having seen Nichols take a drink of intoxicating liquor or enter or leave a place where intoxicating liquors were sold, nor was any liquor found upon his person after his death, or in his possession during the day the accident occurred. No evidence appears in the record as to detecting the odor of intoxicants on his breath or person while living, or on his corpse after his violent death. There was an entire absence of evidence tending to establish "thickness of tongue," incoherency of speech, or the maudlin voice which may accompany the intoxicated. No autopsy was performed after the death.

The writer of the majority opinion assumes that a man who staggers is a "drunk." Yet, on the argument of this case, our attention was called to medical authority which establishes that these symptoms established by the evidence in the record were incident to no less than 60 diseases, in addition to intoxication. Further, this learned author of the majority opinion, in his many years of active life, must have observed that men of the years of the deceased (sixty-three) not infrequently develop a natural weakness of the urinary tract which necessitates frequent and sometimes uncontrollable urination; and that when that function, due to surrounding circumstances, is repressed, it results in nervousness, shifting on the feet, and even contortions, the outward manifestations thereof being not dissimilar to what is depicted in the record before us.

But there is no allegation in defendant's answer or evi-

dence in the record that plaintiff's decedent staggered in the slightest degree after the act of urination, testified to by the defendant's witnesses, was completed. There is no evidence that defendant's truck collided with him during the continuance thereof. The precise allegations of defendant's answer, limited as they are, are in all respects substantially disproved. He may not successfully defend on claimed contributory negligence which is not pleaded in his answer and substantially established by his evidence. Facts in the record indisputably establish that on completion of the act of urination Nichols proceeded west on the north half of the highway more than a block (300 feet) when he was overtaken by the defendant's truck from the rear, run down and killed, while the defendant's driver was in an area of dazzling light, blinded by an approaching car's headlights, but running without diminished speed at from 25 to 30 miles an hour. This was clearly gross negligence as a matter of law.

Under these circumstances, Nichols, as a pedestrian, had an equal right to use the highway with all who passed over it whether traveling vehicular or otherwise. He had a right "to rely upon an assumption that drivers of automobiles will not violate the law of the road, or statutes regulating the operation of automobiles, and will observe the ordinary care required of them." 3 Cooley, Torts (4th ed.) 538. See, also, *Cotten v. Stolley,* 124 Neb. 855, 248 N. W. 384. Properly on the highway, Nichols had a right to assume that he would not be run into from behind, and was not obliged to leave the highway. *Tri-State Refining Co. v. Skaggs,* 223 Ky. 731, 4 S. W. (2d) 739. A pedestrian is not required, as a matter of law, to look back for approaching vehicles, and is not guilty of contributory negligence on failing so to do. 29 C. J. 658; *Raymond v. Hill,* 168 Cal. 473, 143 Pac. 743; *Undhejem v. Hastings,* 38 Minn. 485, 38 N. W. 488; *Wiel v. Wright,* 55 Hun, 611, 8 N. Y. Supp. 776; *Petrie v. E. A. Myers Co.,* 269 Pa. St. 134, 112 Atl. 240; *People v. Blandford,* 23 Porto Rico, 580; *Cotten v. Stolley, supra; Brenning v. Remington,* 136 Neb. 883, 287 N. W. 776.

It follows that every allegation of the defendant's answer relative to contributory negligence was disproved, and wholly unsupported by the evidence. Defendant was limited as to defense to the contributory negligence alleged by him. No disputed issue of fact was for the jury; the controlling facts were undisputed and afforded no basis for conflicting inference. As in *Cotten v. Stolley, supra,* the district court in the instant case rightfully withdrew the defense of contributory negligence from the consideration of the jury. Its action should be affirmed.

I am authorized to state that Rose and Messmore, JJ., join in this dissent.

IN RE ESTATE OF OSCAR SAMSON.
EMMA B. SAMSON, APPELLEE, V. A. L. NEUMANN, EXECUTOR, ET AL., APPELLANTS.
7 N. W. (2d) 60

FILED DECEMBER 18, 1942. No. 31536.

1. **Executors and Administrators.** In determining whether the right to a widow's allowance under section 30-103, Comp. St. 1929, survives her death, the common-law rule was that it did not. This right is a purely personal one, which she alone can enjoy. When she dies her right to support ends.
2. **Revivor.** A cause of action created by statute does not survive unless declared so to do by the statute itself or by provisions for its survival made by some other statute.
3. ———. "It is fundamental that when a party to a pending suit dies and the cause of action in such suit is one that dies with the person, the suit abates and cannot be revived. The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death unless the cause of action on account of which the suit was brought is one that survives by law." 1 Am. Jur. 105, sec. 159.

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

John L. Barber, Jr., and *Chatt & Ellenberger,* for appellants.

Carroll O. Stauffer and *McKenzie & Dugan, contra.*

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

PAINE, J.

A claim for a widow's allowance was denied by the probate court. Widow appealed to district court and died while appeal was pending there. The executor of her estate had the district court enter a conditional order of revivor, to which a plea in abatement was filed objecting to such order. The district court overruled the plea in abatement and revived the cause of action in the name of Carroll O. Stauffer, executor of the estate of Emma B. Samson, deceased, from which order the executor and heirs of the husband's estate appeal.

An examination of the transcript discloses the following pleadings, which may be epitomized briefly before a discussion of the legal points involved.

On October 11, 1940, Mrs. Emma B. Samson filed a petition in the county court of Burt county for a widow's allowance of $125 a month for her support and maintenance pending the administration of the estate of her husband, Oscar Samson, deceased, alleging that she is 73 years of age, an invalid, unable to care for and support herself, and is obliged to employ help to assist her in her housework and also personal care for herself; that the value of said estate is between $175,000 and $200,000, and the debts of the estate will not exceed $1,000.

On October 28, 1940, A. L. Neumann, executor of the estate of Oscar Samson, deceased, filed in the county court objection to widow's allowance, for the reason that she owns Nebraska real estate and has an income therefrom, as well as title to sufficient personal property, for her maintenance during the probating of the estate; that on August 12, 1927, Oscar Samson and Emma B. Samson entered into a postnuptial agreement, whereby she released and quitclaimed to the heirs of Oscar Samson all her right, title, interest, dower, claim or demand in or to the property of Os-

car Samson, and is therefore barred from any widow's statutory allowance during the probate of the estate. Attached to said objection as exhibit A was the postnuptial agreement, in which each party waived all right, title and interest in the real or personal property of the other, the agreement reciting that Oscar Samson had bequeathed and devised to his wife the sum of $32,500 and certain real estate in the city of Oakland in his last will and testament.

On February 20, 1941, Emma B. Samson filed a second petition for widow's allowance, asking for the sum of $600 a month for her support and maintenance pending the administration of the estate.

On May 7, 1941, A. L. Neumann, executor, filed amended objections to application for widow's allowance, alleging that the deceased and the petitioner were married in 1911, the marriage being the third for the deceased and the second for petitioner, and both parties had children by their former marriages; that Oscar Samson died August 27, 1940, at the age of 91 years; that on August 12, 1927, the parties entered into a postnuptial agreement, to which petitioner never made any objection or complaint during the lifetime of the deceased, and she is now estopped to question or attack said agreement, and is barred by reason of laches and delay from attacking the nuptial agreement.

On May 7, 1941, reply was filed in the county court to the answers and amended objections of the executor, admitting that Samson induced his wife to sign the postnuptial agreement under the representations that he owned property not worth over $140,000, that the provision he was making for claimant was of greater value than one-fourth of his entire estate, that he was making such provision for claimant to facilitate the settlement of his estate in the event of his death before that of claimant, and for the purpose of assuring her that she would receive a just share of his estate; that she later learned that said representations were untrue and were made for the purpose of cheating and defrauding her, and that he was worth the sum of $300,000, and that the agreement was not drawn

for the purpose of facilitating the settlement of his estate, but for the purpose of leaving to his children a large part of his estate which in justice and right belonged to claimant as his wife.

Arguments were made to the acting county judge, and on May 7, 1941, it was ordered that the application for widow's allowance be denied and disallowed. The widow appealed to the district court. On August 3, 1941, the widow died, and her executor was substituted as claimant and permitted to proceed with the claim as ordered by the district court.

On November 21, 1941, A. L. Neumann, executor of the estate of Oscar Samson, deceased, filed plea in abatement, alleging that the claimed right to a widow's allowance had fully and completely abated and become extinguished by reason of the death of said Emma B. Samson, and objecting to any order or revivor and to the further continuance of this case in any respect whatsoever, and praying that the application for revivor be denied.

After a hearing on said matter on January 10, 1942, the plea in abatement was overruled, and the cause of action was revived in the name of the executor of the widow's estate. Motion for a new trial being overruled, A. L. Neumann, executor of the estate of Oscar Samson, and five heirs appealed.

The decision of the trial court appears to be based upon our statute, section 20-1402, Comp. St. 1929, reading: "No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery for a nuisance, or against a justice of the peace for misconduct in office; which shall abate by the death of the defendant."

It is argued that, an action for a widow's allowance not being named therein, therefore it does not abate, and we are cited to the case of *Cleland v. Anderson*, 66 Neb. 252, 92 N. W. 306, 5 L. R. A. n. s. 136, which was an action to recover damages because of an unlawful conspiracy of the

defendants whereby the plaintiff had been driven out of the lumber business and forced into bankruptcy, and in discussing the force and effect of said section 20-1402, Comp. St. 1929, Commissioner Pound said:

"As the statute is construed by the court, no action will abate by reason of the death of the plaintiff, whatever the nature of the cause of action upon which it is based, except such as are expressly named. Under that section, therefore, whatever might have been the rule had not an action been pending, it must be held that the interest of the bankrupt in the action brought by him against Iddings, Birge and Field would have passed to his personal representative upon his death, and in consequence was assignable."

In several states, decisions are found supporting the trial court in the case at bar.

"Under statute giving widow $500 from estate of husband in preference to all unsecured claims and without regard to widow's other rights under will or intestacy laws, right to payment vests in widow on death of husband, and survives to widow's administrator, where widow dies before payment is made (Act Gen. Assem. April 6, 1933, 38 Del. Laws, c. 185)." *In re Hearn's Estate* (1937) 22 Del. Ch. 447, 195 Atl. 367.

The Missouri courts have held in several cases that, where a widow died pending appeal to the circuit court without having received allowance which was made to her by the probate court, the action may be revived in the name of her administrator. It is said that many opinions are found adverse to this, but that, as the Missouri court has held this way on several occasions, such opinions from other courts are not binding upon them. *Williams v. Schneider*, 1 S. W. (2d) (Mo. App.) 230.

This case has involved considerable research to ascertain what course should be adopted hereafter in Nebraska. In the first place, all statutes *in pari materia* should be studied together and, in addition to section 20-1402, heretofore set out, section 20-1405, Comp. St. 1929, reads:

"Where one of the parties to an action dies, or his powers as a personal representative cease, before the judgment, if the right of action survive in favor of or against his representatives or successor, the action may be revived, and proceed in their names." And section 20-1410, Comp. St. 1929, reads: "Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names."

Section 20-322, Comp. St. 1929, states: "An action does not abate by the death, or other disability of a party, or by the transfer of any interest therein during its pendency, *if the cause of action survive or continue.*"

These sections require an investigation as to when causes of action survive, and there is a distinction between the use of the word "abatement" in common law, where it means an entire overthrow or destruction of a suit, and in equity courts, where abatement may indicate rather a temporary suspension of further proceedings in the suit because of want of proper parties.

"The question for determination is whether this action survives the death of the plaintiff. The well known common-law rule, *actio personalis moritur cum persona,* is invoked by the respondents, which presents two questions for our determination: First, was the claim asserted by plaintiff personal in its nature; and, second, if it was personal did it survive the death of the plaintiff?

"As to the first question, we are clearly of the opinion that the right to support was purely personal. From the very nature of the right it could be nothing more. It was a right which she alone could enjoy. Its duration depended upon her survival. There can be no support for a nonexisting person. This brings us to the question: Did the right of action survive, pursuant to section 8561, N. C. L., which provides: 'An action shall not abate by the death

* * * of a party * * * if the cause of action survive or continue * * * '?" *Foy v. Smith's Estate,* 58 Nev. 371, 81 Pac. (2d) 1065. In this action to set aside a divorce, the plaintiff appealed from an adverse decision and died pending appeal, and the court held: "All that she was entitled to * * * was support. She got that during her life. When she died, her claim upon the defendant and his estate died also."

A case exactly in point came before the North Carolina court nearly a century ago, and has been followed in many other states. In that case it is said: "After the interlocutory order had been made on her petition, appointing commissioners to allot to her a year's allowance, she died before the allotment was made by them. We think that her administrator had no right to revive and prosecute the said petition. The Legislature certainly did not intend that the year's allowance out of the stock, crop, and provisions of the intestate's husband should be assets for any purpose, in the hands of *her* administrator. * * * But, it seems to us, that, if she be dead, before the commissioners make the allotment, the necessity for it would of course cease, as her house and her table only, whilst she was alive, were intended by the Legislature to be supported for one year, out of the assets of her husband. She, alone, can sue for the allotment. The children are not authorized to sue for any allotment. They were not intended to participate in the allotment in any other way, than as members of the widow's family while she was alive. The children, therefore, must stand upon the same footing as the infant children of an intestate father, who leaves no widow; in which case the children certainly have no year's allowance. It seems to us that the petition and proceedings under it were abated by the death of the widow before a final judgment was rendered." *Cox v. Brown,* 5 Ired. Law (N. Car.) 194.

This case of 1844 was followed in 1869 in a decision holding: "When a widow files a petition for a year's provisions, under the statute, and dies before any allotment is made, the administrator has no right to revive the petition, but it is abated." *Ex parte Dunn,* 63 N. Car. 137.

In a later case it was said: "So if the widow dies before the allotment is made, her right ceases, and neither her administrator nor her children succeed to it. * * * Nor if she die after allotment and before confirmation, does the right survive." *Simpson v. Cureton,* 97 N. Car. 112, 2 S. E. 668.

The New Jersey court said: "In the present case, before the decedent's will was proved and before an inventory, appraisement and selection could be made, the widow, who constituted the family, died. I do not think the right she took at the death of her husband survived to her representatives." *Carey v. Monroe,* 54 N. J. Eq. 632, 35 Atl. 456.

In an election case in Illinois, the court said: "It has frequently been held in this state and elsewhere that a cause of action created by statute does not survive unless declared so to do by the statute itself or by provisions for its survival made by some other statute. * * * Statutes in derogation of the common law are to be construed strictly. The so-called abatement statute, which may be more properly denominated a survival statute, abolishes the common-law rule of abatement in those proceedings included within its scope. The act is therefore a change or limitation of the common-law rule and provides for survival of actions of the character and under the circumstances therein described. It is not contended that the primary act or any other statute of the state provides for survival of a contest proceeding." *People v. Taylor,* 342 Ill. 88, 174 N. E. 59.

"But in some states it is held that, if the widow die before it is allotted to her, her right thereto abates, and it cannot be claimed by her administrator. 'This allowance for necessaries,' say the commissioners revising the statutes of Massachusetts, 'is not intended to compensate the widow for any apparent injustice to which she may, in any case, be exposed by the statute rules of distribution, or by the will of her husband; but merely to furnish her with a reasonable maintenance for a few weeks, and with some articles of necessary furniture, when she is not otherwise provided with them.' It was held, in accordance with this view, that the death of the widow pending an appeal by the

executors from an allowance made to her by the court of probate put an end to her claim." Woerner, American Law of Administration (3d ed.) 259, sec. 86.

"In California it is held that allowance to the widow terminates *ipso facto* if she remarries, the theory being that she is entitled to allowance only as a member of the family of the deceased. It seems, however, that the court may continue the allowance of the children notwithstanding remarriage of their mother. Death of the widow, it seems, also terminates any right to subsequent allowance, but the right to moneys accrued and unpaid or on hand passes to her heirs or representatives." 2 Bancroft, Probate Practice, 1311, sec. 731. See, also, *Estate of Treat,* 162 Cal. 250, 121 Pac. 1003; *Estate of Hamilton,* 66 Cal. 576, 6 Pac. 493; *In re Still,* 117 Cal. 509, 49 Pac. 463; *In re Lux,* 114 Cal. 73, 45 Pac. 1023.

In *Adams v. Adams,* 10 Met. (Mass.) 170, at the 1845 term, the learned Chief Justice Shaw, who delivered the opinion of the court, says: "On the whole, though there may have been some fluctuating views on the subject, we are of opinion, that this provision is intended for the present relief of the widow, for the maintenance of herself and children; that it is temporary in its nature and personal in its character, and confers no absolute or contingent right of property, which can survive her, or go to her personal representative. Upon no other ground could this provision be rescued from the imputation of injustice; as it would in many cases operate to take property, even from creditors already suffering from the insolvency of their debtor—a class always most highly favored." This is approved in *Kingman v. Kingman,* 31 N. H. 182.

The case of *Drew v. Gordon,* 13 Allen (Mass.) 120, followed the case of *Adams v. Adams, supra,* holding that the widow having failed to select, from her deceased husband's personal estate, the allowance up to $200 made her by the probate court, the same could not be claimed by her personal representative after her death. The statute involved in these cases contained this provision: "Such parts of the

personal estate of a person deceased as the probate court, having regard to all the circumstances of the case, may allow as necessaries to his widow, for herself and family under her care." Gen. St. Mass. 1860, ch. 96, sec. 5.

In Cleveland a policeman brought action to set aside his resignation, obtained by threats, and then died. The widow asked that the action be revived. It was held that the action did not survive his death, and many pertinent questions are examined, and the section of the Ohio statute is set out and discussed. *State v. City of Cleveland,* 133 Ohio St. 423, 14 N. E. (2d) 351.

Other decisions which shed light upon the propositions involved, but cannot be discussed because of the length of this opinion, are: *State v. City of Shawnee,* 167 Okla. 582, 31 Pac. (2d) 552, 92 A. L. R. 948, with annotations; *Tarbox v. Fisher,* 50 Me. 236, holding that the widow's death abates her allowance if no final decree had been entered; *Spring v. Webb,* 227 Fed. 481; *Havill v. Havill,* 332 Ill. 11, 163 N. E. 428; *Succession of Tugwell,* 43 La. Ann. 879, 9 So. 499.

In Nebraska we have *Smith v. Estate of Bayer,* in which case two opinions, upon different phases of the litigation, were released on the same day, one written by Reese, C. J., the other by Barnes, J., and found in 95 Neb. 488, 145 N. W. 1030, and 95 Neb. 532, 145 N. W. 1029, which opinions have been rarely, if ever, cited. In Judge Barnes' opinion we find that a widow waited a year before making application for an allowance, and died while an appeal was pending from its disallowance by the county court. It is said that, as she waited about a year after the death of her husband, her application was denied by the probate court, and she died before she took any steps to appeal from such order, so that her administrator succeeded to no right that he could enforce.

Appellee insists that this case lends no aid to the solution of the question before the court in the instant case, for sufficient facts were not disclosed. However, by gleaning the facts as set out in both of the opinions, we believe the case is in point.

"It is fundamental that when a party to a pending suit dies and the cause of action in such suit is one that dies with the person, the suit abates and cannot be revived. The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death unless the cause of action on account of which the suit was brought is one that survives by law." 1 Am. Jur. 105, sec. 159.

The statutes provide for an allowance to a widow, but under the common law this right did not survive, and no provision is found in any statute in Nebraska authorizing any such allowance to her heirs or executor upon her death. The law does not provide for her heirs or representative as against the estate of her husband after her death.

The conclusion is inevitable that the cause of action did not survive her death, and hence there is nothing to revive, and section 20-1402, Comp. St. 1929, has no application. The judgment of the trial court is reversed and the action dismissed.

REVERSED AND DISMISSED.

EVELYN CHARLOTTE YOUNG, APPELLANT, V. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, APPELLEE.
7 N. W. (2d) 81

FILED DECEMBER 18, 1942. No. 31439.

1. Insurance. Where a fraternal beneficiary society issues a beneficiary certificate to one of its members, the constitution and by-laws of such society constitute a part of the insurance contract.
2. ———. Where the parties to a beneficiary certificate are in different states when the contract is made, the place where the last act is performed which is necessary to the validity of the contract is the place where the contract is entered into.
3. ———. When a beneficiary certificate provides that it is in force at 12 o'clock noon on the day it is dated and signed at the home office, the law of the state in which the home office is located becomes a part of the contract, such state being the place where the last act necessary to the validity of the contract is performed.

4. ———. Where a provision of the contract of insurance, valid in the foreign state where the contract was entered into, is a bar to a recovery, such provision is required to be enforced in this state under the full faith and credit clause of the Constitution of the United States, although such provision is void under the law of this state.

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

Butler, James & Morrison and *H. G. Wellensiek,* for appellant.

Cordeal, Colfer & Russell and *E. W. Dillon, contra.*

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

CARTER, J.

This is an action upon an accident insurance certificate insuring the life of plaintiff's husband against accidental death. A jury was waived and the case was tried to the court. The trial court found generally for the defendant and dismissed the action. The plaintiff appeals.

The defendant was a fraternal beneficiary society incorporated under the fraternal beneficiary society laws of the state of Ohio and licensed to issue policies of accident insurance in this state. On August 20, 1938, Leonard Taylor applied for membership and insurance in the defendant order and paid the initial membership and initiation fee requested of him by the secretary of the local council at McCook, Nebraska. On August 30, 1938, the application was accepted by the defendant at its home office in Columbus, Ohio, and the insurance certificate in question was issued and subsequently delivered to Leonard Taylor at McCook, Nebraska.

It appears from the record that on the night of December 31, 1938, the insured was struck in the face by one Frank White and knocked to the ground, causing open wounds to the head and face. That, as the result of a tetanus infection thereby acquired, Leonard Taylor died on January 7, 1939. Proofs of death were furnished the de-

fendant at its home office on January 26, 1939. On February 27, 1939, the defendant denied liability on two grounds; first, that the death of Leonard Taylor was not the result of accidental means independent of all other causes, and, second, that Leonard Taylor was not a member in good standing at the time of the accident. This action was commenced to recover on said certificate on April 28, 1941.

Where a fraternal beneficiary society issues a beneficiary certificate to one of its members, the constitution and by-laws of such society constitute a part of the insurance contract. *Van Dahl v. Sovereign Camp, W. O. W.*, 130 Neb. 181, 264 N. W. 454.

The constitution and by-laws of the defendant fraternal beneficiary society, in effect on August 30, 1938, and in effect at the date of the alleged accident, provided: "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee." It is admitted that the action was not commenced within six months after February 27, 1939, the date the claim was disallowed by the Supreme Executive Council.

It is not disputed that the quoted provision limiting the time in which suit to recover benefits may be commenced to a period of six months is valid and binding in the state of Ohio. See *Bartley v. National Business Men's Ass'n*, 109 Ohio St. 585, 143 N. E. 386; *Appel v. Cooper Ins. Co.*, 76 Ohio St. 52, 80 N. E. 955; *Oster v. Columbian Nat. Fire Ins. Co.*, 7 Ohio Law Abstract, 570. If the insurance certificate is an Ohio contract, the pleaded provision of defendant's constitution and by-laws, limiting the time for the commencement of action to a period of six months, is a complete bar to recovery.

Plaintiff urges that the insurance certificate is a Nebraska contract and that the six months' limitation for filing suit is void and of no effect in this state. It is not disputed that such a provision is considered to be against public policy in this state and that the pleaded provision is in-

effective if the insurance certificate is a Nebraska contract. See *Miller v. State Ins. Co.*, 54 Neb. 121, 74 N. W. 416; *Omaha Fire Ins. Co. v. Drennan*, 56 Neb. 623, 77 N. W. 67; *Grand View Bldg. Ass'n v. Northern Assurance Co.*, 73 Neb. 149, 102 N. W. 246. Is the insurance certificate an Ohio or a Nebraska contract?

The rule is that, where the parties to an insurance contract are in different jurisdictions, the place where the last act is done which is necessary to the validity of the contract is the place where the contract is entered into. *McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866, 122 N. W. 27; *Avondale v. Sovereign Camp, W. O. W.*, 134 Neb. 717, 279 N. W. 355. The insurance certificate in the instant case contains the provision "that Leonard Leo Taylor, a member of the Order of United Commercial Travelers of America, in consideration of the statements contained in his application for insurance and the application fee paid by him, is hereby accepted as an Insured Member of said Order under 'Class A,' beginning at twelve (12) o'clock, noon, Eastern Standard time, on the day this certificate is dated, and is entitled to all the rights and benefits which may be provided for such 'Class A' Insured Members in and by the constitution of said Order in force and effect at the time any accident occurs subsequent to said time and date." The certificate shows that it was signed and dated at Columbus, Ohio, on August 30, 1938. This was the final act necessary to put the insurance in force. Liability attached under the terms of the certificate from and after 12 o'clock noon on August 30, 1938, for any loss occurring thereunder, without the doing of any other act. Delivery or acceptance of the certificate was not essential to the placing of the insurance in force. It is clear, therefore, that, as the last act necessary to the validity of the contract was performed in Ohio, the insurance certificate was an Ohio contract. As such, the law of Ohio, and not that of Nebraska, becomes a part of the contract. The provision limiting the bringing of suit to six months after disallowance of the claim by the Supreme Executive Council is therefore valid and a bar to a recovery.

Plaintiff urges that the case of *Avondale v. Sovereign Camp, W. O. W.*, 134 Neb. 717, 279 N. W. 355, supports her position that the insurance certificate was a Nebraska contract. We think this case is clearly distinguishable. In that case the constitution and by-laws provided that liability under the certificate of insurance should not begin until he shall have "had delivered to him, in person, his beneficiary certificate while in good health." The opinion shows that the last act necessary to the validity of the insurance certificate was the delivery of the certificate and the obtaining of a certificate of good health. This was done in Louisiana and the court held, properly we think, that it was a Louisiana contract. But in the case at bar the last act necessary to the validity of the insurance contract was performed in Ohio, and hence the certificate is an Ohio contract.

In view of the fact that the insurance certificate is an Ohio contract and contains a provision, valid in Ohio, and to which we must give full faith and credit, which bars recovery, the plaintiff cannot recover in this state. It is not necessary, in view of the foregoing determination, to discuss other assignments of error. We find no error in the record.

AFFIRMED.

CHESTER MALOLEPSZY, APPELLEE, V. CENTRAL MARKET, INC., APPELLANT: WALTER E. HARKERT, APPELLEE.
7 N. W. (2d) 74

FILED DECEMBER 18, 1942. No. 31423.

1. **Negligence.** "The liability of the owner of the premises to an invitee who enters thereon is only coextensive with the invitation, and when the limits of the invitation are exceeded the invitation ceases, and the duty of the owner is only that of abstaining from acts wilfully injurious." *Wright v. Salvation Army*, 125 Neb. 216, 249 N. W. 549.
2. **Trial.** In view of the record, motion for a directed verdict in the instant case should have been sustained.

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

Gaines & Shoemaker and *H. A. Palmer,* for appellant.

Gross & Crawford and *Harry L. Welch, contra.*

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

MESSMORE, J.

The plaintiff brings this action against the Central Market, a corporation, for personal injuries alleged to have been sustained by him in falling down an elevator shaft on the premises of defendant Central Market (hereinafter referred to as defendant).

Plaintiff's petition alleges that on October 27, 1940, at about 10:15 a. m., as an employee of Walter E. Harkert's restaurant, located at 1619 Farnam street in Omaha, Nebraska, he was directed by the manager to go to the Central Market to purchase meat; that he entered the business establishment of Central Market, located at 1608 Harney street, through a rear door, which he alleges was one of the regular and customary places of entering defendant's place of business; that he was an invitee on defendant's premises, and in walking from the rear toward the front of the store he walked into an open elevator shaft located 20 or 30 feet south of the rear entrance of the market and fell into the shaft, injuring himself, detailing his injuries; that the front of the Central Market was closed, but that it was the regular and customary occurrence for the plaintiff and his employers to enter the defendant's place of business from the rear and to proceed to the wholesale meat department for the purpose of purchasing meat; that the elevator shaft was poorly lighted and plaintiff by reason thereof failed to see the shaft. He further alleges that there was a wooden gate which ordinarily guards the opening of the shaft, not automatically operated; that at the time he fell this gate was up and not in its regular position; that the elevator was on the second floor and its gate

was not lowered to its regular position to keep persons, and particularly this plaintiff, from walking into the pit. Plaintiff charges the defendant, its agents and servants with negligence in failing to keep its premises in the vicinity of the elevator properly and sufficiently lighted; in failing to place the safety gate across the elevator shaft and pit when the elevator was not on the floor level; in moving the elevator from the floor level to the floor above; in failing to prevent persons, and particularly this plaintiff, from walking into the elevator pit; in failing to warn this plaintiff and other persons rightfully on the premises that the elevator shaft was open and unprotected; and in maintaining a trap and pitfall without properly lighting and guarding it to prevent persons, and particularly this plaintiff, from falling into it.

Defendant Central Market admits its corporate capacity and that plaintiff was an employee of Walter E. Harkert; denies generally the other allegations of the petition, and for further answer denies that the rear door was a regular and customary place of entering its place of business; alleges that plaintiff was not an invitee under the circumstances, and that the door through which he entered was not for the use of customers or the public, but that such entrance opened into a loading platform and into an elevator room, used exclusively by defendant in its business, and not in furtherance of the sale of its merchandise, either wholesale or retail, and was separate and apart from that part of the business used by the defendant for transacting business with its customers; that on Sunday, October 27, 1940, the store was closed, and at no time, either when the store was closed or open for business, was said entrance used by the customers or the public to gain entrance either to the retail or wholesale department; alleges negligence on the part of the plaintiff, and that at the time of the accident he was a trespasser on defendant's premises.

The answer of defendant Harkert prays that he be subrogated to the rights of the plaintiff to the extent of $546.55, and that upon judgment in favor of plaintiff this judgment

be paid by reason of the rights of subrogation set forth.

The Central Market operates a retail grocery and wholesale and retail meat market in connection therewith, and is directly across the alley from Harkert's restaurant. At about 10 o'clock on the morning of the accident, the plaintiff, dressed in his restaurant uniform, reported for duty and was directed by the manager to go to the Central Market to obtain some sausage patties. The wholesale meat department of the Central Market is located in the northwest corner of the building and is partitioned off from the retail business. The entrance to the wholesale meat department is located at the west end of the building, and the entrance to the loading dock or elevator room, the scene of the accident, was in the east end of the building. There is a room used for storage adjoining the wholesale meat department in the back of the store. No business is transacted in this room. Through this back room to the northeast corner of the building is an elevator room which is partitioned off on its east and west side, and there is a door leading into the elevator room from the south and an iron door to the north, which leads into the alley. The west door into the wholesale meat department is about a foot from the level of the ground. The east door, through which the plaintiff proceeded, is a sliding door that slides up and down and is built up from a platform.

On occasions, certain customers of the Central Market were privileged to obtain merchandise on a Sunday either by calling or coming to the store. This merchandise had been furnished the Harkert restaurant on a few occasions on Sunday. When employees of the restaurant went to the Central Market to procure merchandise they would go to the west door and would rattle it in an attempt to attract attention in the market. Failing on one occasion, an employee went to the front door and was admitted. There is no evidence that any Harkert employee had ever entered the east door into the elevator room on any other occasion than the morning in question, when a colored man, who was picking up some trash to haul in his own truck, and who

was close to the east door, observed the plaintiff at or near the west door and called to him to come around and call the elevator man. This caused the plaintiff to enter the east door from the loading platform and proceed about 20 feet, resulting in his falling into the elevator shaft and injuring himself; the elevator had been taken to the second floor; the picket gate was not in front of the elevator shaft; the gate on the other side being down, the plaintiff thought the outer, protecting gate was the gate in front of the elevator shaft as he walked toward it. There was a light in the room, one in the adjoining room, and a light in the elevator which had been taken to the second floor. Upon hearing the plaintiff call for help, the colored man went to his rescue. Subsequently, the manager of Harkert's obtained the sausage by entering the same door of the Central Market through which the plaintiff went.

The case was submitted to a jury and a verdict rendered in favor of plaintiff in the sum of $5,583.77. From this vedict and judgment thereon and the overruling of a motion for a new trial, defendant Central Market appeals to this court.

We have set forth the substantial and material facts. At the close of all the evidence defendant moved for a directed verdict which was denied by the court. In this connection the rule is:

"A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." *Moncrief v. Interstate Transit Lines,* 129 Neb. 168, 261 N. W. 163.

The question is whether or not the court erred in overruling defendant's motion to dismiss the action or to instruct the jury in favor of the defendant, made at the close of the plaintiff's evidence.

While the factual situation in cases of this kind vary to a considerable extent, we believe, under the circumstances of this case and from a review of the record, that the holding in *Wright v. Salvation Army,* 125 Neb. 216, 249 N. W. 549, is applicable. In that case this court held:

"The liability of the owner of the premises to an invitee who enters thereon is only coextensive with the invitation, and when the limits of the invitation are exceeded the invitation ceases, and the duty of the owner is only that of abstaining from acts wilfully injurious."

And in *Collins v. Sprague's Benson Pharmacy,* 124 Neb. 210, 245 N. W. 602, it was held:

"The duty which a merchant owes his customers, with respect to the safety of the premises, applies particularly to that part of the premises which is appointed for the transaction of his business.

"Where one, at his own request, and solely for his personal pleasure, convenience, or benefit, enters upon the private portion of the business premises of another, with his consent, but without an invitation, he is a bare licensee in such portion of the premises not open to the public, and the occupier of the premises owes no duty to him, save to refrain from inflicting injury upon him."

From the record it is clear that the purpose of the east door into the Central Market was to take out and bring in merchandise for the benefit of the market itself. It was a loading and unloading place, and not a part of the premises wherein merchandise was sold, or where the public was invited to enter for the purpose of purchasing meat, either retail or wholesale. It is partitioned off from the business part of the premises, and there is not a scintilla of evidence that on this or any other occasion plaintiff was invited to enter the Central Market through the east door. The burden is on the plaintiff to show that he was invited on the premises for the purpose of transacting business. and he must carry this burden by a preponderance of the evidence. He has failed to show such fact. All of the evidence is clear that, in obtaining meat or other merchan-

dise on occasions of emergency, the customer so obtaining it went to the front door of the Central Market or to the west door leading into the wholesale meat department.

We have taken cognizance of the principle of law, cited by the plaintiff from Restatement, Torts (Negligence), sec. 343 b., but find that in an analysis thereof, together with other authorities cited by the plaintiff, the facts in the instant case do not meet the situation as set forth in such authorities. We will not unnecessarily lengthen the opinion by setting forth plaintiff's authorities in this respect.

The colored man, who called to the plaintiff to come around to the east door and call the elevator man, had no authority, express or implied, to invite any person into the Central Market for the purpose of transacting business. He worked independently and separately and for his own benefit, hauling débris from this market and from other places. The facts and circumstances are directly opposed to the plaintiff's contention that he was an invitee.

We are obligated to conclude that the motion of defendant Central Market for a directed verdict at the close of the evidence should have been sustained. In view of this conclusion, it is unnecessary to consider other assignments of error.

The judgment on the verdict is reversed and the cause dismissed.

REVERSED AND DISMISSED.

PAINE, J., dissenting.

I respectfully dissent from the opinion adopted in this case. In my opinion, the questions involved were submitted to the jury under proper instructions, and the verdict of $5,583.77 was warranted by pleadings and evidence, and the judgment entered thereon should be affirmed.

The facts, as I understand them, show that the plaintiff at the time of the accident was a healthy, able-bodied man, 29 years of age, having a life expectancy of 36.03 years. He had been employed for four years by Harkert. The defendant, Central Market, Inc., operates a large retail gro-

cery store, and in connection therewith operates a wholesale and retail meat market, which is directly across the alley from the Harkert establishment. Plaintiff had often been sent across the alley to the Central Market to get meat, which his employer bought at wholesale prices, the same as the better hotels and restaurants, but until the day of the accident, October 27, 1940, he had never been sent for meat on Sunday.

The front of the Central Market was closed on Sunday, but it was a regular and customary occurrence for Harkert's and certain hotels and restaurants to purchase meat at wholesale at a door opening on the alley. At 10 o'clock in the forenoon plaintiff was sent across the alley to purchase meat for his employer. He rattled the door to the wholesale meat department of defendant's place of business, but failed to draw the attention of any one inside.

Farther down the alley, at a rear door opening onto a dock, F. L. Hogan, who was engaged in the trucking business, operating his own truck, hauling rubbish and trash from the defendant's place of business, was breaking up some boxes and bundling them up. The plaintiff thought that Hogan was a Central Market man, and Hogan called to him to come down there and go inside where he was and call the elevator man. The plaintiff entered at this second alley door and started to go to the elevator shaft to call the elevator man. The place was very dimly lighted, and looking straight ahead he saw a slat gate in front of him, which he supposed closed the elevator shaft, and walked towards it to call up to the elevator man, who was on the second floor, but instead the slat gate on the side towards the plaintiff had not worked properly and had stuck and not fallen down as the elevator went up, and plaintiff walked directly into the unlighted elevator shaft, which he could not see, and fell 15 feet to the bottom of the pit, causing fractures of several vertebrae and other serious injuries. The light was just bright enough so he could see the slats of the gate on the other side, but the floor was dark, and because the gate had failed to come down by gravity on his side, as it should have done, he walked right into the pit.

Plaintiff alleges that his injury was caused by reason of the carelessness and negligence of the defendant in the following particulars: (a) Failing to keep its premises in the vicinity of the elevator properly and sufficiently lighted; (b) failing to place the safety gate across the open elevator shaft and pit when the elevator was not at the floor level; (c) moving the elevator from the floor level to the floor above and failing to lower the safety gate to prevent persons from walking into the open elevator pit; (d) failing to warn or caution plaintiff and other persons rightfully on the premises that the elevator pit and shaft were open and unprotected; (e) maintaining a trap and pitfall without properly lighting and guarding it to prevent persons from falling into it.

Raymond Mauck testified that he was 32 years old, and was manager of "Harkert's," where plaintiff worked, and had sent him to defendant's store that Sunday morning to get the sausage meat. After the accident, Mauck testified, he got the meat himself, going across the alley and in at the same back door, or dock entrance, which the plaintiff had used, then went straight across the elevator into the meat department and back the same way with the meat, both elevator gates being up at the time; that there were two employees of the defendant working in there at the time that he got the meat.

The trial court in instruction No. 5 correctly defined:

"An invitee is a person who enters or remains upon the premises in the possession of another after having been expressly or impliedly invited to do so, such as a person who enters a premises in the possession of another for the purpose of transacting some business with the possessor of the premises.

"You are further instructed that it is the duty of a person in possession of premises, in respect to an invitee or business customer, to keep his premises in a reasonably safe condition for the purpose for which they are intended to be used."

These instructions are supported by *Haley v. Deer*, 135 Neb. 459, 282 N. W. 389.

The defendant's position was set out in its motion to direct a verdict as a matter of law because "The plaintiff, at the time and place of this accident, was on the premises of the defendant as a trespasser, or at best as a mere licensee, to whom this defendant owed no duty except that of avoiding wilful and wanton negligence."

The defendant endeavors to sustain its position by citing *Collins v. Sprague's Benson Pharmacy,* 124 Neb. 210, 245 N. W. 602, where a person was injured in going to a toilet provided only for the use of store clerks, and was clearly a bare licensee, and offers no support under the facts in this case, for a licensee is one who is on the premises of another for his own interest or gratification. He is exercising a privilege solely for his own convenience or benefit. A licensee does not stand in any contractual relation with the owner of the premises, as a prospective purchaser does.

Here is a case more clearly in point, where a farmer was injured by an automobile being repaired and out of control, while he was passing through the rear portion of a village automobile repair and farm implement shop in order to transact business in the front, and it was held that the fact that he reached the place where he was injured by passing through a rubbish-strewn alley and the rear entrance of the building did not constitute him a bare licensee, so as to preclude him from invoking the rights of one upon premises by invitation, and a verdict in his favor was sustained. *Jewison v. Dieudonne,* 127 Minn. 163, 149 N. W. 20.

This matter is discussed in Restatement, Torts (Negligence), sec. 343, and is found on pages 938 to 943, from which we may briefly summarize as follows: There is only one particular in which the owner who holds his land open for business visitors is under a greater duty in respect to its physical condition than to a visit of a licensee. He has no financial interest in the entry of a gratuitous licensee, who is entitled to expect nothing more than an honest disclosure of the dangers known to the owner. On the other hand, the visit of a business visitor is, or may be, of finan-

cial benefit to the owner, and such a visitor is entitled to expect the owner will take reasonable care to discover the actual condition of the premises and either make them safe or warn him of dangerous conditions, so that he will have opportunity to decide intelligently whether or not to accept the invitation.

But the owner is subject to liability while the invitee is upon that part of the premises which the owner gives the other reason to believe that his presence is permitted or desired because of its connection with the business. In determining this area, the nature of the business to be transacted is of great importance.

The customer is a business visitor thereon, unless the owner exercises reasonable care to apprise him that the area of invitation is more narrowly restricted. If the owner should realize that either one of two doors might be taken by his business visitor to be the door to the business area, the visitor is entitled to the protection of a business visitor even though he enters the wrong door.

"Since the status of the other as a business visitor depends upon whether the possessor should have known that his visitor would be led to believe that a part of the premises are held open to him as a business visitor, the question is often one of fact and as such a matter for the jury, subject to the normal control which the court exercises over the jury's function in such matters." Restatement, Torts (Negligence), *supra*.

A case somewhat similar to the case at bar is that of *Chichas v. Foley Bros. Grocery Co.*, 73 Mont. 575, 236 Pac. 361. Defendant was engaged in the wholesale grocery business. A freight elevator ran from the basement to the second floor. Plaintiff, a retail grocer, was a steady customer. He drove his automobile to the rear entrance of defendant's building, stopped at a platform, and by means of a plank walked up on this platform about four feet from the ground, entered a door, and proceeded along a passageway, stored with merchandise, which was not well lighted, and in ignorance of the existence of an unguarded elevator shaft fell into it. It was held (236 Pac. 361):

"An owner is liable to invitee, for injuries occasioned by unsafe condition of premises, if known to him and not to invitee, and which was negligently suffered to exist without timely notice. In action by invitee, for injuries sustained by falling through open elevator shaft maintained in defendants' building, contributory negligence of invitee *held* for jury." See, also, *Brett v. Century Petroleums, Inc.*, 302 Ill. App. 99, 23 N. E. (2d) 359; *Palmer v. Boston Penny Savings Bank*, 301 Mass. 540, 17 N. E. (2d) 899; *Rudolph v. Elder*, 105 Colo. 105, 95 Pac. (2d) 827; *Armour & Co. v. Rose*, 183 Ark. 413, 36 S. W. (2d) 70.

In conclusion, the defendant was selling meat on Sunday to wholesale customers, who must use the alley entrance for the front entrance was not open on Sunday. The plaintiff, being sent to buy meat for a regular wholesale customer, had a right to go there. It was a question then whether the plaintiff did what an ordinary man would have done under the circumstances, and if it was so dark that, while proceeding carefully, as directed, to call up to the elevator man, he fell into the pit, and all the facts having been submitted to the jury under proper instructions, in my opinion the verdict should stand, for that invitation to wholesale buyers to buy from the alley entrance on Sunday included all the necessary passageways in and out of the wholesale department.

CARTER, J., dissenting.

The record shows that it was a regular and customary occurrence for favored customers and their employees to enter the place of business of the Central Market from the rear for the purchase of meat. On Sundays, entrance was obtained by attracting attention at the rear if no door was unlocked. I agree with the majority that this constituted a business invitation and constituted such customers and their employees as business invitees. I cannot agree to the holding of the majority that the plaintiff was, as a matter of law, outside the scope of the invitation at the time of the accident.

Plaintiff went to the rear of the Central Market in re-

sponse to the extended business invitation to procure meat. Failing to attract attention at the first door which he found locked, he proceeded approximately forty feet east and entered an open door leading from the loading dock into the building. Plaintiff had never previously sought admission to the Central Market to obtain merchandise and was wholly unfamiliar with the inside arrangement of the building. Neither of the rear entrances were marked in any way, nor were there any signs forbidding entrance to customers. Much is said in the majority opinion on the fact that the east door was not an ordinary place of entrance. The same can be said of the west door. Neither was an ordinary or usual place of entrance for the purchasing public generally.

The scope of the invitation was not limited to any particular door or means of entrance. It invited the favored customers of the Central Market to come to the rear of the building, enter any open door or make their presence known to employees within, so that entry could be effected.

It seems clear to me that plaintiff did what any reasonable person would have done under the circumstances. If one door was locked and another open, it is the natural thing to enter the open door. The Central Market in extending the invitation was bound to anticipate what a reasonable and prudent person would do under the existing circumstances. It is at least a question for the jury to determine whether plaintiff acted reasonably under the circumstances in responding to the invitation extended. To say that a business invitee must choose at his peril one of two doors with which he is unfamiliar in responding to the invitation extended certainly is not supported by reason or logic. I can find no basis in law or fact for this court to substitute its opinion for the judgment of the jury on the question whether plaintiff was outside the scope of his established relation of business invitee. The authorities cited in the dissent of Justice Paine sustain this view. The judgment ought to be affirmed.

STATE, EX REL. DAVE ROWE ET AL., APPELLEES, V. JOSEPH W. EMANUEL ET AL., APPELLANTS.

7 N. W. (2d) 156

FILED DECEMBER 23, 1942. No. 31468.

Counties. Where township organization has been adopted in a county, and the county divided into supervisor districts, and after a state and federal census it appears from an examination of the number of votes cast in a general election that the inhabitants have become unequal in number in the several districts, then a mandatory duty is imposed upon the board of supervisors to redistrict the county into districts in compliance with statutory provisions, and as nearly as possible with regular boundary lines and in regular and compact form and shapes, each district to contain as nearly as possible the same number of inhabitants as any other district.

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

William H. Lamme, for appellants.

W. J. Courtright, contra.

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

SIMMONS, C. J.

This is a mandamus action and presents the question of whether the word "may" as used in section 26-269, Comp. St. 1929, imposes a mandatory duty or a discretionary authority to act. The trial court held that the word was mandatory. Respondents appeal. We affirm the decision of the trial court.

The action grows out of the following situation. Dodge county has been for many years organized into seven supervisor districts. Five of those districts are entirely without and two entirely within the city of Fremont. The 1940 federal census shows the population of the city of Fremont to be over 49 per cent. of the total for the county as against 39 per cent. in 1910. At the general election in 1940 the vote of the city of Fremont was over 49 per cent. of the total vote of the county as against 34 per cent. at the time

of the adoption of the present district boundaries. Fremont, therefore, with a population of almost one-half of the county's total, elects but two of the seven supervisors. The plaintiffs called these matters to the attention of the defendants, as the board of supervisors, submitted a plan of redistricting that would have made the population of each district approximately the same and asked its adoption. The defendants, excepting Myron L. Bodell, voted against redistricting and have since refused to act. The relators, electors and taxpayers of Dodge county, sought an alternative writ of mandamus to compel the respondents, the members of the board of supervisors of the county, to redistrict the county "in compact" form in accordance with the law so that the population, as shown by the general election of 1940, may approach equal numbers in each supervisor district or to show cause. The relators do not seek the adoption of their plan by this action, but do seek a determination of the law and "to enforce" its obedience.

To this application the respondents demurred, contending that the petition did not state a cause of action. The demurrer was overruled.

The respondents then answered admitting the facts alleged in relators' application, and alleged that the city of Fremont was located in the southeast corner of the county, and stated that the county had 198 miles of county road, 279 miles of county drainage ditches, and 976 bridges and culverts across running streams; that each of the five districts outside the city of Fremont is compact in form, contains a somewhat equitable division of area, roads and bridges, that each supervisor has charge of the expenditure of money for roads and bridges in his district, superintends the same, makes purchases of equipment and employs labor; that to enlarge or change the present boundaries would make for inefficiency, increased expense and more difficult administration. They further assert that, even though there are fewer voters in the country districts, the needs of the people in the country districts are different from those in Fremont, and that supervisors residing in

the city may not readily respond to the needs of the people in the rural districts. The respondents further allege that the assessed valuation of the property within the city of Fremont is $7,976,225 and that of the balance of the county is $29,550,125. Respondents denied that it is their duty to redistrict, and allege that they had a right to and did exercise their discretion in refusing to redistrict.

To this answer the relators filed a motion for judgment on the pleadings. The trial court sustained the motion of relators and ordered the defendants to "proceed promptly in their official capacity to revise the supervisor districts of Dodge county so as to adjust them into seven supervisor districts, compact in form, making each district so far as reasonably possible as nearly equal in population as may be." Costs were taxed to the respondents other than Myron L. Bodell. From this order respondents appeal.

Stated briefly, the relators contend for supervisor districts containing substantially an equal number of people. The respondents contend that supervisor districts containing an unequal population may be maintained where the geography requires and business administration and needs may better be considered and served, and that tax revenues may be considered in determining whether or not to change existing boundaries of supervisor districts. Which position is sustained by law?

Section 26-269, Comp. St. 1929, provides as follows: "The supervisor districts may be changed after each state and federal census, if it shall appear from an examination of the number of votes in any district or districts that the inhabitants have become unequal among the several districts. Provided, in the event of any change or amendment of this act which may necessitate a change in the boundaries of such supervisor districts, or any one of them, then it shall be the duty of the county board to make such change in boundary at their next regular meeting after such change or amendment takes effect."

The above section must be considered in connection with other provisions of the same act. Section 26-204, Comp.

St. 1929, provides for the original division of a county into supervisor districts after the adoption of township organization. In the original act (Laws 1895, ch. 28, sec. 4) and in the above section it is provided that the districts shall be "divided as nearly as possible with regular boundary lines and in regular and compact form and shapes, and such districts shall as nearly as possible have the same number of inhabitants as any other district." Exact mathematical equality of population is not required, but "as nearly as possible" equal population is required. Section 26-206, Comp. St. 1929 (Laws 1895, ch. 28, sec. 6), provides for the counting of all the inhabitants of villages within a supervisor district. Section 26-267, Comp. St. 1929 (Laws 1895, ch. 28, sec. 71), provides a method for ascertaining the number of inhabitants in the several districts based upon the whole number of votes cast at the last preceding general election, and that "the supervisor districts shall be divided upon the foregoing basis and in accordance with the results thus obtained."

The legislature anticipated that changes in population might upset this approximate equality. It provided that the number of votes cast in a general election should determine the number of inhabitants in the various voting subdivisions of the county, and provided that redistricting should follow after each state and federal census if those figures established that there were an "unequal" number of inhabitants in the several supervisor districts. The legislature intended that the element of inhabitants alone should control. In redistricting, the requirements of approximately equal numbers in each district as provided in section 26-204, *supra*, should be met.

The admitted facts establish that the supervisor districts of Dodge county do not meet the legislative requirements of equal population, "as nearly as possible," and that redistricting is necessary to achieve that equality.

Did the legislature by the use of the word "may" in the original act (Laws 1895, ch. 28, sec. 72) and in section 26-269, *supra*, intend to leave compliance with the redistrict-

ing provision to the discretion of the board of supervisors, and to enable them to perpetuate the inequality, by asserting reasons for so doing which are outside the legislative basis of districting and redistricting?

The word "may," when used in a statute to delegate a power, the performance of which involves the protection of public or private interests, is mandatory, and it will be so construed whenever it becomes necessary to do so to carry out the legislative intent. *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910. That there is a public and private interest involved in this question is apparent. See *State v. Moorhead,* 99 Neb. 527, 156 N. W. 1067.

Here the legislature quite clearly has provided a method for securing and maintaining practical equality of population within the various supervisor districts. Here the respondents insist that they have a discretionary right to maintain practical inequality of population in supervisor districts with the result that fewer persons in number in some districts exercise the same power in the county government that is accorded to greater numbers in other districts. To sustain respondents' position would require us to hold that the legislature intended that there be practical equality of population when supervisor districts were organized, but that, if later inequalities of population developed, it would be discretionary with the county board to correct the situation or perpetuate the wrong. See *State v. Moorhead, supra.* We impute no such intent to the legislature. Rather it is clear that the legislative intent was to require and provide for periodic readjustments of the district boundaries to meet population changes.

The respondents rely upon the decisions of *Peterson v. Board of Supervisors,* 93 Cal. App. 490, 269 Pac. 743, and *Dozier v. Board of Supervisors,* 130 Cal. App. 746, 20 Pac. (2d) 726. There the statute provided: "The board of supervisors may, by a *two-thirds vote* of the members of said board, change the boundaries of any or all of the supervisor districts of a county. Said districts shall be as nearly equal in population as may be." The statute also vested

power in the board of supervisors "to divide the counties into townships, * * * supervisor, * * * and other districts required by law, change the same, and create others, *as convenience requires.*" (Italics ours.) There the court recognized the rule that "may" is to be construed as mandatory where "a positive duty," "a public duty," "the public interest," or "a matter of public policy" is involved or where the statute confers a power on a public officer for public purposes. The court held that the statute did not impose a positive duty to change the boundaries by reason of unequal population. The decision is based upon the statutory authority to change boundaries "as convenience requires," and also the provision requiring a two-thirds vote. The cases are not controlling in the instant case.

Respondents point out that sections 26-204, 26-206 and 26-269, *supra,* were amended by chapter 17, Laws 1917, and that in particular section 26-269, quoted above, was amended by adding the second sentence. The first sentence, as the act now is, says: "The supervisor districts *may* be changed," etc. The second sentence provides that in the event any amendment of the act "may necessitate a change in the boundaries * * * then it *shall* be the duty of the county board to make such change * * * at their next regular meeting," etc. From this situation respondents argue that the legislature intended the first authority to be permissive and the second mandatory. We are unable to see where the second sentence alters the construction of the first. The second sentence makes it mandatory to proceed, if the statutory conditions exist, "at their next regular meeting." The duty to change boundaries under the first sentence of the section remains the same.

Respondents argue that under section 26-265, Comp. St. 1929, the supervisors of country districts have special duties to perform, and that they are local as well as county officials, citing *Van Horn v. State,* 46 Neb. 62, 64 N. W. 365. Assuming this contention to be true, we see no application of it to the present problem. The supervisors have their statutory duties to perform. We can see no difference be-

tween districts as originally created and districts changed in compliance with the law, so far as the duties of the supervisor are concerned.

Respondents finally argue that the members of the board are best fitted to determine when the county should be redistricted for economical government, and that to place a larger number of supervisors in the city would place an unequal burden on the supervisors from the rural districts. To all of which the answer is that the legislature has said that such districts shall be divided as nearly as possible with regular boundary lines and in regular and compact form and shapes, and shall as nearly as possible have the same number of inhabitants. Section 26-204, *supra*. The duty is mandatory. The decree of the trial court requires that it be performed. The decree is affirmed.

AFFIRMED.

STATE OF NEBRASKA V. HARRY BOATMAN ET AL.
7 N. W. (2d) 159

FILED DECEMBER 23, 1942. No. 31455.

Embezzlement. The crime of embezzlement of public money as defined by section 28-550, Comp. St. 1929, applies only to officers or persons who are charged by law with the performance of the duties therein mentioned, and an employee of a county clerk cannot properly be informed against thereunder.

ERROR to the district court for Douglas county: HENRY J. BEAL, JUDGE. *Affirmed.*

Walter R. Johnson, Attorney General, Rush C. Clarke, James T. English and *Paul J. Garrotto,* for plaintiff in error.

Gross & Crawford, contra.

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

CARTER, J.

This is a proceeding by the county attorney for Douglas county, brought to this court with its consent, for a review of the record and to secure a reversal of the judgment of the district court.

The record discloses that on July 2, 1941, the county attorney for Douglas county filed an information in the district court, charging Harry Boatman, Henry Ploss and James Dugdale as employees of the county clerk for Douglas county with embezzling public money in the sum of $6,134. Defendant Dugdale moved for a separate trial and a separate trial was ordered. On January 6, 1942, defendants Boatman and Ploss demurred to the information, and on January 27, 1942, both demurrers were overruled. On February 2, 1942, defendant Dugdale demurred to the information and this demurrer was overruled the same day. Defendant Dugdale thereupon entered a plea of not guilty and the case proceeded to trial as to him. At the close of the state's case the trial court sustained a motion to direct a verdict in favor of defendant Dugdale. The record then discloses that defendants Boatman and Ploss moved for a dismissal as to them, which the court sustained. The county attorney thereupon presented a transcript of the proceedings and made application for permission to file such transcript for the purpose of obtaining a review under section 29-2314, Comp. St. 1929. The application was granted and the matter is now here for review.

No bill of exceptions has been filed. The presumption necessarily is that the sustaining of the motion for a directed verdict in favor of the defendant Dugdale was supported by the record. Defendant Dugdale having been once in jeopardy, this proceeding can have no effect as to him.

The attorney general urges, however, that the trial court committed error in sustaining the motion to dismiss as to the defendants Boatman and Ploss. The record shows that these defendants had not been arraigned nor placed on trial. It is fundamental that the trial court could not properly sustain the motions to dismiss as to these two defend-

ants on account of an insufficiency of the evidence to sustain a conviction because no trial had been had, nor evidence adduced as to them. Consequently, the only proper basis for sustaining the motions to dismiss was the insufficiency of the information to charge a crime under the statute. Was the trial court in error in holding the information insufficient?

The prosecution was commenced under section 28-550, Comp. St. 1929, which provides in part as follows: "(If) any officer or other person charged with the collection, receipt, safe-keeping, transfer or disbursement of the public money or any part thereof, belonging to the state or to any county * * * shall convert to his own use * * * any portion of the public money * * * such officer or person or persons shall be imprisoned in the penitentiary * * * ." The primary question is whether the defendants Boatman and Ploss, as employees of the county clerk for Douglas county, are officers or other persons within the purview of this statute. This involves the secondary question whether one must be charged *by law* with the collection of pubic money to come within the scope of the statute, or whether a person charged with the duty of so doing but who is not an officer or person charged by law with such duty may or may not properly be informed against as a violator of this section of the statute. It must be conceded that the defendants were not officers or persons charged by law with the collection and safe-keeping of public money. Is a defaulting employee charged with the duty of collecting and safeguarding public funds subject to prosecution under this section?

Our statute was apparently taken from a similar one adopted by the state of Ohio. It is contended that the interpretation given this statute by the supreme court of Ohio prior to its adoption in this state is the one to be followed. We quite agree that in construing a statute borrowed from a foreign state there is a presumption that the legislature adopted it with approval of all interpretations given it by the court of last resort of that state. An examination of

the Ohio statute and an analysis of the cases of that state with reference to it is therefore desirable.

The pertinent part of the Ohio statute is as follows: "Whoever being charged with the collection, receipt, safe-keeping, transfer or disbursement of the public money, or bequest, or any part thereof, belonging to the state, or to any county * * * converts to his own use * * * any portion of the public money * * * shall be deemed guilty of embezzlement * * * and shall be imprisoned in the penitentiary * * * ." Ann. St. Ohio, 1897, sec. 6841.

Our attention is directed to the case of *State v. Newton*, 26 Ohio St. 265. The decision in this case was entered at the December, 1875, term of court, a date subsequent to the adoption of our statute (section 28-550, Comp. St. 1929) in 1873. In that case a county auditor was charged under the Ohio statute, hereinbefore quoted, with the crime of embezzlement. The court held that, as a county auditor had no lawful duty to collect and safeguard the public moneys of the state or county, he could not properly be prosecuted under the act. It must be borne in mind that the purpose of these acts is to define the elements constituting the embezzlement of public money by those charged with the collection and safeguarding of the same. The *Newton* case holds that an officer whose duties do not require him to collect and safeguard public money cannot be charged with embezzlement under this section. We find nothing in the case which controls the decision in the case at bar.

The case of *Moore v. State*, 53 Neb. 831, 74 N. W. 319, is one where a state auditor of public accounts was charged with embezzlement under the section of the statute involved in the case at bar. The court held that a crime was not charged in the information for the reason that the state auditor of public accounts was not an officer charged with the collection, receipt, safe-keeping, transfer, or disbursement of public money. In fact, it was demonstrated in that opinion that the law expressly forbade him to receive or handle it. While there are statements made in the opinion substantiating the position of the defendants, we do not

think they were directly involved or necessary to a decision of the case. In our opinion, the result in the case at bar is not controlled by the decision in the *Moore* case.

The case of *State v. Meyers*, 56 Ohio St. 340, 47 N. E. 138, is much more in point. While it was decided at the January, 1897, term of court and, consequently, subsequent to the adoption of the Nebraska statute, yet the reasoning therein contained applies directly to the case at bar. In holding that only officers and persons charged *by law* with the collection and safeguarding of public moneys could be informed against under the Ohio statute, the Ohio court took into consideration a second statute, section 7299, Ann. St. Ohio, 1897, which was held to have limited the class to which the statute applied to officers and persons charged *by law* with the collecting and safeguarding of public moneys. Such section provided:

"Any failure or refusal to pay over, or to produce, the public money, or any part thereof, by an officer, or other person charged with the collection, receipt, transfer, disbursement, or safe-keeping of the public money, or any part thereof, whether belonging to the state, or to any county, township, municipal corporation, or board of education in this state, or any other public money whatever, or to account to, or to make settlement with, any proper and legal authority, of the official accounts of such officer or person, shall be held and taken as *prima facie* evidence of the embezzlement thereof; and upon the trial of any such officer or person for the embezzlement of public money under section sixty-eight hundred and forty-one, it shall be sufficient evidence, for the purpose of showing a balance against him, to produce a transcript from the books of the auditor of state, or the auditor of the county, or the records of the commissioners of the county; and the refusal of any such officer or person, whether in or out of office, to pay any draft, order, or warrant drawn upon him by the proper officer, for any public money in his hands, no matter in what capacity the same was received or is held by him, or any refusal, by any person or public officer, to

pay over to his successor any public money or securities promptly, on the legal requirement of any authorized officer of the state or county, shall be taken on the trial of an indictment against him for embezzlement as *prima facie* evidence of such embezzlement."

It was stated in the opinion in the *Meyers* case that "it seems reasonably certain that the persons who are subject to prosecution under section 6841, are those only, who are charged by law with the performance of the duties, or some of them, therein mentioned. There are officers and persons to whom all these provisions of the statute aptly apply. * * * And the application of both sections, 6841 and 7299, to such officers and persons, is clear and indisputable. But we have found no provision of law by which a deputy, or a clerk of a county treasurer is charged with the performance of any of the duties above enumerated. * * * True, the statute confers authority on the deputy, during his appointment, to perform the duties of his principal; but that falls short of charging the former with the performance of the duties of the latter. * * * The former is charged by law with the duty of collecting and disbursing the public moneys, and the doing of all acts necessary thereto, as required by law; but the latter is not so charged with the performance of those duties. * * * But the language of section 6841, 'whoever being charged with the collection,' etc., 'of the public money,' etc., is descriptive of the persons who may be guilty of the offenses it punishes, and is therefore descriptive of the offense; and, under that fundamental rule of strict construction applicable to all penal laws, a statute defining a crime cannot be extended by construction to persons or things not within its descriptive terms though they may appear to be within the reason and spirit of the statute."

We agree with the Ohio court, when section 6841 is construed with section 7299, that the two acts could only apply to officers and persons charged *by law* with the collection and safeguarding of public moneys. The question then arises whether this court is justified in making the same interpretation. We think that it is.

Sections 6841 and 7299, Ann. St. Ohio, 1897, constituted a part of the same section of the same act when originally passed by the Ohio legislature. Laws, Ohio, 1858, p. 44, sec. 15. They remained a part of the same section of the Ohio statute at the time the legislature adopted our statute in 1873. And our statute, section 28-550, Comp. St. 1929, still contains the substance of sections 6841 and 7299 of the Ohio statute, the only changes being those necessary to make the statute comply with Nebraska conditions.

The latter part of section 28-550, which corresponds to section 7299 of the Ohio statute, provides that any failure to pay over the public money, or any failure to account therefor, shall be held and taken as *prima facie* evidence of embezzlement. This can apply only to an officer or person authorized *by law* to collect, safeguard and disburse the public moneys and can have no application to a clerk or employee. The statute also recites that the refusal of any such officer or person to pay any draft, order, or warrant, which may be drawn upon him by the proper officer, or any refusal to pay over to his successor promptly, shall be taken as *prima facie* evidence of embezzlement. Certainly, this can apply only to an officer or person authorized by law to collect, safeguard and disburse the public moneys. These provisions of the statute, as held by the Ohio court, clearly indicate the intent of the legislature to limit the class within the scope of the statute to such officers and persons charged *by law* with the collecting, safeguarding and disbursing of the public moneys of the political subdivisions named in the act. While it may appear that clerks and employees who handle public moneys are within the spirit of the act, the rule of strict construction applicable to all criminal statutes requires us to construe it strictly, and, if others were intended to fall within the scope of the act, it is a matter for legislative action and not judicial interpretation. After giving effect to the whole statute, and each part thereof, we conclude that clerks and employees not charged by law with the collection, receipt, safe-keeping, transfer or disbursement of the

public money cannot properly be informed against under the provisions of this statute.

We have examined the statutes, sections 33-131 and 33-132, Comp. St. 1929, providing for the appointment of assistants and clerks in the offices of the county clerks of this state, but we find nothing which imposes the statutory duty of the collection, receipt, safe-keeping, transfer or disbursement of the public money and they therefore can afford no support to the state's contention.

We have also examined the cases cited by the state which hold that a clerk or employee may be prosecuted under a statute providing that all public officers or persons charged with the safe-keeping of public money should be subjected to criminal penalty if the money was not safely kept. See *United States v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *State v. Harrington*, 148 Kan. 602, 83 Pac. (2d) 659; *Commonwealth v. Bain*, 240 Ky. 752, 43 S. W. (2d) 10; *United States v. Bloomgart*, 24 Fed. Cas. 1180; *Lacy v. State*, 13 Ala. App. 212, 68 So. 706. But in those cases there are no provisions limiting the class within the act as exists in the Ohio and Nebraska statutes.

We necessarily come to the conclusion that only such officers and persons charged by law with the collection, receipt, safe-keeping, transfer or disbursement of the public money may be properly charged with crime under section 28-550. The trial court therefore did not err in dismissing the action as to the defendants Boatman and Ploss. The judgment of the district court is affirmed.

AFFIRMED.

RALPH REXROAT, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES.

7 N. W. (2d) 163

FILED DECEMBER 23, 1942. No. 31496.

1. **Workmen's Compensation.** Where an employer alleges in a petition on appeal that the disability under which the employee la-

bors is not due to injuries which he sustained, but due to his own failure or unwillingness to allow normal recovery, and that, had the employee made any effort to restore the injured member to service, his disability at this time would be negligible, such is an affirmative allegation, tantamount to charging the employee with negligence, and in order to prevail in such case the burden of proof, under section 48-107, Comp. St. 1929, is on the employer to establish wilful negligence of the injured employee. Section 48-102, Comp. St. 1929, provides in part that "it shall not be a defense (a) that the employee was negligent, unless and except it shall also appear that such negligence was wilful." Upon failure of the employer to establish wilful negligence on the part of the employee with a reasonable degree of certainty, this allegation of the petition fails.

2. ———. "Malingering, as applied to compensation cases, may be defined as a deception, practiced by a dishonest employee, by feigning, inducing, or prolonging either sickness or injury, for the purpose of securing illegal or fraudulent payments therefor under the workmen's compensation law." *Great Western Sugar Co. v. Hewitt*, 127 Neb. 790, 257 N. W. 61.

3. ———. Where the evidence establishes that the employee accepted all the medical treatments afforded him, followed the instructions of his physician, submitted to examinations required by the employer, and where such treatment was not adequate under the circumstances, the employee is not guilty of malingering.

4. ———. Where an employee is admittedly injured in the course of his employment, as provided for in section 48-101, Comp. St. 1929, and compensation was paid, and during the period for which compensation was paid to the employee he submitted to all treatment accorded him, and developed a mental condition, according to the preponderance of the evidence given by medical experts, wherein the patient is firmly convinced that he has a permanent disability, and, due to such mental condition, he honestly and consciously believes that he is suffering pain and that his physical condition is incurable, treatment neglecting this phase of the employee's make-up was lacking and not adequate through no fault of the employee, and under such circumstances he is not guilty of wilful negligence or malingering.

5. ———. Where compensation has been paid by an employer for a period of more than eight years and then stopped, and an original compensation case is brought by the employee (there being no question that the injury occurred in the course of his employment) to have the degree of his disability and the compensation to be paid therefor determined, and an award is made in con-

formity with the disability as set out in section 48-121, Comp. St. 1929, and an appeal is taken to the district court, and in a petition on appeal the employer pleads facts constituting wilful negligence and fails to prove them with a reasonable degree of certainty, the award of compensation as fixed by the compensation commissioner in such action prevails, and judgment should be entered in such amounts, with credit given to the employer for the amounts paid.

APPEAL from the district court for Dakota county: SIDNEY T. FRUM, JUDGE. *Reversed, with directions.*

W. G. Ashford and *Mark J. Ryan,* for appellant.

Walter R. Johnson, Attorney General, and *Herbert T. White, contra.*

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

MESSMORE, J.

This is a workmen's compensation case. It is not disputed that the claimant (appellant), a common laborer, aged 39 years, on February 26, 1932, an employee of the department of roads and irrigation of the state of Nebraska, was working on highway No. 20, about a mile and a half west of South Sioux City, Nebraska, with a road grader, to be pulled behind a tractor, and in endeavoring to hitch the grader to a five-ton caterpillar tractor, the tractor backed over the appellant's right foot and right leg. The accident arose out of and in the course of appellant's employment, as provided in section 48-101, Comp. St. 1929.

The original action was commenced November 2, 1934, before the compensation commissioner, and on March 4, 1935, the cause was heard. On March 20, 1935, an award was rendered by the commission in favor of the appellant, granting him compensation at the rate of $10.50 per week for the first 300 weeks and $7.09 per week thereafter for the remainder of appellant's life, for a 75 per cent. permanent partial loss of the use of his right arm and right leg. The appellee paid compensation in conformity with this award from February 27, 1932, to Febuary 22, 1940, in-

clusive, when appellee ceased to pay such compensation. The instant case has been tried, submitted and briefed as an original compensation case.

The appellee did not file an application under section 48-142, Comp. St. 1929, on the ground of decrease of incapacity, due solely to the injury, but stopped the payment of compensation. The pleading on appellant's behalf does not attack the procedure in the instant case, but treats the case as an original compensation case.

The transcript reflects the following for the purposes of this action, that an award was made by a judge of the compensation court, filed May 6, 1941, setting forth the appellant's injury occurring in the course of his employment, and finding and decreeing that the plaintiff was temporarily totally disabled from and after February 26, 1932, to and including the 22d day of February, 1933, constituting a period of 51 5/7 weeks, at which time all temporary total disability terminated and ceased, and said temporary total disability was followed immediately by 75 per cent. permanent partial disability of the right leg, and 75 per cent. permanent partial disability of the right arm for a period of 248 2/7 weeks, and thereafter 75 per cent. permanent partial disability for the remainder of appellant's life; that at the time of said accidental injuries, appellant's wages were $21 each week, sufficient to entitle him to compensation at the rate of $14 each week for a period of 51 5/7 weeks for temporary total disability, and compensation at the rate of $10.50 per week for a period of 248 2/7 weeks for disability as hereinbefore set out, and $7.09 per week for the remainder of appellant's life; that the appellant has received compensation in the amount of $4,160.53 for which the appellee should have credit. The hospital expenses and medical fees paid were enumerated. The credit to appellee as designated in the award is $724, as against compensation of $14 per week for 51 5/7 weeks from and after February 26, 1932, to and including February 22, 1933; $2,607 to be credited in amounts paid for permanent partial disability from and after February 22, 1933, 248 2/7 weeks, and

$829.53 credited on the amount of $7.09 each week thereafter to the date of the award, as compensation payable during the appellant's lifetime. A waiver of rehearing before the compensation commission and an election to appeal directly to the district court from such award were filed.

The petition on appeal from the compensation court filed in the district court May 19, 1941, set out, in substance, the history of the proceedings, alleging that the court "acted without and in excess of its powers;" the findings of fact are not sustained by the evidence, and the disability under which the appellant labors is not due to the injuries which he sustained, but due to his own failure or unwillingness to allow a normal recovery, and that, had the appellant made any effort on his part to restore the injured member to service, his disability at this time would be negligible.

An answer was filed on May 29, 1941, and an amended and substituted answer on December 1, 1941, by leave of court obtained, in which the appellant admits the exhibits attached to the petition are true and correct copies of the originals filed in the workmen's compensation court; denies that the court acted without and in excess of its powers, and that the findings of fact as set forth are not supported by the record and do not support the order and award; denies that the disability suffered is in any way due to any fault or unwillingness on his part to allow normal recovery, and that he has made a diligent effort to restore the injured member to service, but despite his efforts his disability continues and is a direct result of the injury sustained by him for which the award was made; alleges that since February 26, 1932, appellant has been totally disabled and should be paid compensation on the basis of total disability; alleges that he did not appeal from the original award allowing him but 75 per cent. permanent partial disability for the reason that he believed he would eventually regain the use of his limbs, and that by reason of the permanent total disability he is unable to earn a livelihood, and is entitled to receive compensation at the rate of $14 a week for the remainder of his life, and is therefore en-

titled to the difference between $10.50 a week, as set forth in the award, and $7.09 permanent disability as set forth therein, and prays for recovery in such amount.

The district court entered judgment June 9, 1942, in substance as follows: Setting forth that the appellant was injured in the course of his employment on February 26, 1932; that he sustained an injury to his right foot and right leg, with the result that the fifth metatarsal bone of appellant's right foot was broken and he sustained a soft tissue injury to his right leg; that the appellant was hospitalized for his injuries directly after the accident and made a normal physical recovery from the direct effect of the injury sustained; that there was some atrophy of appellant's lower extremities and at the time of trial of this cause the appellant was suffering disability, preventing him from engaging in manual labor, which was the means by which he earned his livelihood prior to the accident. The court found from the evidence, however, that appellant at the proper time in the course of his recovery from his injuries was advised to abandon the use of his crutch and to use his right leg; that from September 9, 1937, up to and including the date of trial, the appellant had no organic physical or neurological disability, and that he has never suffered sufficient physical or anatomical injury to account for permanent disability or the disability of which he complains, and the court found from a preponderance of the evidence that appellant's present disability is due to the disuse of his upper right and lower right extremities, and that the failure on his part "to use his right arm and right leg whether caused by hysteria or conscious failure is the efficient intervening cause of the whole of the disability" of which he now complains; that the disability of which appellant complains, "whether continued or produced by hysteria or conscious acts or failure, cannot be considered as the result of 'violence to the physical structure of the body,' or such 'disease or infection as naturally results therefrom,' " and that such disability is not compensable under the workmen's compensation act, and that the ap-

pellant has been fully compensated in the payment of compensation to him in the amount of $4,160.53, and medical expenses incurred, which have been paid. Appellant's petition was dismissed. Motion for a new trial was filed, submitted and overruled, and the cause was appealed to this court, the appellant contending that the finding and judgment of the trial court is not sustained by sufficient evidence, is contrary thereto, and contrary to law, citing section 48-101, Comp. St. 1929.

The evidence of the medical experts as to appellant's disability, the extent thereof, and the physical examinations of the appellant with respect thereto are, in substance, reflected by the record as follows:

Immediately after the accident the appellant was removed by a stock truck to Doctor Legg's office in South Sioux City. The doctor was not in, and the appellant was taken in an ambulance to the Methodist Hospital where he was treated by the doctor. Thirty stitches were taken in the foot and leg, and the leg was treated with wet dressings and was not put in a cast. One bone was broken, the fifth metatarsal, just below the little toe. The patient remained in the hospital 39 days and bandages were kept on his leg for a period of three months, at the end of which period they were removed by the doctor's orders. He was subsequently treated by Doctor Legg for four years. He made several calls to the doctor's office, appellant designating the number of calls as 30.

Dr. C. E. Legg testified: The appellant had "a contused laceration extending from just below the knee to near the ankle, over the crest of the tibia. It was laid open. X-rays showed no broken bones except in the foot. There was a broken metatarsal bone." The doctor saw the plaintiff practically every day while he was in the hospital and continued to see him every day for a short time at the office, and then two or three times a week until 1934. In answer to the question: "What sort of treatment did you give him at the office?" the witness answered: "When he first came from the hospital there was a slight skin wound; that was

healed by granulation and then later on I gave him vibratory treatments to tone up the muscles of that limb." The doctor saw the patient frequently after 1934, sometimes once or twice a month or twice or three times a year. He testified that the limb "apparently never did regain its normal function," and the patient was unable to get along without a crutch; "he complained of it being cold and when he attempted to step on it he claimed there was pain there;" that he had never been able to resume his employment; that the "measurements of his limb compared with the well limb" and his physical condition showed the limb to be smaller; the doctor examined him two days before the trial. The witness stated the patient claimed that his right limb would not "bear his weight. He has perfect use of it so far as motion is concerned, but when he commences to step on it it pains him and it seems to be weaker than normally." He testified that the temperature of the leg was cooler "on the injured side than on the well side;" that in his opinion the appellant "will never be able to do manual labor or resume his normal duties as he did before;" that he advised the patient to use the leg as much as possible and to do without a crutch, which had been furnished him, in order to rehabilitate the leg; that the continued use of the crutch developed "crutch palsy." According to the various reports made by the doctor when he fixed the time of the appellant's recovery, as he proceeded along with the case, the time was always extended, appellant failing to respond to treatment. The doctor testified on cross-examination that during the four years he treated the patient he urged him to walk without the crutch, gave him other examinations; his reflexes disclosed no nerve injury, permanent muscular injury or bone injury; the fifth metatarsal bone healed promptly; "owing to the limited nutrition of the cord over the crest of the tibia, which is always rather poorly supplied with blood vessels, that was slow in healing, but that was the only reason for that." The doctor discovered no reason why the patient suffered pain when he tried to walk. He failed to find from an ex-

amination of the ball of the foot "any callous or evidence of much use on the bottom" of the foot, which would indicate that the patient either had not used or could not use the foot. During the period of two years or more of such treatment the doctor advised with the patient about attempting to use his foot, and the patient reported that he would try; he attempted to use it while in the doctor's office, but was unable to do so, and would complain of pain when he would take a step. The doctor's opinion, in accounting for the disability, was that it was probably more or less psychic, or mental; that the patient made an honest effort to use his leg and complied with instructions.

Dr. R. T. Rohwer made an examination of the appellant October 4, 1941. He observed the patient generally in his walking; paid particular attention to the use of the arms, legs, hands and feet, the range of motion, the various joints of the members, the texture of the skin, the tone and volume or size of the muscles, and made investigation of the nerve function of the members. The examination revealed a suggestion "of limitation in the movement of the arm, probably flexion in the elbow." On an examination of the right ankle there appeared to be a limitation which is described as "dorsoflexion of the ankle," and when an attempt was made to forcibly flex the foot, the limitation persisted and caused some pain in the calf muscles of the leg. There was atrophy in all the muscles "of the thigh and over the hip, the gluteal muscles were definitely smaller than on the other leg;" diminution in the size of the calf muscles, and the doctor gave the measurements. He stated the patient was unable to walk without a crutch. His opinion was that the functioning of the patient's right upper and lower extremities was impaired, which could not be "directly attributed to any basic or gross organic lesion," as evidenced by the weakness and atrophy and limitation of motion; that "there was a physical basis for this disuse which was probably the disuse resulting originally from fear of pain and aggravating his condition, and that the functioning was probably further impaired by his mental

attitude toward his condition." In the doctor's opinion he was suffering from a definite psychoneurosis, which evolved from the accident and injury. From the fact that the patient's condition is of about nine years' standing, the doctor gave an opinion as to the adequateness of the treatment given him at the time of the injury and the completeness thereof. The doctor testified that "from a physical standpoint the extremity as such was adequately taken care of at the time, however, after the wounds were healed, dressings removed and with a lapse of time, there ceased to be the expected improvement and response. * * * Probably the treatment then should have been continued until such time that the man would have been completely rehabilitated, which was not done. * * * It may not have been recognized at the time the nature of the functioning of the psychiatric program;" that, in his opinion, the appellant is "totally disabled and, until proved otherwise, that he is permanently disabled;" that his condition is attributable to the injury he received February 26, 1932. The doctor's next impression was that he attributed lack of use of appellant's limb to his fear of the injury, rather than to anything else. On cross-examination the witness testified: "He (appellant) was able to apply the foot to the normal range of motion, with the exception of this limited dorsoflexion. However, he was not able to use the foot to bear weight on it, he did not stand on the foot bearing weight on it to any reasonable degree. * * * Ordinarily the fracture of the metatarsal as such and the soft tissue injury that he had sustained, the disability would be of a limited duration." In answer to the question: "From your examination wouldn't you say that Mr. Rexroat's present condition is entirely due to his mental condition?" the witness said: "No, I will put it this way, that his mental condition definitely has not permitted him to go ahead and use his arm and leg. Q. That disability that Mr. Rexroat has now, Doctor, in his right leg and right arm, is almost entirely due to nonuse of them? A. Yes, I will grant that. * * * Q. Do you consider this condition that Mr. Rexroat now has what is

called hysteria? A. We might term it hysteria. * * * Q. A mental condition entirely? * * * A. He is definitely convinced, very honestly convinced, that he is suffering from disuse and also pain. His symptoms are real. He experiences pain and weakness. * * * Q. Isn't pain that is registered in his mind mental pain? A. Frankly, some is and he may have a hyperesthesia. He is more sensitive to injury. I do believe that his atrophic arm with vasomotor disturbance and with muscular spasm such as occurs in the calf of the leg would produce physical pain." On further cross-examination the doctor testified: "Q. And malingering is simply a desire on the part of an injured person or a person who has been sick not to have a recovery, that is, not to have a physical recovery, does that about describe a malingerer? A. That is essentially it. The malingerer intentionally or consciously seeks disability, usually for monetary gain or sympathy, or probably to cover up failure in life in other respects. * * * Q. Hysteria differs from malingering only in this degree, that in hysteria the patient has built up within his mind a condition that he himself honestly believes that he is unable to move about and perform his normal functions, isn't that about the only difference between hysteria and malingering? A. In hysteria it is not conscious, it is an unconscious affair, although the mechanism of the development of the particular mental state is probably different." With reference to appellant, the doctor stated: "It was my feeling and belief that he developed this particular mental state because of fear and lack of understanding, ignorance as to what happened and how he got that way and what he must do in order to get well—that is early in his disability. I don't believe he has an understanding of why he is as he is." The witness said that the disability in the arm could come from the use of the crutch after the patient was discharged from the hospital. The doctor was asked if he had an opinion as to whether or not appellant is a malingerer, and he answered: "A. It was my opinion that he was suffering from a psychoneurosis of an hysteric nature and that he was not a

malingerer." The doctor believed that "this man actually suffers pain. It is registered on his central nervous system as pain."

Dr. S. D. Carney examined appellant September 10, 1941. He testified the patient complained of pain in his right arm and that his leg became cold, that "when he laid his right arm on the table or chair arm, that the arm became cold, that he lost feeling in the arm, and complained of a constant ache in the leg." The doctor testified to the difference in measurements of the injured portions as compared with the well portions and on examination of the leg, he stated, "the leg seemed to be smaller than the left leg. It was discolored looking like a case of eczema. The skin was scaley from the knee to the ankle. There was a scar showed on it over the crest of the tibia. This scar was not attached to the tissue, but was freely movable. The X-ray showed a fracture of the fifth metatarsal bone. The leg was colder to the touch, noticeably colder when you put your hand on it, and measurement showed it to be smaller." The witness further testified that the left arm was atrophied and scaley, had the appearance of eczema; that his reflexes were all normal; "the motions of the arm and leg were all present, but he did not have the strength in these muscles;" he could "pick up a small object and do it with precision;" there was no evidence of paralysis or nerve destruction; use of muscles was normal. The witness was asked: "Do you have any opinion, Doctor, as to whether Mr. Rexroat's not using that arm and leg are due to fear of pain in it if he does use it, or whether it is due to some mental quirk? A. Of course he told me that he could not use it because it hurt him, but after examining the man carefully I could not find any reason why there should be pains. And it is my opinion that he didn't use it because he didn't want to." On cross-examination, the witness placed the percentage of disability of the right arm and right leg at 75 per cent.

Dr. A. C. Bennett examined appellant December 17, 1941, gave him general physical neurologic and psychiatric ex-

aminations. The doctor found no physical disabling condition. He detailed method of the neurologic examination, and to explain a generalized functional motor weakness, the doctor said: "Well, one of two things are responsible for that, either the patient's mental attitude that those muscles were weak and therefore he didn't use them, or perhaps prolonged disuse of the arm would produce a functional loss of strength there, but not the result of anatomical disease of nerves or muscles." The witness further testified: "When the patient was asked to stand with both feet together he insisted upon using a crutch; contended that he couldn't raise up on his toes or back on his heels, and in studying his gait he wanted to demonstrate using a crutch, keeping his right foot semi-abducted, that is, turned out. When asked to walk without the crutch, would hop on the left foot and drag the right foot along and scrape it on the floor, yet there was good motor power throughout the examination, showing that this was a functional state of disability. The patient's excuse for it was that he had too much pain in his right foot and leg to allow him to bear his weight on this member." The witness was asked: "From your examination of him, Doctor, do you have any opinion as to whether the patient's mental condition causes or contributes to his present condition? * * * A. It is my opinion that the whole thing is based on his mental attitude toward his disability, and that he has no basic neurological anatomical disease whatsoever." The doctor further said that exercise of the patient's right arm and leg would result in improvement, but there would have to be mental cooperation to obtain the desired effect; that the doctor's physical, neurological and psychiatric examination of the patient produced no evidence of any physical organic trouble caused by the accident to his leg which would account for the disability. When asked, "Do you have any opinion, Doctor, as to what effect Mr. Rexroat's present mental attitude has with relation to creating a condition of permanent disability?" the witness replied: "Well, the present mental attitude that he has, unless it is

changed, you would consider him disabled, but it is a correctable attitude. He should have a recoverable condition state of mind, because it is purely a state of mind. It is possible to change his mental attitude under appropriate treatment." The doctor testified that the patient's condition was psychoneurosis of more than nine years' standing; that the patient "got off on the wrong foot" early in his treatment experience with an abnormal mental attitude toward himself. "Q. You used the word 'malingering' here, Doctor. Do you want to be understood as being of the opinion that this man is a malingerer? A. No, I said it raises the question when the patient is too antagonistic toward any efforts of proper aid or help toward recovery, and I said it is very difficult at times to distinguish between that that is conscious malingering and the hysterical individual who unconsciously malingers, and in this individual I feel that the weight of evidence is in favor of being hysterically subconscious of illness. * * * Q. Wouldn't the present condition of this patient more likely be the result of improper treatment or lack of proper treatment at the time of the injury than the mental condition at the present time? A. I would like to qualify it by saying about the treatment, I would not say that it was improper, but it didn't go far enough. It was not adequate in that it didn't take into consideration his personality, make-up and things like that. It probably was not recognized on the part of his doctors the importance of the nerve element in the picture, or something of that sort. I saw nothing in the history to indicate that he did not have proper treatment, but he never has had any treatment directed toward the mental disability. * * * Q. From your psychiatric examination, Doctor, I take it that you formed the opinion that the patient is firmly convinced that he has a permanent disability? A. That is the impression he gave me, yes."

Dr. J. W. Duncan examined appellant September 1, 1937, and in November, 1938. From his examination it was his opinion that the patient had suffered "a soft tissue injury more than five years previously;" that the wound healed

and that the patient's statements were in many cases evasive and contradictory; that any disability he had to the right upper extremity "could have been due to a crutch palsy," which comes only if the crutch bears firmly in the armpit and makes pressure on the nerves; that there was no disability to the right upper extremity except from disuse of the muscles; that he believed the patient did not need a crutch at the time he saw him; that there was no cause for the ache in his shoulders; that in his right lower extremity he sustained "a soft tissue injury, which healed completely without any disturbance of circulation and without any limitation of movement in any of the joints of that extremity." The doctor did not believe that the patient had any organic disability in that extremity at the time he examined him, and thought that the atrophy he showed "was due to disuse and the use of the crutch." The same conclusion was reached on the second examination. The purpose of the examination was to advise the compensation court of appellant's disability due to injury, if any. The doctor was a member of the medical advisory board of the workmen's compensation court at that time. He testified on cross-examination that he was led to believe on the second examination that the patient was malingering; that it is difficult to distinguish between hysteria and malingering; that on the second examination the doctor felt that appellant "knew pretty well that if he used his arm and his leg he would get well;" the witness thought it advisable to have the patient examined by a neuropsychiatrix, and his opinion as to whether or not the patient was malingering would be more or nearly correct. On further cross-examination, the witness was asked: "Regardless of whether Rexroat is suffering from hysteria or whether he is malingering he is at this time definitely disabled from earning a livelihood and will be until he is rehabilitated, and that was his condition at the time of your examination? A. I think he was disabled at the time I examined him from muscular weakness and atrophy from disuse, whether it was from malingering or whether from hysteria. Q. And you don't pretend to say which it was definitely? A. No, I do not."

Dr. J. W. McNamara, a member of the advisory board of the workmen's compensation court, examined appellant November 15, 1938, when Doctors Duncan and Fouts were present. He testified that this examination coincided with that made by Doctor Duncan, and in all respects was practically the same.

We deem it advisable to quote further from the testimony of Doctor Legg, the only attending physician of appellant: "Q. Doctor, would it be possible for a man to have a leg in the condition that plaintiff's is without a crushing injury to start with? A. No, I don't think so. Q. Mere disuse alone wouldn't produce such condition? A. No. * * * Q. What is the fact, Doctor, was the crushing injury to the soft tissue of the leg much more severe than a fracture of the metatarsal bone? A. Well, at that time I didn't think that the crushing was to the extent that it would cause him permanent disability, that it would absorb. There didn't appear to be much crushing underneath. It was in the top of the muscle, not underneath where it was crushed." In all the doctor's reports, he answered the question, "Has injured person obeyed orders in regard to treatment?" with "Yes." The witness felt that there was some nerve injury, but his testimony on this point is conflicting and contradictory. Quoting further: "Now, Doctor, you are more familiar with this case than any other of these doctors that testified. What is your candid opinion, is the plaintiff malingering or sincere in his disability? A. I believe he is sincere." On recross-examination: "Q. Doctor, in your report to the Compensation Court on April 22, 1940, you used this language, 'The only conclusion that I can come to is that this man's disability is self-imposed. He is either a malingerer or has developed a mental attitude that prevents him from honestly appraising his own condition. His disability would long since have ceased had the patient made the necessary effort to get the leg back in service.' A. Yes, I made that statement and I thought at that time that it was true. Now the question is whether it is mental. He is not malingering I am satisfied of that. Whether it

is mental or whether there is an injury there that they were unable to determine is more than I can answer because I don't know that. I judged only by the appearance of the muscles at the time of the injury, the amount of hemorrhage, etc. Now ordinarily it should have recovered long since, but whether there was a deeper seated injury than I was able to determine, I can't say. Dr. Bennett may be right so far as the mental part is concerned." The witness stated: "After I read Dr. Bennett's report, and that was what caused me to change. It is either that he was injured—the injury was deeper seated than I at first suspected or as Dr. Bennett says, it is a mental injury. After reading his report it strikes me that he went into it very thoroughly from a psychiatric standpoint and he is a better judge of psychopathy than I am because he makes that his business. * * * Q. He is either a malingerer or he has developed a mental attitude which prevents him from honestly appraising his own condition? A. Yes, sir."

Appellant was asked on cross-examination: "You would be unwilling to undergo treatment by a psychiatrist? A. Yes, I think it would be just foolish." On redirect examination appellant was asked: "I want to ask you this question, if the Court should direct or request you to submit yourself to any competent psychiatrist or other physician for additional treatment with a view of rehabilitating yourself, are you willing to submit to such treatment as the Court should direct? A. I will do anything I can to help use my leg." He testified he used his leg by exercise and followed the direction and advice of his physician. The foregoing constitutes the material testimony upon which the court based its decree, dismissing the appellant's petition.

It seems that the expert medical testimony is undisputed that there is no physical or nervous bar to plaintiff using the injured leg. However, the evidence is far from proving with reasonable certainty that the appellant is a malingerer. Appellee's witness, Doctor Bennett, testified to the contrary; Doctors Duncan and McNamara in their testimony did not go so far as to charge the appellant with

being a malingerer. Doctor Duncan thought appellant's condition might be due to hysteria or malingering and would not say definitely. Doctor McNamara did not consider himself qualified to give an opinion on the subject, and stated that the opinion of a psychiatrist would be more valuable than his would be. Doctor Legg, the attending physician, stated that the appellant is not malingering; he was satisfied of that. Doctor Carney, who examined the patient once, nine years after the injury, stated that in his opinion appellant was a malingerer. Doctor Bennett testified that the treatment did not go far enough; that it failed to take into consideration the "importance of the nerve element in the picture," the patient's personality, make-up and other elements heretofore set out. He further stated that the history of the case clearly indicated that the patient should have had psychiatric treatment. Doctor Rohwer's testimony is that after a long period of time appellant was still going to the doctor's office and still taking treatments. If he has developed psychoneurosis, Doctors Bennett and Rohwer agree that it is directly attributable to the accident; that is the fact or else, as Doctor Legg testified: "There is an injury there that we are unable to determine."

The appellant has submitted himself to all of the treatment offered him and to every examination requested by his employer. He followed Doctor Legg's instructions and advice. Three eminent physicians have twice examined him, and two others have examined him once, not one of whom has given any specific advice or prescribed any course of treatment. There has been no change in the appellant's condition since March 12, 1935.

From an analysis of the expert testimony, it is quite apparent that the treatment given by Doctor Legg was not adequate. It would seem that when the appellant failed to respond to treatment and was developing a mental condition, as testified to by the experts, treatment in this field should have been given, the objective being to rehabilitate the appellant, whether he was suffering physically or men-

tally. The conclusion is that he developed an attitude with reference to his injury that had all of the elements of physical pain, and this he endured throughout the period of time for which compensation was paid, and up to the present time. It is our firm belief that the treatment should not have ended.

The important issue in this case, contended for by the appellant, is whether disability under which appellant labors at the present time is due to hysteria directly attributable to the accident, or to conscious failure to allow a normal recovery, or whether it was a deep-seated and more serious injury than was apparent to the doctor in charge of the case. This question has not been passed upon.

The appellee cites numerous cases to the effect that disability chargeable against an employer is only that resulting from accident incurred in employment and not that caused by a workman's carelessness, preventing or delaying recovery. If an employee, suing for compensation under the workmen's compensation act, by his own conduct, inactivity and neglect after an injury, suffers a member of his body to become useless, when with proper effort on his part, without unusual pain or suffering, it could have been restored, he cannot recover compensation.

We have carefully considered the cases cited by the appellee and conclude that the factual situation in each of them is distinctively different than in the case at bar, and the rules of law therein announced are not applicable to the instant case, and under the circumstances presented herein.

As previously stated, the appellee stopped payment of compensation to appellant. At or subsequent to this time, the appellee did not file an application on the ground of decrease of incapacity, as provided for by section 48-142, Comp. St. 1929, as amended; hence, this original compensation action.

The petition on appeal from the compensation court alleges that the disability under which the appellant labors is not due to the injuries which he sustained, but due to his own failure or unwillingness to allow normal recovery;

that had the appellant made any effort to restore the injured member to service his disability at this time would be negligible. This allegation constitutes the charge of negligence against the appellant.

Section 48-102, Comp. St. 1929, provides: "In all cases brought under Part I of this article (48-101 to 48-108) it shall not be a defense (a) that the employee was negligent, unless and except it shall also appear that such negligence was wilful," etc.

Section 48-107, Comp. St. 1929, provides: "In all actions at law brought pursuant to Part I of this article (48-101 to 48-108) the burden of proof to establish wilful negligence of the injured employee shall be on the defendant." The two foregoing sections place the burden of proof of establishing negligence in a compensation action on the parties pleading such negligence. Ordinarily, the employer endeavors to show that the employee is a malingerer. The term is defined in *Great Western Sugar Co. v. Hewitt,* 127 Neb. 790, 257 N. W. 61, as follows:

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

Applying the above definition to the facts and circumstances in the instant case, the evidence falls short of establishing with reasonable certainty that the appellant is a malingerer. Further, the evidence is insufficient to show wilful negligence on the part of the appellant as charged by the appellee. The award was originally made on March 20, 1935, and amounts paid, as heretofore set out, to February 22, 1940. The benefits were accepted by appellant, with no appeal respecting such amounts until the present action wherein he asks for additional compensation, in that the former compensation was not accurately computed. The compensation judge in the instant case set forth the judgment as shown which increased or changed the amount of compensation from the original judgment, this in pur-

suance of his analysis of the appellant's compensation due him under section 48-121, Comp. St. 1929; that is, the appellant suffered temporary total disability from and after the injury for 51 5/7 weeks, which would entitle him, under the current wage of $21 each week, to the amount of $14 per week, and the sum of $10.50 per week for a period of 248 2/7 weeks, where temporary total disability is followed by permanent partial disability. This disability was 75 per cent. for loss of the use of his right leg and right arm. This constituted the compensation allowance for the first 300 weeks; subsequent thereto the allowance of $7.09 each week thereafter for life, based on partial permanent disability then suffered by the appellant. This latter award is in keeping with the evidence with respect to the disability suffered by the appellant, and it was through no fault of the appellant that after a period of eight years the employer suddenly stopped payment of all disability. This action, constituting an original compensation action, again determines the amounts to be paid as compensation and the disability suffered by the appellant. The appellee sought to deprive the appellant of further compensation and force him to again prove the extent of his disability and the amount he would be entitled to recover for the same, and attacked that right by the affirmative allegation, as hereinbefore set out, in the petition on appeal.

We conclude, under the circumstances, that the appellant is entitled to the award as made by the compensation commissioner in the instant case. The cause is reversed and remanded, with instructions to enter judgment accordingly, with full credit to be given the appellee for the amounts paid.

REVERSED.

FIRST NATIONAL BANK OF MISSOURI VALLEY, IOWA, APPELLEE, V. ELVIN E. MCFERRIN, APPELLANT.

7 N. W. (2d) 173

FILED DECEMBER 23, 1942. No. 31471.

1. **Courts.** The courts of Nebraska are without jurisdiction over the subject-matter in an action in ejectment when the real estate involved is not a part of the Nebraska domain.
2. **States.** Lands cut off from the mainland of a state by avulsion do not change their status but remain a part of the state from which they were cut off.
3. ———. "The eastern boundary of Nebraska is the 'middle of the channel' of the Missouri river. * * * The western boundary of Iowa east of Nebraska is the same." *Miller v. McLaughlin*, 118 Neb. 174, 224 N. W. 18.
4. ———. "The middle of the channel of the Missouri river is the boundary line between the states of Nebraska and Iowa." *Miller v. McLaughlin*, 281 U. S. 261, 50 S. Ct. 296.
5. **Waters:** STATES. If the lands in question here, from the date of acquisition of this territory by the Louisiana purchase in 1803 to 1846 the date when the state of Iowa was admitted to the Union, were west of the middle line of the Missouri river, the jurisdiction of Nebraska rightfully attached to it. If the river has subsequently turned its course and now runs west of the lands, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the states, and the lands do not in consequence of this action of the water change their owner.
6. **States.** It was the intention of the congress of the United States in the formation of the state of Nebraska out of the territory obtained through the Louisiana purchase that the eastern boundary adjacent to the state of Iowa should be coincident and coterminus with the middle of the channel of the Missouri river as it existed at the date of purchase of the territory, except to the extent that it was abridged, if it was abridged, by any rights acquired by the state of Iowa through the enabling act whereby that state was admitted into the Union.
7. **Ejectment.** If it be shown that these lands were cut off from the territory of Nebraska by avulsion in 1856 or 1857, the district court for Washington county, Nebraska, had jurisdiction of the subject-matter of the action.
8. ———. The evidence of the defendant was sufficient to require submission of the question of whether or not this land was in the state of Nebraska.

9. **Appeal.** In reviewing a directed verdict, or the discharge of a jury and rendition of judgment by the trial court, this court will consider as conclusively established every fact which the evidence proves, or tends to establish the contention of the party against whom the verdict was directed or judgment rendered, and if from the entire evidence thus construed different minds might reasonably draw different conclusions it will be deemed error on the part of the trial court to have directed such verdict or rendered such judgment.

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

Chatt & Ellenberger, for appellant.

O'Hanlon & O'Hanlon and *Clarence W. Kellogg, contra.*

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

YEAGER, J.

This is an action in ejectment by the First National Bank of Missouri Valley, Iowa, a corporation, plaintiff and appellee, against Elvin E. McFerrin and others, defendants, which was tried to a jury in the district court for Washington county, Nebraska. At the conclusion of the evidence the plaintiff moved the court to discharge the jury and render judgment in favor of plaintiff and against the defendants in accordance with the prayer of the petition, which motion was sustained and judgment was accordingly entered. From this judgment Elvin E. McFerrin is the only appellant.

The land involved in this action is on the east or Iowa side of the Missouri river, and is described in the petition as follows: Tax lot number seven (7), the west half of the southwest quarter (W½ SW¼) and the southeast quarter of the southwest quarter (SE¼ SW¼), all in section twenty (20); the east half of the southeast quarter (E½ SE¼) and the southeast quarter of the northeast quarter (SE¼ NE¼), all in section nineteen (19); all in township nineteen (19) north, range twelve (12) east of the sixth P. M., in Washington county, Nebraska.

The petition declares that the fee simple title to the lands is in the plaintiff, that the defendant Elvin E. McFerrin is in possession, and that plaintiff is entitled to immediate possession.

The answer on which the case was tried contains a general denial, a denial of plaintiff's title and right of possession and an allegation that the court was without jurisdiction over the subject-matter.

Numerous errors have been assigned as grounds for reversal, but only a few of them require consideration, and these will be discussed in the order of their relative importance. The assignment of first importance is that the court erred in entertaining jurisdiction of the subject-matter of the action, for the reason that appellant contends that the real estate involved here is not within the boundaries of the state of Nebraska.

There can be no question about the proposition that, if this real estate is not a part of the Nebraska domain, the district court for Washington county, Nebraska, was without jurisdiction to entertain this action in ejectment. *Fall v. Fall,* 75 Neb. 104, 120, 106 N. W. 412, 113 N. W. 175; *Rober v. Michelsen,* 82 Neb. 48, 116 N. W. 949; *Wimer v. Wimer,* 82 Va. 890, 5 S. E. 536; *Lindley v. O'Reilly,* 50 N. J. Law, 636, 15 Atl. 379; *Fall v. Eastin,* 215 U. S. 1, 30 S. Ct. 3.

In 1934 the appellee was the owner of a judgment obtained in Iowa against the appellant. In that year it instituted action on the judgment against the appellant by attachment of the real estate here involved in the district court for Washington county, Nebraska, claiming, of course, that the real estate was in Washington county, Nebraska. The real estate was sold to the appellee pursuant to the judgment on the attachment and sale thereof was confirmed on August 10, 1936. The appellant made no personal appearance in that action. It is this judgment and this sale which form the basis of the title and right of possession asserted by the appellee here.

To support his claim that this real estate is not a part

of the Nebraska domain the appellant asserts that before statehood it was either a part of the territory of Nebraska and that it was cut off by avulsion in 1856, or that certain lands in the same general location were obliterated and that thereafter these lands were builded onto the state of Iowa by accretion, but denies that any of the land ever was within or a part of the state of Nebraska.

The appellee states that these lands were cut off from the territory of Nebraska by avulsion, and asserts that the avulsion occurred in the years of 1856 and 1857 and before Nebraska statehood. In this connection it is the substantial contention of appellee that the land is beyond the western line of Iowa and, having been a part of the territory of Nebraska though having been cut off and separated from the territory by the main channel of the Missouri river before Nebraska statehood, which condition has remained substantially unchanged since, it is and has been always since statehood a part of the state.

We are not permitted to concern ourselves with the question of whether or not the land is in the state of Iowa, and not even with any decisions of the courts of that state declaring the location of the land with reference to its state line or of that of Nebraska. Obviously the courts of that state may declare it not to be a part of its domain, but they may make no binding determination with reference to the Nebraska domain. This is corollary to the proposition already mentioned that if the real estate in question is not a part of the Nebraska domain the district court for Washington county, Nebraska, was without jurisdiction to entertain the action and in consequence the decisions applicable there are applicable here.

In order that an understanding may be had of the problem presented here, it becomes necessary in brief to recite some of the history of the admission of Iowa and Nebraska into statehood.

The state of Iowa was admitted to the Union of states in the year 1846 pursuant to an enabling act of the national congress. By this act the western line of the state in the

vicinity of the land in question here was fixed at the middle of the channel of the Missouri river. The parties here do not question that at that time the land in issue here, if it was then subject to identification, was not within the Iowa boundaries. The appellee contends that the boundary has not substantially changed at all, while the appellant contends that it has changed only by the addition of lands including these by accretion to Iowa by imperceptible action of the river. It therefore follows that both parties place the center of the main channel of the Missouri river at the date of admission of Iowa to statehood to the east of this land, if it was subject to identification at that time. It becomes clear then that the parties are in accord on the proposition that, if this is identifiable land cut off by avulsion, it never was during any period in question a part of the domain of the state of Iowa.

The state of Nebraska was admitted into the Union of states on March 1, 1867, pursuant to an enabling act of congress passed April 19, 1864, 13 U. S. St. at Large, p. 47. The act geographically fixed the boundary of that part of the state bordering the Missouri river, which includes the boundary in question in this action, as follows: " * * * thence down the middle of the channel of said Missouri river, and following the meanderings thereof, to the place of beginning." It will be noted that it does not fix the eastern boundary of Nebraska as coincident with the western boundary of Iowa. This is the same description as is contained in the Constitution under which Nebraska came into the Union in 1867. Const. 1866, art. X, sec. 1. All of the conditions of the enabling act were accepted by the terms of the Constitution. Const. 1866, art. XI, sec. 6.

Accordingly then the middle of the channel of the Missouri river was, in 1864, the date of the enabling act, and in 1867, the date of Nebraska's admission to the Union, to the west of the land in question. Both agree that this land, if it existed as such, was not west of the middle of the channel of the Missouri river at any time after 1857.

Based upon this fact the appellant contends that under

the boundary description contained in the enabling act of congress, above referred to, and the 1866 Constitution of Nebraska (Cobbey's Ann. St. 1909, p. 69), this land never was a part of the state of Nebraska domain.

This contention of appellant is inescapable unless the congress contemplated in the enabling act of 1864 that the eastern boundary of Nebraska should not necessarily be the middle line of the Missouri river as it then existed. Did congress otherwise contemplate? The effect of appellee's contention is that it did.

There is nothing in the enabling act of congress, the Nebraska Constitution of 1866, the congressional act of February 9, 1867 (Cobbey's Ann. St. 1909, p. 53), admitting the state to the Union, or the presidential proclamation of admission (Cobbey's Ann. St. 1909, p. 56), which makes any reference to any survey or any line except the middle of the channel of the Missouri river.

As authority for its position the appellee calls attention to the statements contained in the finding of the district court quoted in and apparently approved by the opinion in *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N. W. 328, in which case jurisdiction of land in the same general location as the land here was being considered, wherein it was stated: " * * * and the courts of Nebraska have jurisdiction of all lands within the United States survey of 1856 without regard to the enabling act by which Nebraska was admitted into the Union, except such lands, if any, as may have accreted to the Iowa bank before the said avulsion occurred;" and those contained in *Miller v. McLaughlin*, 118 Neb. 174, 224 N. W. 18: "The eastern boundary of Nebraska is the 'middle of the channel' of the Missouri river. * * * The western boundary of Iowa east of Nebraska is the same;" also those contained in *Miller v. McLaughlin*, 281 U. S. 261, 50 S. Ct. 296: "The middle of the channel of the Missouri river is the boundary line between the states of Nebraska and Iowa."

In the cases of *Miller v. McLaughlin, supra*, the police power and in consequence the jurisdiction of the states of

Iowa and Nebraska over the Missouri river as a common boundary were the only matters for consideration, and without consideration of exceptional circumstances such as are presented here the general assumption was indulged that the boundaries of the two states coincided at the middle of the channel of the river.

The case of *Iowa Railroad Land Co. v. Coulthard, supra,* is in point, but it is rested on a stated United States survey of 1856. We think the conclusion is correct, but that the limiting of the basis therefor is erroneous. No reason is found in the authorities for grounding the jurisdiction of the courts of the state of Nebraska on the named or any other government survey.

The true reason for the jurisdiction of the courts of Nebraska over this land, if it is land cut off from the mainland by avulsion, is made clear by the opinion in *Missouri v. Kentucky,* 11 Wall. 395, 20 L. Ed. 116. This was an action by the state of Missouri against the state of Kentucky for decree declaring that Wolf Island, an island in the Mississippi river between Missouri and Kentucky, was a part of the domain of the state of Missouri, and cross-action by the state of Kentucky.

Kentucky was admitted into the Union as a state on June 1, 1792. Missouri was admitted in 1820. As pointed out in the opinion in *Missouri v. Kentucky, supra,* the territory which became the state of Kentucky was a part of "the ancient right and possession of Virginia," and by the treaty of 1763 the boundary was the middle of the bed of the Mississippi river. As is also pointed out, Kentucky succeeded to this right and possession in 1792. As is further pointed out, this line was recognized by the treaty of this country with Great Britain in 1783.

Having all of these dates and incidents in mind the court said in the opinion: "It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the is-

land, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States and the island does not, in consequence of this action of the water, change its owner."

It appears then, assuming that the land in question here was cut off from the territory of Nebraska by avulsion, that the following paraphrase of the language quoted from *Missouri v. Kentucky, supra,* should be controlling here: It follows, therefore, that if the lands in question here, from the date of acquisition of this territory by the Louisiana purchase in 1803, to 1846, the date when the state of Iowa was admitted to the Union, were west of the middle line of the Missouri river, the jurisdiction of Nebraska rightfully attached to it. If the river has subsequently turned its course and now runs west of the lands, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the states, and the lands do not in consequence of this action of the water change their owner.

On this authority it is the opinion of this court that it was the intention of the congress of the United States in the formation of the state of Nebraska out of the territory obtained through the Louisiana purchase that the eastern boundary adjacent to the state of Iowa should be coincident and coterminus with the middle of the channel of the Missouri river as it existed at the date of purchase of the territory, except to the extent that it was abridged, if it was abridged, by any rights acquired by the state of Iowa through the enabling act whereby that state was admitted into the Union.

The appellant cites, among others, the cases of *George v. Pierce County,* 111 Wash. 495, 191 Pac. 406; *Moss v. Gibbs,* 10 Heisk. (Tenn.) 283; *Laxon v. State,* 126 Tenn. 302, 148 S. W. 1059, in support of his contention. It is quite true that they do so very specifically, but they cannot justify this court in an attempt to override the declaration

of the United States supreme court, the final authoritative tribunal in determination of disputed boundaries between the states.

We conclude, therefore, that if it shall be shown that these lands were cut off from the territory of Nebraska in 1856 or 1857, the district court for Washington county, Nebraska, had jurisdiction of the subject-matter of this action. We conclude further that if there was an issue as to whether or not these lands were within the state of Nebraska the court had jurisdiction to try that issue.

By its petition the plaintiff put in issue the location of the land by its description and declaration that it was in Washington county, Nebraska. From an examination of the bill of exceptions we conclude that the evidence of plaintiff was sufficient for submission of that issue to a jury and to sustain a verdict in favor of plaintiff.

In denial of the contention of the plaintiff on this issue the defendant adduced evidence that the lands in question cannot be identified as lands cut off from Nebraska by avulsion. The substance of his contention is that there was an avulsion in 1856, but that those lands were obliterated by the action of the river, and that these lands were added to the Iowa side from the bed of the river or by accretion.

On the basis of this evidence he contends that it was error for the court to discharge the jury and render judgment in favor of the plaintiff. In support of his position he invokes the rule that in reviewing a directed verdict, or the discharge of a jury and rendition of a judgment, this court will consider as conclusively established every fact which the evidence proves, or tends to establish the contention of the party against whom the verdict was directed or the judgment rendered, and if from the entire evidence thus construed different minds might reasonably draw different conclusions it will be deemed error on the part of the trial court to have directed a verdict or rendered such judgment. *Central Nat. Bank v. Ericson*, 92 Neb. 396, 138 N. W. 563; *Littlejohn v. Fink*, 109 Neb. 282, 190 N. W. 1020; *Petersen v. Ohio Casualty Ins. Co.*, 131 Neb. 128, 267 N. W. 393.

From an examination of the evidence without setting it forth at large or in substance, and in the light of the authority of this rule, we are convinced that the trial court erred in refusing to submit this controverted issue to the jury.

The appellant complains that the evidence of title and right of possession in the plaintiff was insufficient, assuming that the lands are in Nebraska, to sustain an action in ejectment. While we are not obliged to determine the question at this time it is presented, and we deem it proper to respond to the contention of appellant here in order that misunderstanding may be avoided on another trial of this case.

In an ejectment action the plaintiff must plead his legal title and present right of possession. *Omaha Real Estate & Trust Co. v. Reiter,* 47 Neb. 592, 66 N. W. 658; *Wells v. Steckelberg,* 52 Neb. 597, 72 N. W. 865; *Comstock v. Kerwin,* 57 Neb. 1, 77 N. W. 387; *Runkle v. Welty,* 78 Neb. 571, 574, 111 N. W. 463, 113 N. W. 160.

In such action where the defendant is in possession of the disputed lands under claim of ownership plaintiff must recover on the superiority of his title, and, if he relies on a record or paper title, he must show a regular chain of title from the government, or from some grantor in possession, or from a common source from which each of the litigants claims. *Runkle v. Welty, supra.*

The defendant here was in possession and the plaintiff did not show a regular chain of title from the government, nor did it show title from a grantor in possession. It did, however, show record title coming from the defendant in possession by virtue of the judgment in the attachment proceeding hereinbefore referred to. The one as effectively divests title as the other, and no reason suggests itself why a plaintiff should be required to go back beyond the deed which divests the defendant of title and vests that same title in the plaintiff.

The plaintiff here claimed title through the defendant, and in this action it is the holding that it is not required

to go back farther than the defendant in proving its title. See *Byers v. Rodabaugh*, 17 Ia. 53.

The appellant urges that a judgment in ejectment cannot be sustained in this action for the reason that from the description set forth and sought to be proved the location of the land in dispute cannot be located. With this contention we are unable to agree.

The rule in this state, as laid down in the first paragraph of the syllabus of *Lane v. Abbott*, 23 Neb. 489, 37 N. W. 82, is that, "In order that a plaintiff may recover real estate in an action of ejectment, his description of the land in dispute must be such as would enable a competent surveyor to locate it by referring to deeds, writings or known objects by which the exact land can be identified."

Certainly, within this rule a competent surveyor, by reference to and extension of section, township and range lines of well-known and recognized surveys in the state of Nebraska, would be able to locate the exact land in dispute herein.

Errors with regard to cross-examination and the admission of evidence are assigned and discussed, but since they probably will not recur on a retrial they will not be considered.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

The following opinion on motion for rehearing was filed April 9, 1943. *Former judgment of reversal adhered to.*

1. **Courts.** The courts of Nebraska are without jurisdiction over the subject-matter in an action in ejectment when the real estate involved is not a part of the Nebraska domain.
2. **States.** Lands cut off from the mainland of a state by avulsion do not change their status but remain a part of the state from which they were cut off.
3. ———. If the lands in question in 1846, the date when the state of Iowa was admitted to the Union, were west of the middle line of the Missouri river, the jurisdiction of Nebraska rightfully attached to them. If the river has subsequently changed

its course by avulsion and now runs west of the lands, the status of the sovereign ownership or attachment was not thereby changed, for the channel which the river abandoned remains, as before, the boundary.

4. ———. It was the intention of the congress of the United States in the formation of the organized territory of Nebraska and of the state of Nebraska that the eastern boundary adjacent to the state of Iowa should be coincident and coterminus with the middle of the channel of the Missouri river as it existed at the time the state of Iowa was admitted into the Union.
5. ———. By the organic act of 1854 the eastern boundary of the organized territory of Nebraska was fixed as the middle of the main channel of the Missouri river.
6. ———. If the lands in question were west of the middle line of the Missouri river in 1854 the jurisdiction of the organized territory of Nebraska attached to them. If the river has subsequently turned its course by avulsion and now runs west of the lands, the status of the sovereign ownership or attachment was not thereby changed, for the channel which the river abandoned remains, as before, the boundary.
7. **Courts.** If it be shown that these lands were cut off from the territory of Nebraska by avulsion in 1856 and 1857, the district court for Washington county, Nebraska, had jurisdiction of the subject-matter of the action.
8. ———. The evidence of the defendant was sufficient to require submission of the question of whether or not this land was in the state of Nebraska.
9. **Appeal.** In reviewing a directed verdict, or the discharge of a jury and rendition of judgment by the trial court, this court will consider as conclusively established every fact which the evidence proves, or tends to establish the contention of the party against whom the verdict was directed or judgment rendered, and if from the entire evidence thus construed different minds might reasonably draw different conclusions it will be deemed error on the part of the trial court to have directed such verdict or rendered such judgment.

YEAGER, J.

This action comes here at this time on motion for clarification of the opinion and for rehearing and it appears from further study that there is a more conclusive reason for a determination of the true location of the land in question, assuming that it is avulsion resulting from the action of the

Missouri river in 1856 or 1857, than those stated in the original opinion. Therefore, though the ultimate determination is the same, it seems advisable that a new opinion should be prepared. Since the changes are such that they could not well be assimilated into the original without confusion, it seems that an entire opinion should be substituted for the one adopted. The original opinion appears as *First Nat. Bank v. McFerrin, ante,* p. 617, 7 N. W. (2d) 173.

This is an action in ejectment by the First National Bank of Missouri Valley, Iowa, a corporation, plaintiff and appellee, against Elvin E. McFerrin and others, defendants, which was tried to a jury in the district court for Washington county, Nebraska. At the conclusion of the evidence the plaintiff moved the court to discharge the jury and render judgment in favor of plaintiff and against the defendants in accordance with the prayer of the petition, which motion was sustained and judgment was accordingly entered. From this judgment Elvin E. McFerrin is the only appellant.

The land involved in this action is on the east or Iowa side of the Missouri river, and is described in the petition as follows: Tax lot number seven (7), the west half of the southwest quarter (W½SW¼) and the southeast quarter of the southwest quarter (SE¼SW¼), all in section twenty (20); the east half of the southeast quarter (E½SE¼) and the southeast quarter of the northeast quarter (SE¼ NE¼), all in section nineteen (19); all in township nineteen (19) north, range twelve (12), east of the sixth P. M., in Washington county, Nebraska.

The petition declares that the fee simple title to the lands is in the plaintiff, that the defendant Elvin E. McFerrin is in possession, and that plaintiff is entitled to immediate possession.

The answer on which the case was tried contains a general denial, a denial of plaintiff's title and right of possession and an allegation that the court was without jurisdiction over the subject-matter.

Numerous errors have been assigned as grounds for re-

versal, but only a few of them require consideration, and these will be discussed in the order of their relative importance. The assignment of first importance is that the court erred in entertaining jurisdiction of the subject-matter of the action, for the reason that appellant contends that the real estate involved here is not within the boundaries of the state of Nebraska.

There can be no question about the proposition that, if this real estate is not a part of the Nebraska domain, the district court for Washington county, Nebraska, was without jurisdiction to entertain this action in ejectment. *Fall v. Fall,* 75 Neb. 104, 120, 106 N. W. 412, 113 N. W. 175; *Rober v. Michelsen,* 82 Neb. 48, 116 N. W. 949; *Wimer v. Wimer,* 82 Va. 890, 5 S. E. 536; *Lindley v. O'Reilly,* 50 N. J. Law, 636, 15 Atl. 379; *Fall v. Eastin,* 215 U. S. 1, 30 S. Ct. 3.

In 1934 the appellee was the owner of a judgment obtained in Iowa against the appellant. In that year it instituted action on the judgment against the appellant by attachment of the real estate here involved in the district court for Washington county, Nebraska, claiming, of course, that the real estate was in Washington county, Nebraska. The real estate was sold to the appellee pursuant to the judgment on the attachment and sale thereof was confirmed on August 10, 1936. The appellant made no personal appearance in that action. It is this judgment and this sale which form the basis of the title and right of possession asserted by the appellee here.

To support his claim that this real estate is not a part of the Nebraska domain the appellant asserts that before statehood it was either a part of the territory of Nebraska and that it was cut off by avulsion in 1856, or that certain lands in the same general location were obliterated and that thereafter these lands were builded onto the state of Iowa by accretion, but denies that any of the land ever was within or a part of the state of Nebraska.

The appellee states that these lands were cut off from the territory of Nebraska by avulsion, and asserts that the avulsion occurred in the years of 1856 and 1857 and before Ne-

braska statehood. In this connection it is the substantial contention of appellee that the land is beyond the western line of Iowa and, having been a part of the territory of Nebraska though having been cut off and separated from the territory by the main channel of the Missouri river before Nebraska statehood, which condition has remained substantially unchanged since, it is and has been always since statehood a part of the state.

We are not permitted to concern ourselves with the question of whether or not the land is in the state of Iowa, and not even with any decisions of the courts of that state declaring the location of the land with reference to its state line or of that of Nebraska. Obviously the courts of that state may declare it not to be a part of its domain, but they may make no binding determination with reference to the Nebraska domain. This is corollary to the proposition already mentioned that if the real estate in question is not a part of the Nebraska domain the district court for Washington county, Nebraska, was without jurisdiction to entertain the action and in consequence the decisions applicable there are applicable here.

In order that an understanding may be had of the problem presented here, it becomes necessary in brief to recite some of the history of the admission of Iowa and Nebraska into statehood.

The state of Iowa was admitted to the Union of states in the year 1846 pursuant to an enabling act of the national congress. By this act the western line of the state in the vicinity of the land in question here was fixed at the middle of the channel of the Missouri river. The parties here do not question that at that time the land in issue here, if it was then subject to identification, was not within the Iowa boundaries. The appellee contends that the boundary has not substantially changed at all, while the appellant contends that it has changed only by the addition of lands including these by accretion to Iowa by imperceptible action of the river. It therefore follows that both parties place the center of the main channel of the Missouri river at the date of

admission of Iowa to statehood to the east of this land, if it was subject to identification at that time. It becomes clear then that the parties are in accord on the proposition that, if this is identifiable land cut off by avulsion, it never was during any period in question a part of the domain of the state of Iowa.

The state of Nebraska was admitted into the Union of states on March 1, 1867, pursuant to an enabling act of congress passed April 19, 1864, 13 U. S. St. at Large, p. 47. The act geographically fixed the boundary of that part of the state bordering the Missouri river, which includes the boundary in question in this action, as follows: " * * * thence down the middle of the channel of said Missouri river, and following the meanderings thereof, to the place of beginning." It will be noted that it does not fix the eastern boundary of Nebraska as coincident with the western boundary of Iowa. This is the same description as is contained in the Constitution under which Nebraska came into the Union in 1867. Const. 1866, art. X, sec. 1. All of the conditions of the enabling act were accepted by the terms of the Constitution. Const. 1866, art. XI, sec. 6.

Accordingly then the middle of the channel of the Missouri river was, in 1864, the date of the enabling act, and in 1867, the date of Nebraska's admission to the Union, to the west of the land in question. Both agree that this land, if it existed as such, was not west of the middle of the channel of the Missouri river at any time after 1857.

Based upon this fact the appellant contends that under the boundary description contained in the enabling act of congress, above referred to, and the 1866 Constitution of Nebraska (Cobbey's Ann. St. 1909, p. 69), this land never was a part of the state of Nebraska domain.

This contention of appellant is inescapable unless the congress contemplated in the enabling act of 1864, that the eastern boundary of Nebraska should not necessarily be the middle line of the Missouri river as it then existed. Did congress otherwise contemplate? The effect of appellee's contention is that it did.

There is nothing in the enabling act of congress, the Nebraska Constitution of 1866, the congressional act of February 9, 1867 (Cobbey's Ann. St. 1909, p. 53), admitting the state to the Union, or the presidential proclamation of admission (Cobbey's Ann. St. 1909, p. 56), which makes any reference to any survey or any line except the middle of the channel of the Missouri river.

As authority for its position the appellee calls attention to the statements contained in the finding of the district court quoted in and apparently approved by the opinion in *Iowa Railroad Land Co. v. Coulthard,* 96 Neb. 607, 148 N. W. 328, in which case jurisdiction of land in the same general location as the land here was being considered, wherein it was stated: " * * * and the courts of Nebraska have jurisdiction of all lands within the United States survey of 1856 without regard to the enabling act by which Nebraska was admitted into the Union, except such lands, if any, as may have accreted to the Iowa bank before the said avulsion occurred;" and those contained in *Miller v. McLaughlin,* 118 Neb. 174, 224 N. W. 18: "The eastern boundary of Nebraska is the 'middle of the channel' of the Missouri river. * * * The western boundary of Iowa east of Nebraska is the same;" also those contained in *Miller v. McLaughlin,* 281 U. S. 261, 50 S. Ct. 296: "The middle of the channel of the Missouri river is the boundary line between the states of Nebraska and Iowa."

In the cases of *Miller v. McLaughlin, supra,* the police power and in consequence the jurisdiction of the states of Iowa and Nebraska over the Missouri river as a common boundary were the only matters for consideration, and without consideration of exceptional circumstances such as are presented here the general assumption was indulged that the boundaries of the two states coincided at the middle of the channel of the river.

The case of *Iowa Railroad Land Co. v. Coulthard, supra,* is in point, but it is rested on a stated United States survey of 1856. We think the conclusion is correct, but that the limiting of the basis therefor is erroneous. No reason is

found in the authorities for grounding the jurisdiction of the courts of the state of Nebraska on the named or any other government survey.

The true reason for the jurisdiction of the courts of Nebraska over this land, if it is land cut off from the mainland by avulsion, is pointed to by the opinion in *Missouri v. Kentucky,* 11 Wall. 395, 20 L. Ed. 116. This was an action by the state of Missouri against the state of Kentucky for decree declaring that Wolf Island, an island in the Mississippi river between Missouri and Kentucky, was a part of the domain of the state of Missouri, and cross-action by the state of Kentucky.

Kentucky was admitted into the Union as a state on June 1, 1792. Missouri was admitted in 1820. As pointed out in the opinion in *Missouri v. Kentucky, supra,* the territory which became the state of Kentucky was a part of "the ancient right and possession of Virginia," and by the treaty of 1763 the boundary was the middle of the bed of the Mississippi river. As is also pointed out, Kentucky succeeded to this right and possession in 1792. As is further pointed out. this line was recognized by the treaty of this country with Great Britain in 1783.

Having all these dates and incidents in mind the court said in the opinion: "It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before. the boundary between the States and the island does not, in consequence of this action of the water, change its owner."

The effect of this is that if Wolf Island was a part of the Kentucky domain during its status either as a territory or a state it could never have become a part of Missouri. This is important in that the court evidenced a purpose to hold that lands on one side of a navigable stream shall be, be-

come and remain a part of the adjacent area, whether it be state or territory, and that it shall never become a part of a state on the other side where the main channel of the stream is fixed as its boundary.

Applying that intention to the case at bar it will be observed that prior to 1846 the areas on both sides of the Missouri river in question were territorial lands of the United States government. It requires no citation of authority to state that the congress had the power to divide this territory into territorial divisions, states, or territories and states. In 1846 the congress constituted the state of Iowa and fixed its western boundary as the then main channel of the Missouri river.

Reasoning from the deduction we have thus made from *Missouri v. Kentucky, supra,* from this division and the establishment of the Iowa line, all that was on the western side of the line remained, or became a part of the Nebraska territory.

From this date to 1854 it will be admitted that the line was only a line bordering a large unorganized territory to the west and that the congress could have established any line in division of territory it chose. It never made a division prior to 1854.

In 1854 the congress approved an act organizing the territory to the west into the territory of Nebraska. 10 U. S. St. at Large, ch. 59, p. 277; Cobbey's Ann. St. 1909, p. 40. Section one of the act is as follows: "Be it Enacted by the Senate and House of Reperesentatives of the United States of America in Congress Assembled, That all that part of the Territory of the United States included within the following limits, except such portions thereof as are hereinafter expressly exempted from the operations of this act, to-wit: beginning at a point in the Missouri river, where the fortieth parallel of north latitude crosses the same; thence west on said parallel to the east boundary of the Territory of Utah, on the summit of the Rocky Mountains; thence on said summit northward to the forty-ninth parallel of north latitude; thence east on said parallel to the

western boundary of the Territory of Minnesota; thence southward on said boundary to the Missouri river; thence down the main channel of said river to the place of beginning, be, and the same is, hereby created into a temporary government, by the name of the Territory of Nebraska: and when admitted as a State or States, the said Territory, or any portion of the same, shall be received into the Union with or without slavery, as their Constitution may prescribe at the time of their admission."

It will be noted that in this act the congress used the same designation for the eastern boundary of this organized territory as it used for the western boundary of Iowa.

The reasonable inference to be drawn from this is that congress contemplated that all of the unorganized territory to the west was a part of the Nebraska territory and intended that it should be and become a part of the organized territory of Nebraska.

It is the opinion of this court that it was the intention of the congress of the United States in the formation of the organized territory of Nebraska out of the territory west of the Missouri river and the formation of the state of Nebraska out of the territory of Nebraska that the eastern boundary adjacent to the state of Iowa should be coincident and coterminus with the middle of the channel of the Missouri river as it existed at the time Iowa was admitted into the Union.

The appellant cites, among others, the cases of *George v. Pierce County*, 111 Wash. 495, 191 Pac. 406; *Moss v. Gibbs*, 10 Heisk. (Tenn.) 283; *Laxon v. State*, 126 Tenn. 302, 148 S. W. 1059, in support of his contention. It is quite true that they do so very specifically, but they cannot justify this court in an attempt to override what we consider a reasonable inference to be drawn from other decisions and the evident purpose and intent inferable from the acts of congress herein referred to.

Even assuming the incorrectness of our position that the line between the states of Iowa and Nebraska must be considered as having been established as of the date of the ad-

mission of Iowa to the Union, still on another ground it is necessary to hold for the purposes of this action, if this was land removed from the western side of the river by avulsion in 1856 or 1857, that it belonged to the state of Nebraska. As has been pointed out in the quotation from section one of the organic act of the territory of Nebraska, the eastern boundary of the organized territory was by congress declared to be east of the lands in question. Also as pointed out, this declaration was made at least two years before the claimed avulsion occurred. Nothing has transpired since 1854 to alter the attachment of these lands.

This provision prescribed the eastern boundary of the territory at that time and the implication is clear that it was also to become the boundary of a contemplated state unless expressly exempted by congress from the operation of the act in this respect. It was never expressly exempted. As has already been noted the Nebraska enabling act and the Nebraska Constitution use the same description of the boundary.

From this it is clear that the congress, by the organic act, at least from the date of approval of this act, intended that all lands west of the main channel of the Missouri river in 1854 should be a part of the organized territory of Nebraska. If this land was cut off by avulsion, the avulsion did not take place until the years 1856 and 1857, hence it never did and never could have become a part of Iowa by avulsion from the opposite side of the river.

We conclude that, there having been no specific expression of a contrary intention or exemption, the congress in the enabling act for statehood intended the boundary to be the same as that fixed in the organic act. It follows then that if this land was cut off from the territory of Nebraska in 1856 or 1857 it still belongs to Nebraska and the district court of Washington county, Nebraska, had jurisdiction over the subject-matter of the action. We conclude further that if there was an issue as to whether or not these lands were within the state of Nebraska, the court had jurisdiction to try that issue.

By its petition the plaintiff put in issue the location of the land by its description and declaration that it was in Washington county, Nebraska. From an examination of the bill of exceptions we conclude that the evidence of plaintiff was sufficient for submission of that issue to a jury and to sustain a verdict in favor of plaintiff.

In denial of the contention of the plaintiff on this issue the defendant adduced evidence that the lands in question cannot be identified as lands cut off from Nebraska by avulsion. The substance of his contention is that there was an avulsion in 1856, but that those lands were obliterated by the action of the river, and that these lands were added to the Iowa side from the bed of the river or by accretion.

On the basis of this evidence the defendant contends that it was error for the court to discharge the jury and render judgment in favor of the plaintiff. In support of his position he invokes the rule that in reviewing a directed verdict, or the discharge of a jury and rendition of a judgment, this court will consider as conclusively established every fact which the evidence proves, or tends to establish the contention of the party against whom the verdict was directed or the judgment rendered, and if from the entire evidence thus construed different minds might reasonably draw different conclusions it will be deemed error on the part of the trial court to have directed a verdict or rendered such judgment. *Central Nat. Bank v. Ericson*, 92 Neb. 396, 138 N. W. 563; *Littlejohn v. Fink*, 109 Neb. 282, 190 N. W. 1020; *Petersen v. Ohio Casualty Ins. Co.*, 131 Neb. 128, 267 N. W. 393.

From an examination of the evidence without setting it forth at large or in substance, and in the light of the authority of this rule, we are convinced that the trial court erred in refusing to submit this controverted issue to the jury.

The appellant complains that the evidence of title and right of possession in the plaintiff was insufficient, assuming that the lands are in Nebraska, to sustain an action in ejectment. While we are not obliged to determine the ques-

tion at the time, it is presented, and we deem it proper to respond to the contention of appellant here in order that misunderstanding may be avoided on another trial of this case.

In an ejectment action the plaintiff must plead his legal title and present right of possession. *Omaha Real Estate & Trust Co. v. Reiter,* 47 Neb. 592, 66 N. W. 658; *Wells v. Steckelberg,* 52 Neb. 597, 72 N. W. 865; *Comstock v. Kerwin,* 57 Neb. 1, 77 N. W. 387; *Runkle v. Welty,* 78 Neb. 571, 574, 111 N. W. 463, 113 N. W. 160.

In an action where the defendant is in possession of the disputed lands under claim of ownership plaintiff must recover on the superiority of his title, and, if he relies on a record or paper title, he must show a regular chain of title from the government, or from some grantor in possession, or from a common source from which each of the litigants claims. *Runkle v. Welty, supra.*

The defendant here was in possession and the plaintiff did not show a regular chain of title from the government, nor did it show title from a grantor in possession. It did, however, show record title coming from the defendant in possession by virtue of the judgment in the attachment proceeding hereinbefore referred to. The one as effectively divests title as the other, and no reason suggests itself why a plaintiff should be required to go back beyond the deed which divests the defendant of title and vests that same title in the plaintiff.

The plaintiff here claimed title through the defendant, and in this action it is the holding that it is not required to go back farther than the defendant in proving his title. See *Byers v. Rodabaugh,* 17 Ia. 53.

The appellant urges that a judgment in ejectment cannot be sustained in this action for the reason that from the description set forth and sought to be proved the land in dispute cannot be located. With this contention we are unable to agree.

The rule in this state, as laid down in the first paragraph of the syllabus of *Lane v. Abbott,* 23 Neb. 489, 37 N. W. 82, is that, "In order that a plaintiff may recover real estate in

an action of ejectment, his description of the land in dispute must be such as would enable a competent surveyor to locate it by referring to deeds, writings, or known objects by which the exact land can be identified."

Certainly, within this rule a competent surveyor, by reference to and extension of section, township and range lines of well known and recognized surveys in the state of Nebraska, would be able to locate the exact land in dispute herein.

Errors with regard to cross-examination and the admission of evidence are assigned and discussed, but since they probably will not recur on a retrial they will not be considered.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

Rose and Eberly, JJ., not participating.

PAINE, J., dissenting.

This tract of land has been the subject of much litigation in the courts, the contention of one side in all these suits being that, since the land was on the east side of the Missouri river, it was in the state of Iowa. It is a tract of some 1,200 acres in a larger tract of over 1,600 acres now lying east of the Missouri river, which flows north to south along the west side of this larger tract of land.

Plaintiff bank produces maps and proof to show that the tract is located in sections 19 and 20, township 19 north, range 12 east, in Washington county, Nebraska. Defendant McFerrin, on the other hand, shows that the land is in sections 32 and 33, township 79 north, range 45 west of the 5th P. M. in Harrison county, Iowa.

Iowa was admitted as a state in 1846, and that enabling act defined the western boundary of Iowa as the middle of the channel of the Missouri river. The enabling act admitting Nebraska was approved by congress on April 19, 1864, but congress did not pass the act to carry into effect the admission of the state until February 9, 1867, and there was

a little further delay, as Andrew Johnson, the President, did not issue the proclamation of admission until March 1, 1867.

The tract of land in question, as shown by the government survey made in Iowa in 1852 and the government survey made of Nebraska in 1856, was in what is now Washington county, Nebraska. It has been determined several times by courts of last resort that probably in the early spring of 1857 there was a great avulsion, by which the river cut across, forming a new channel and placing this land on the east side of the middle of the channel of the Missouri river, where it has remained at all times since the spring of 1857.

If, as stated in Clark, Surveying and Boundaries (2d ed.) 510, boundaries between states are generally fixed by the enabling act of congress, how could an avulsion of 1857, or any of many avulsions occurring before that date, affect the easterly boundary of Nebraska, which was fixed, *i. e.*, *frozen*, exactly as it was in April, 1864, by the enabling act of congress?

If the land in question was east of the channel of the Missouri river when the jurisdiction of the state of Nebraska attached when the enabling act fixed the boundaries, by what act of the United States or of Nebraska was it transferred across the river to Nebraska?

Can this court say that, when congress in the enabling act said that the lower part of the eastern boundary of the state of Nebraska should be "thence down the middle of the channel of said Missouri river, and following the meanderings thereof, to the place of beginning," congress really intended thereby to have an exception read into the eastern boundary of Nebraska as follows: "Save and except a certain tract of land taken away from Nebraska Territory by avulsion back in the year 1857 and now lying east of the middle of the channel but which shall also be included in the state of Nebraska?"

For my part, it strikes me that congress meant just what it said on the date it passed the act, and this court has no right to interpolate new boundaries in that act.

In *Miller v. McLaughlin*, 281 U. S. 261, 50 S. Ct. 296, Seymour L. Smith and C. A. Sorensen, as attorney general, argued a case to the United States supreme court involving concurrent fishing rights in the Missouri river, and Justice Brandeis began his opinion (April 14, 1930) with these words: "The middle of the channel of the Missouri river is the boundary line between the states of Nebraska and Iowa." Judge Rose, in an opinion under the same title, found in 118 Neb. 174, 224 N. W. 18, said: "The eastern boundary of Nebraska is the middle of the channel of the Missouri river." See, also, *Iowa v. Illinois*, 147 U. S. 1, 13 S. Ct. 239.

In the case of *Missouri v. Kentucky*, 11 Wall. 395, 20 L. Ed. 116, decided in 1870, the litigation concerned Wolf Island, a large island lying perhaps a little closer to the Kentucky side of the river. It appears to be the holding that, if Wolf Island, in 1763, or in 1820, the latter being the date of the admission of the state of Missouri, was on either of said dates, or at any intermediate period between these dates, east of the middle of the Mississippi river, then the jurisdiction of Kentucky rightfully attached to it. If the river later changed its course, and now runs east of the island, this does not change its ownership to the state of Missouri.

Defendant insists that, to paraphrase this holding and apply it to the case at bar, it would read: "It follows, therefore, that if the land in question in 1846 or 1867, or at any intermediate period between these dates was east of this line (the middle of the channel of the Missouri river), the jurisdiction of Iowa rightfully attached to it."

In this Wolf Island case, the United States supreme court makes no distinction at all between gradual or sudden changes, but the jurisdiction appears to be fixed at the time the boundary of the state is fixed by congress.

The long and expensive litigation over the question whether this land, which has physically been a part of Iowa since the early spring of 1857, may not in some way be brought under the jurisdiction of Nebraska courts, appears to make the following quotation quite applicable:

"In case of doubt, every territory terminating on a river is presumed to have no other boundary than the river itself, because nothing is more natural than to take a river for a boundary, when a settlement is made; and wherever there is a doubt, that is always to be presumed which is most natural and most probable." *Nebraska v. Iowa*, 143 U. S. 359, 12 S. Ct. 396.

In paragraph 2 of the syllabus in the case at bar, it is stated: "Lands cut off from the mainland of a state by avulsion do not change their status but remain a part of the state from which they were cut off."

I think these words should be added,—unless they were cut off from the territory, which afterwards became a state, prior to the time the boundaries of the state were fixed by congress.

To invalidate the boundaries of a state, as fixed by congress, by opening the door to an investigation of each and every one of innumerable avulsions occurring along the Missouri or Mississippi rivers in times past would be a dangerous precedent to set.

I dissent from the opinion adopted by four members of this court because I believe that the jurisdiction of the courts of Nebraska does not extend over land which was outside of the state of Nebraska when its original boundary lines were fixed by congress and has always remained outside thereof.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1943

WILLIAM KASSEBAUM, APPELLANT, V. NEBRASKA STATE RAILWAY COMMISSION, APPELLEE.

7 N. W. (2d) 464

FILED JANUARY 6, 1943. No. 31467.

1. **Automobiles.** Certificates of convenience and necessity issued by the Nebraska state railway commission to a common carrier by motor vehicle under the "grandfather" clause of section 75-228 (a), Comp. St. Supp. 1941, determine the operations of the carrier prior to the critical dates of the act.
2. ———. In a proceeding to determine whether or not such a carrier is operating within the terms of his certificate, the Commission cannot go behind the certificate and show that the carrier's operations, prior to the critical period, were different than those set out in his certificate.
3. ———. The legislature has not granted to the Commission power to classify such carriers as regular or irregular route carriers; nor to establish a formula of elements that determine to which classification a common carrier belongs; nor to test the operations of a carrier according to such classification. His operations are to be tested by the terms of his certificate.
4. ———. The Commission is granted the power and directed, in issuing certificates, to specify the services that may be rendered by such a carrier; and either the routes over which the fixed termini, if any, between which and the intermediate and off route points, if any, at which such carrier is authorized to operate, or in case of operations not over specified routes or between fixed termini, the territory within which such a carrier is authorized to operate.

5. ———. A certificate defining only the territory within which a carrier is authorized to operate is broader in scope than a certificate which is restricted to specified routes over which, the fixed termini between which, and intermediate and off route points at which a carrier is authorized to operate.
6. ———. Where a carrier holds a certificate limited only as to the territory in which he is to operate, his certificate authorizes him to carry all of the authorized commodities tendered him within the authorized territory.
7. ———. Under the certificate here construed and under the facts considered and found by the Commission, a requirement of the Commission that such a carrier may not make regular trips is not a reasonable limitation which the Commission may attach for the public convenience and necessity.
8. ———. If the needs of commerce require that freight be moved on certain days of each week, the regulations of the Commission should aid and not retard the movement.
9. ———. "Irregular routes," as used in the certificate here construed, means that the carrier may follow those routes, from the point of origin of a shipment to destination within territorial limits, which may be adequate, economical and efficient in the movement of the commerce which he hauls; within those limits the carrier may follow the routes of his choice, repeating trips over the same route if the shipment which he hauls justifies it.
10. ———. The term "irregular routes," as used in the certificate here construed, does not require that the carrier move his shipments at irregular times. He may move his shipments as the needs of commerce require.

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

Harry F. Russell, for appellant.

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

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

SIMMONS, C. J.

Appellant Kassebaum holds a certificate of convenience and necessity as a common carrier by motor vehicle. Upon citation to show cause it was held by the state railway commission that his operations were in violation of the law

and his certificate. Kassebaum appeals. The appeal presents the question of the proper construction to be given to the certificate. We reverse the order of the Commission in part.

As used herein the term Commission means the Nebraska state railway commission.

For several years prior to 1937 the appellant Kassebaum was operating a commercial trucking business in the state of Nebraska. In 1937 the legislature enacted chapter 142, Laws 1937, now sections 75-222 to 75-238, Comp. St. Supp. 1941. Section 75-228, *supra,* provides: "Ninety days after the effective date of this Act it shall be unlawful for any common carrier * * * subject to the provisions of this Act to engage in any intrastate operations * * * unless there is in force with respect to such carrier a certificate of public convenience and necessity * * * : Provided, * * * if any such carrier * * * was in actual *bona fide* operation as a common carrier by motor vehicle on April 1, 1936, over the route or routes or within the territory for which application is made, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation * * * ." Pursuant to this provision of the act, on December 21, 1937, a certificate was issued to Kassebaum authorizing him "to operate as a common carrier of property by motor vehicle upon the highways of Nebraska, and to render the service and over the route or routes or within the territory hereinafter authorized and to desist from any other operations * * * subject to the condition that applicant conforms to the provisions * * * (of the act) and the requirements, rules and regulations of the Commission."

The certificate specifically provided as follows: "Service Authorized: Commodities generally, including live stock, but except those requiring special equipment other than refrigeration. Route or Territory Authorized: Irregular routes from within a 25-mile radius of Hebron, to and from Omaha and vicinity and Lincoln and vicinity, occasionally to and from various points in the extreme western part of

the state, including Scottsbluff, also occasionally to and from various points in the state of Nebraska on a statewide basis."

On June 4, 1941, the commission cited Kassebaum to appear and show cause, if any, why his certificate should not be revoked, canceled, annulled or suspended for wilful failure to comply with the provisions of the act and the rules and regulations of the commission, and why he should not be required to confine his operations as set forth in his certificate. The citation recited the issuance of the certificate; that it authorized "only operations as a common carrier over irregular routes," that it correctly described Kassebaum's actual operations as of April 1, 1936; it charged that Kassebaum was conducting operations not authorized by his certificate "in that he was operating as a common carrier by motor vehicle over a route between the fixed termini of Hebron and Lincoln, Nebraska, with a strong degree of regularity" from December 4, 1940, until May 17, 1941.

To this citation respondent answered to the effect that his operations were entirely within the law, and within the terms of his certificate.

On June 23, 1941, a hearing was had before an examiner of the Commission. The evidence in many respects is indefinite and inconclusive. The evidence discloses however that beginning in the fall of 1940 Kassebaum's business between Hebron and Lincoln increased and he operated a somewhat regular service between the above points on Mondays, Wednesdays and Fridays, and advertised such service. In November, 1940, a criminal complaint was filed in Thayer county, evidently charging a violation of the act, but the exact nature of the charge is not shown. Subsequent to that charge, Kassebaum discontinued his scheduled trips, but continued to make trips on call and to solicit business to complete a cargo. These trips continued to preponderate on Mondays, Wednesdays and Fridays, although he made a substantial number of trips on other days of each week. While not at all definite in the evi-

dence, the examiner found that he followed generally highways 81 and 6 from Hebron to Lincoln and return.

Based on the examiner's report, the Commission found that the essential elements of a regular route service are that (1) there must be fixed termini, (2) a fixity of highways traveled, (3) a regularity of service rendered, and (4) a predetermined plan of the carrier to conduct such operations; that each of the foregoing elements were found in the instant case; that the services being performed by Kassebaum were those of a regular route operator; and that such services were not authorized by his certificate. He was ordered to cease and desist from performing regular route service and to limit his operations to those authorized in his certificate. The Commission denied a rehearing. Kassebaum appeals.

The case requires a construction of the act, a construction of Kassebaum's certificate and a determination of whether or not his operations as detailed in the evidence and as found by the Commission are authorized by his certificate.

The act recites a policy "to regulate transportation by motor carriers * * * in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical and efficient service * * * develop and preserve a highway transportation system properly adapted to the needs of the commerce of Nebraska." Section 75-222, *supra*. It places upon the Commission the duty to regulate common carriers by motor vehicle "and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service." Section 75-225, *supra*. The Commission has authority to attach to the exercise of the privileges granted by the certificate "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require." Section 75-228 (d), *supra*. The Commission may suspend, change or revoke a certificate in whole or in part "for wil-

ful failure to comply" with the act or "with any lawful order, rule or regulation" of the Commission or "with any term, condition or limitation" of the certificate. Section 75-231, *supra.* Wilful violation of any terms of the act is made a misdemeanor punishable by fine. Section 75-237, *supra.*

Kassebaum's certificate was issued under the so-called "grandfather" clause of section 75-228 (a), *supra.* To secure it he was required to show the operations that he was conducting on April 1, 1936, and subsequent thereto, and was not required to furnish further proof of public convenience and necessity. That is the only distinction made in the act between those who hold a "grandfather" certificate and those who hold a certificate issued upon a showing of public convenience and necessity. The certificate determined his operations prior to the critical dates of the act. The Commission cannot, in this proceeding, go behind the certificate and show that Kassebaum's operations prior to that period were different than those set out in his certificate. It must start with that certificate as the basis of his rights, and the issue is whether or not his operations are within or without the authorizations of his certificate.

That Kassebaum should limit his operations "to those authorized in his certificate" is not questioned.

The Commission in their order first tested Kassebaum's operations by their formula and not by the language of his certificate or the act. Based on their formula they appear to hold that Kassebaum's certificate does not authorize him to haul from Hebron to Lincoln and Omaha over the same highway with any degree of regularity.

It is evident, from the Commission's order, that it considers it has the power to classify common carriers into two groups, *i. e.,* regular and irregular route carriers, to establish a formula of elements that determine to which classification a common carrier belongs, and to test the operations of a carrier according to such classifications instead of testing his operations by the terms of his certificate.

Does the Commission have that power?

Our act (section 75-222, *supra*), refers to, and appears to have been copied in part from, the Motor Carrier Act 1935, 49 U. S. St. at Large, Part 1, ch. 498, p. 543.

The Commission appear to have assumed they have the same authority as the Interstate Commerce Commission, and to have followed the classification made by it of regular and irregular route carriers. Our act classifies carriers into two groups, "common carrier" (section 75-228, *supra*), and "contract carrier" (section 75-229, *supra*). So does the federal act. 49 U. S. St. at Large, Part 1, ch. 498, secs. 206 (a), 209 (a). This classification of common and contract carriers is recognized in our act in section 75-225 (a) and (b), *supra,* and in the federal act in section 204 (a) (1) and (2), 49 U. S. St. at Large, Part 1, ch. 498, p. 546. The federal act further provides: "The Commission may from time to time establish such just and reasonable classifications of * * * groups of carriers included in the term 'common carrier by motor vehicle,' * * * as the special nature of the services performed by such carriers * * * shall require; and such just and reasonable rules, regulations, and requirements, * * * to be observed by the carriers * * * so classified or grouped, * * * ." 49 U. S. St. at Large, Part 1, ch. 498, sec. 204(c), p. 547. Our legislature did not enact that part of the federal act, and did not give to the Commission that power of classification of common carriers. Our act does give to the Commission power to classify motor carriers as to bonds, insurance, etc. Section 75-232, *supra*. This provision is not in the comparable section of the federal act, section 215, 49 U. S. St. at Large, Part 1, ch. 498, p. 557.

The authority to classify common carriers, as the Commission here seeks to do, is negatived by the omissions from our act of the grant of power contained in the federal act and by the specific authority to classify as to bonds and insurance. The definition of a "common carrier" contained in section 75-223 (i), *supra,* is not a grant of power authorizing such a classification.

Accordingly we hold that the legislature has not granted to the Commission the power to classify common carriers as regular or irregular route carriers, nor to establish a formula of "elements" that determine to which classification a common carrier belongs, nor to test the operations of a carrier according to such classification. His operations are to be tested by the terms of his certificate. The attempt of the Commission here to classify Kassebaum's operations as those of a "regular route operator" and to hold that he has violated his certificate because he does not hold a regular route operator's certificate is without the authority of the Commission.

However, the Commission is granted the power and directed, in issuing certificates, to "specify the service to be rendered" and either (1) "the routes over which (,) the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, * * * such carrier is authorized to operate;" or (2) "in case of operations not over specified routes or between fixed termini, the territory within which (,) such carrier is authorized to operate." Section 75-228 (d), *supra.* The commas inserted in the above quote and shown as (,) are not found in our act but are found in the comparable section of the federal act. 49 U. S. St. at Large, Part 1, ch. 498, sec. 208 (a), p. 552. This division of the authority to be specified in the certificate is supported by the provision that, if any carrier was "in actual *bona fide* operation as a common carrier by motor vehicle on April 1, 1936, over the route or routes *or* within the territory for which application is made * * * the Commission shall issue such certificate," etc. Section 75-228 (a), *supra,* and the federal act, section 206 (a), *supra.*

It is clear from the terms of Kassebaum's certificate that the Commission so construed the act when the certificate was issued, for Kassebaum's certificate specifies only "the territory within which (he) is authorized to operate." It is patent that the Commission in issuing Kassebaum's certificate recognized that he had been operating "within the

territory" for which his application was made and that he was authorized to continue to operate within that territory. A certificate defining only the territory within which a carrier is authorized to operate is one broader in scope than a certificate which restricts the carrier to specified routes over which, the fixed termini, between which and intermediate and off route points at which a carrier is authorized to operate. Kassebaum's certificate is broader in its authority than a certificate limited to named routes, fixed termini and intermediate and off route points.

What then are the outside limits of the authority granted by the certificate? So far as involved in the charges here, Kassebaum is authorized by his certificate to operate "Irregular routes from within a 25-mile radius of Hebron, to and from Omaha and vicinity and Lincoln and vicinity." The Commission does not contend that he was operating outside the territorial limits of his certificate. The position of the Commission appears to be that the use of the words "Irregular routes" in his certificate prevents Kassebaum from operating between Hebron and Lincoln upon a schedule regular as to road traveled and regular as to time of trips made; or, otherwise stated, the Commission appears to hold that Kassebaum's certificate does not authorize him to handle freight if all or the major part of it originates in Hebron or Lincoln and is destined to Lincoln or Hebron; that he is not permitted regularly to follow the paved highway between those points; and that he is not permitted to follow a schedule of trips that causes his movements to come largely on certain days of each week. The Commission does not take the position that he was doing too much hauling, but rather that he was doing too much hauling from and to Hebron.

Does Kassebaum's certificate so limit his operations? Kassebaum's certificate establishes that he was engaged in general hauling within the territory set out in his certificate prior to the passage of the act. The fact that his business has grown so as to require more frequent and somewhat regular trips cannot be the basis of construing

his certificate so as to deny him the right to carry within that territory all of the authorized commodities tendered him. His certificate makes no limitation as to volume of business. He has been authorized to render the service within territorial limitations without regard to volume of or increase of business.

The noun "route" is defined by Webster as the "course or way which is or is to be traveled or passed." It is defined in 54 C. J. 1106, as: "A way used for going from one place to another, in common acceptation excluding terminal points, and making it dependent on them. The term implies passage to and from." To what extent is the meaning of the word "route" changed when modified by the word "irregular"? The Commission appear to take the position that Kassebaum must follow different routes on trips from and to Hebron and Lincoln. If Kassebaum has shipments to move from Lincoln to Hebron on succeeding days, would it "promote adequate, economical and efficient service" to require him to use the paved road one day, a graveled road the next and perchance a dirt road on the third day? Would such a requirement tend to "develop and preserve" a transportation system "properly adapted to the needs of the commerce of Nebraska?" We think not. The provisions of section 75-228 (d), *supra,* that in case of operations authorized not over specified routes or between fixed termini (and that is Kassebaum's situation) the certificate shall specify "the territory within which such carrier is authorized to operate," clearly indicate a legislative intention to permit carriers such as Kassebaum, holding such a certificate, to have a freedom of choice of routes to meet the needs of the commerce which they serve that is far broader than that had by carriers who are by their certificates limited to following regular routes to and from fixed termini. The answer to what is the correct meaning of the words "irregular route" as used in his certificate may be determined from an analysis of the territory that Kassebaum is authorized to serve. He is not required to go from and to Lincoln and Hebron. His ship-

ments may originate at or be delivered to any point within a radius of 25 miles of Hebron and Lincoln or Omaha and vicinity. We are not here required to define the meaning of "vicinity." Obviously to render "adequate, economical and efficient service" requires that he be permitted to go from his point of origin to his point of delivery along that route that is best suitable to the trip that he is making. He may use different routes on different trips or he may use the same route repeatedly if economical, efficient operation requires. He is not restricted to specified routes. He may, but is not required to, use the same route for all of his trips.

Does Kassebaum's certificate require that he move shipments at irregular times and not on a fixed schedule? Certainly the term "irregular routes" cannot be construed to mean irregular times. The authority recited in the certificate to "occasionally" make trips to and from points in the western part of the state and "occasionally" to and from various points in the state on a state-wide basis indicates that the Commission, at the time the certificate was issued, contemplated that the service between "a 25-mile radius of Hebron, to and from Omaha and vicinity and Lincoln and vicinity," would be not occasional or irregular as to time. Regularity of time of trips is not denied by the certificate. We find no authority in the act giving the Commission specific authority to regulate or control the time of movements. His certificate cannot be so construed.

Is the requirement as to the time of trips a "reasonable" limitation which the Commission may attach "for the public convenience and necessity"? We think not. There is no contention here that Kassebaum's operations resulted in an improper use of the highways, caused congestion or otherwise inconvenienced or damaged the public. One of the declared policies of the act is to "recognize and preserve the inherent advantages of. * * * such transportation * * * in the public interest." Section 75-222, *supra.* One of the "inherent advantages" of motor transportation is that it is able to start at any time for any destination

with a limited amount of shipment. If a truck load of freight is ready to move on a Monday, it does not preserve the inherent advantages of motor transportation nor promote adequate, economical or efficient service to require the carrier to wait and start on Tuesday. The "needs of commerce" require that shipments be moved when ready. If the needs of commerce require that freight be moved on certain days of each week, the regulations of the Commission should aid and not retard the movement. The Commission is authorized to "establish reasonable requirements with respect to continuous and adequate service." Section 75-225, *supra*. A requirement which prevents the rendering of continuous service by a carrier is not a reasonable one under the act.

We find therefore that Kassebaum's certificate does not limit him as do the certificates of carriers who are authorized to move to and from fixed termini over fixed routes; the routes which he may use are those which go from his point of origin of a shipment to his destination (within territorial limits), and which may be adequate, economical and efficient to the service which he renders in the movement of commerce; within those limits he may follow the routes of his choice, repeating trips over the same route if his shipments justify it; and his certificate does not limit him to the time when he may make his trips.

Kassebaum's operations as detailed in the evidence and as found by the Commission are within the authorization of his certificate and the provisions of the act. That part of the Commission's finding and order determining otherwise is reversed.

REVERSED.

VILLAGE OF AXTELL, APPELLEE, V. NEBRASKA HARDWARE MUTUAL INSURANCE COMPANY, APPELLANT.

7 N. W. (2d) 471

FILED JANUARY 6, 1943. No. 31510.

1. **Constitutional Law.** In the absence of legislative definition, the meaning of "doing business" as used in an ordinance is a matter for judicial determination to be made primarily upon the particular facts and circumstances of each case. An all-determinative, fixed, definite or precise rule for construing the words cannot be written.
2. **Insurance.** As used in the ordinance here construed, "doing business" implies a fair measure of permanency and continuity of business acts and purposes, in the sense that they may be distinguished from casual, occasional or isolated acts or business transactions.
3. ———. The words "doing business" refer to the doing of some of the business that is ordinarily and customarily done by the corporation in carrying out the purpose for which it was created, as distinguished from acts that are within the power of the corporation.
4. ———. The presence of an agent of the corporation, within the village, soliciting business which is later consummated by the execution of policies and their delivery to the policyholders in the village, a course of action which is continuous over a period of years, is indicative, if not determinative, that the corporation is doing business in the village.
5. ———. A broader meaning is attributable to the words "doing business" when used in a tax act, from the fact that the corporation receives the protection of local laws and institutions such as a water system, fire fighting equipment, a fire department, etc.
6. ———. The fact that the insurance is written on property situated within the village is indicative that the corporation writing the insurance is doing business in the village. The fact that the corporation has written a substantial part of the insurance risks in a village adds force to that determination.
7. ———. The fact that the corporation contracts to do further business in the village, to wit, adjust losses there, in the event losses occur, is indicative that it is doing business there.
8. ———. Soliciting of members in a village by a mutual insurance company and receiving considerable sums of money there for premiums are indicative of doing business in the village.
9. ———. The fact that none of the several acts or transactions

considered separately may constitute doing business is not conclusive, but rather the combined acts and circumstances must be considered. It is the effect of the combined acts and circumstances which determines the question.

10. **Constitutional Law.** Courts are not to speculate upon the reasons that prompted the legislature to indefinitely postpone a bill, nor to construe an ordinance in the light of proposed amendments to a state law.

APPEAL from the district court for Phelps county: EDMUND P. NUSS, JUDGE. *Affirmed.*

J. P. O'Gara and *Perry, Van Pelt & Marti,* for appellant.

Anderson, Storms & Anderson, contra.

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

SIMMONS, C. J.

Plaintiff sues to recover from the defendant an occupation tax for the years 1939, 1940 and 1941.

The ordinance of plaintiff provides: "For the use, support and maintenance of the Volunteer Fire Department * * * an occupation tax of Five Dollars ($5.00) per annum shall be and is hereby levied upon each and every fire insurance company * * * doing business in this village." The question here presented is, was the defendant "doing business" in the plaintiff village so as to make it liable for the payment of the tax? The action was tried to the court, a jury being waived. The trial court found for the plaintiff. Defendant appeals. We affirm the judgment of the trial court.

The defendant is a mutual insurance company with its home office in the city of Lincoln. It has an agent who resides at Hastings, Nebraska, and who since 1926 has devoted his time exclusively to soliciting business for the defendant in the territory which includes the plaintiff village. The defendant does not have a resident agent and does not maintain an office at Axtell.

It secured its policyholders in Axtell through its agent who went into the village to call upon policyholders or

prospective policyholders. If the agent is successful in selling the insurance an application for insurance is made out and signed by the applicant. The premium on the insurance is sometimes paid to the agent at the time the application is signed. The application is, and, when paid, the premium and application are, then mailed to the defendant's office in Lincoln. If the application is approved by the defendant the policy is issued in Lincoln and mailed to the insured at Axtell. The defendant does not make an inspection of the property, save whatever inspection is made by the agent at the time the application is written. In conjunction with the inspection, if any, made by the agent the defendant uses the rating of the risk established by the Nebraska Inspection Bureau. The agent receives a commission of 50 per cent. of the first year's premium. Renewals are handled by mail from Lincoln without the intervention of the agent.

The defendant began insuring property in Axtell in 1920, and has done so continuously since that time. Its agent made at least six calls a year at Axtell, at irregular times. During the year 1939 it had nine policies, 1940 seven policies, and 1941 five policies in force in Axtell upon which it collected total premiums of $378.26.

The policy provisions and method of adjusting losses provide that when losses occur, and none are shown for the years in question, statements of losses were to be prepared in Axtell, minor ones would probably be adjusted by mail, and others by personal visits of a representative of the company to Axtell and an adjustment there made according to the policy terms.

The plaintiff has a municipal water system and furnishes fire protection through its water mains, fire fighting equipment and a voluntary fire department.

Defendant contends that, in order to establish that defendant is doing business in the village of Axtell, plaintiff must prove (1) that applications for insurance were executed in the village of Axtell, (2) were approved there by the defendant, and (3) were issued from there by the defendant.

The question of what constitutes "doing business," as that term is used in statutes, in the absence of a legislative definition, has been determined often by the courts. Generally, the question has arisen with relation to statutes applicable to foreign corporations "doing business" in a state. It has arisen with reference to statutes regulating such corporations, to taxation statutes, to statutes regarding the service of process, etc. Discussions of this subject generally are found in 23 Am. Jur. pp. 333 to 391; in 14a C. J. pp. 1270 to 1291; in 20 C. J. S. pp. 45 to 61, secs. 1828 to 1841; in 17 Fletcher, Corporations (Perm. ed.) secs. 8464 to 8502. Discussions of the term "doing business" with reference to insurance are found in 29 Am. Jur. 77; in 1 Couch, Cyclopedia of Insurance Law, sec. 245 (b); in 32 C. J. 996; and in Annotation 137 A. L. R. 1128. Discussions of the term "doing business" with reference to taxation are found in 61 C. J. 338, 340, 342, and in 2 Cooley, Taxation (4th ed.) sec. 920.

There are a wealth of decisions dealing with this subject, many of which have been cited to us by the parties. They are of assistance in establishing the reasons that have prompted the courts to reach the conclusions made. The texts above cited will furnish the references to the decisions and the discussions which we have considered. In the absence of a legislative definition, the meaning of "doing business" is a matter for judicial determination to be made primarily upon the particular facts and circumstances of each case. For that reason we do not undertake the impossible task of declaring a definition applicable to all situations, as no all-determinative, fixed, definite or precise rule for construing the words can be written. Cases on "all fours" with this one have not been found and accordingly we shall not cite decisions from other jurisdictions.

By analogy from the reasons given in the cases of foreign corporations charged with doing business in a state, we may arrive at bases for the determination of whether or not the defendant, a domestic corporation with its home

office in Lincoln, was doing business in the plaintiff village within the meaning of the ordinance. We undertake to determine only those rules, supported by the authorities, which appear applicable to and determinative of the instant case.

The word business is a comprehensive term and generally embraces everything about which a person may be employed. As used in the ordinance here construed, "doing business" implies a fair measure of permanency and continuity of business acts and purposes, in the sense that they may be distinguished from casual, occasional or isolated acts or business transactions.

"Doing business" as used in the ordinance refers to the doing of some of the business that is ordinarily and customarily done by the corporation in carrying out the purpose for which it was created, as distinguished from acts that are within the power of the corporation.

The presence of an agent of the corporation, within the village, soliciting business which is later consummated by the execution of policies and their delivery to the policyholders in the village, a course of action which is continuous over a period of years, is indicative, if not determinative, that the corporation is doing business in the village.

A broader meaning is attributable to the words "doing business" when used in a tax act, from the fact that the corporation receives the protection of local laws and institutions such as fire fighting equipment, a fire department, etc.

The fact that the insurance is written on property situated within the village is indicative that the corporation writing the insurance is doing business in the village. The fact that the corporation has written a substantial part of the insurance risks in a village adds force to that determination.

The fact that the corporation contracts to do further business in the village, to wit, adjust losses there, in the event losses occur, is indicative that it is doing business there within the meaning of the ordinance.

The fact that none of the several acts or transactions considered separately may constitute doing business is not conclusive, but rather the combined acts and circumstances must be considered. It is the effect of the combined acts and circumstances which determines the question.

In *Tomson v. Iowa State Traveling Men's Ass'n,* 88 Neb. 399, 129 N. W. 529, the defendant objected to the jurisdiction of the court, contending that it had never been engaged in business in Nebraska. It was shown that the defendant secured its new members in this state through the solicitation of existing members who were authorized to take applications, collect admission fees, transmit both to the company, and certificates of membership were issued from the defendant's home office in Iowa. It was shown that defendant had a large membership in this state, apparently secured by the above process. It was held that the defendant was doing business in this state. This case has been repeatedly referred to in the texts on the proposition that actively soliciting members and receiving considerable sums of money for assessments constitute doing business within the jurisdiction where the members are solicited and the funds received. As to this feature of the *Tomson* and the instant case the difference seems to be largely one of degree.

In a much different factual situation this court in *Traphagen v. Lindsay,* 95 Neb. 823, 146 N. W. 1026, said: "The expression 'doing business in the state,' as we view it, means that any person or corporation having a place of business in another state who comes into this state and solicits business by which it is to furnish any article of commerce or any manufactured article which is made in whole or in part at its place of business in another state, and which is to be furnished, sold or delivered to the purchaser in this state, is, in a comprehensive sense, doing business in this state."

Consistent with our own cases and for the reasons given, which are supported by the authorities, we hold that the defendant was "doing business" in the plaintiff village within the meaning of that language in the ordinance in question.

There remains one further matter to be considered. The ordinance in question rests upon the authority of section 35-401, Comp. St. Supp. 1939, now section 35-401, Comp. St. Supp. 1941. Defendant offered in evidence a transcript containing a certified copy of Legislative Bill No. 97 introduced in the Legislature on January 21, 1941, and referred to a committee and there considered. The bill proposed to amend the above section by inserting, following the words "doing business in such city or village" these words "through local writing agent, through transient agent, or by soliciting fire insurance business from or by delivering any policy of fire insurance to or by collecting any fire insurance premium from any person, firm or corporation within the corporate limits of the municipality by mail or otherwise." The transcript purports to contain a summary of the testimony of witnesses for and against the bill. The bill was not passed. Defendant assigns this ruling as error. It does not here argue that the exhibit was admissible, but submits that we should consider it in any event.

Assuming, but not determining, our right to consider it, it is apparent that the proposal was one attempting to secure a legislative definition of the words "doing business" as used in the statute. We are not to speculate upon the reasons that prompted the legislature to indefinitely postpone the bill, nor to construe the ordinance in the light of proposed amendments to the state law. We are here called upon to construe the ordinance as it is written in accord with the statute.

The judgment of the trial court is affirmed.

AFFIRMED.

VIOLET M. BAUGHMAN, APPELLANT, V. CITY OF OMAHA, APPELLEE.

7 N. W. (2d) 365

FILED JANUARY 6, 1943. No. 31518.

1. **Workmen's Compensation.** Workmen's compensation is awardable "when personal injury is caused to an employee by accident

arising out of and in the course of his employment," but does not "cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." Comp. St. 1929, secs. 48-101, 48-152.

2. ———. Injury *held* not compensable under the workmen's compensation law on a record showing that employee was a detective sergeant on the police force of Omaha; that he reported off duty to the police station at the end of his eight-hour shift without any assignment or requirement for subsequent special duty; that he was struck and fatally injured by an automobile while on his way home from work.

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

James M. Patton, for appellant.

Harold C. Linahan, W. W. Wenstrand, Edward Sklenicka and *G. H. Seig, contra.*

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

ROSE, J.

This is a proceeding under the workmen's compensation law. Comp. St. 1929, secs. 48-101 to 48-161.

Thomas A. Baughman, a detective sergeant of the police department in Omaha, was struck by an automobile on Thirteenth street south of Dodge street, February 2, 1941, at 12:09 a. m., was fatally injured by the impact and died six hours later, leaving his widow, Violet M. Baughman, and six children under 21 years of age.

At the time of the accident the city employee's salary was $160 a month, and his widow, plaintiff, petitioned the compensation court for an allowance of $15 a week for the statutory period and for funeral expenses of $150.

The city of Omaha, defendant, denied liability to plaintiff for compensation. A judge of the compensation court heard the parties to the cause and disallowed the claim. Plaintiff appealed to the district court, where, upon a trial,

there was a finding that Thomas A. Baughman was not engaged in the performance of his duties as an employee of defendant at the time of the fatal accident. From the dismissal of the proceeding, plaintiff appealed to the supreme court.

The parties agree that the only question involved in this case is whether or not the employee was acting within the scope of his employment for the city of Omaha at the time of the accident resulting in his death. There is no dispute over the facts. Both parties rested at the close of plaintiff's evidence. The following facts are shown by the record: On February 2, 1941, the city employee, Baughman, was a detective sergeant on the police force. His assignment for duty on that date was "misdemeanor detail, petty larceny, theft." His shift was from 4:00 o'clock in the afternoon until midnight. He checked "off duty" at the police station at 12 o'clock at night and started on foot toward his home. He left the sidewalk on Thirteenth street south of Dodge street, passed between two parked cars at the curb, entered a lane of public travel for vehicles while walking diagonally across Thirteenth street toward three men who were standing in front of the Dodge Hotel or tavern and was struck by an automobile and fatally injured at 12:09 o'clock the same night. He was armed at the time and wore the insignia of a policeman, but had not been assigned to any special duty. There was then no appearance of disorder about the hotel or tavern.

In addition to proving the foregoing facts plaintiff introduced in evidence a manual of general rules and regulations of the police department which was in effect at the time of the fatal accident and applicable to each member, including employee, the detective sergeant. The manual provides in substance: Each member shall devote his time and attention to the business of the department; shall not be employed or engaged in any other business or calling; shall be deemed always on duty; shall have the same responsibility for suppression of disturbances when not in uniform as when in uniform. The rules in the manual re-

quire patrolmen to prevent crime; to watch the conduct of persons with known bad character; to watch disreputable houses; to pay particular attention to all public houses and drinking places.

Provision is made by statute for workmen's compensation "When personal injury is caused to an employee by accident arising out of and in the course of his employment." Comp. St. 1929, sec. 48-101. The language quoted, however, is declared by the workmen's compensation law "Not to cover workmen except while engaged in, on or about the premises where their duties are being performed, or where their service requires their presence as a part of such service at the time of the injury, and during the hours of service as such workmen." Comp. St. 1929, sec. 48-152. See *Richtarik v. Bors, ante,* p. 226, 5 N. W. (2d) 199. The evidence is that the hours of the employee's shift were from 4:00 p. m. to 12:00 m.; that he reported off duty to the police station at midnight; that the accident occurred nine minutes later when he was on his way home from work. "At the time of the injury," therefore, he was on his way home and not where his services required his presence on his eight-hour shift. There is no evidence that his duty to his employer required him to be in the place of danger in the street where he was struck by an automobile or that detective or police services were required at the hotel or tavern. "Awards for compensation cannot be based upon speculation, possibilities, or probabilities." *Wayne County v. Lessman,* 136 Neb. 311, 285 N. W. 579. Outside the eight-hour shift, special duties had not been assigned to or required of him. The occasion for the performance of general or voluntary services imposed by the manual of the police department at the time of the accident was not shown by sufficient evidence to overturn the findings of the district court.

AFFIRMED.

JOHN F. MCCARTHY, APPELLEE, V. HUGH PFOST, APPELLANT.
7 N. W. (2d) 363

FILED JANUARY 6, 1943. No. 31470.

Affirmance. Record examined and *held*: That the rulings of the trial court on admission and rejection of evidence at the trial be sustained; the trial court's denial of defendant's motion for a mistrial on account of alleged misconduct of plaintiff's attorney be approved; that the evidence received is ample to sustain the verdict returned by the jury and the judgment entered thereon by the trial court.

APPEAL from the district court for Hamilton county: LOVEL S. HASTINGS, JUDGE. *Affirmed.*

B. J. Cunningham, for appellant.

Dryden, Dryden & Jensen, contra.

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

EBERLY, J.

This is an appeal from the district court for Hamilton county wherein the jury returned a verdict for plaintiff below in the sum of $1,575 for legal services performed and expenses necessary and reasonable in connection therewith. The defendant was Hugh Pfost. It may be said that the sufficiency of the pleadings is unchallenged; the correctness of the trial court's instructions submitting the case to the trial jury is not attacked by appellant's brief. Defendant offered no evidence on the question of value of the legal services performed by plaintiff, and the testimony of plaintiff and his witnesses on that subject is without contradiction in the record; the skill and ability of plaintiff and his assistants in the conduct of the litigation are not challenged. Indeed, in reference to the briefing of the case appellant's brief includes the following: "The question (briefed and presented by appellee) was an undecided one in Nebraska, and it is not our intention to state that skill and ability in studying and briefing was not required. It definitely was required." It may further be said that plaintiff McCarthy

and his assistants were successful in securing decisions as desired by his client, both in the district court and in the supreme court to which his client's case was appealed by opposing parties. See *In re Estate of Pfost,* 139 Neb. 784, 298 N. W. 739.

The real question at issue between the parties to this litigation, as presented by the record, is not whether plaintiff McCarthy was employed or not, or the actual value or skilfulness of such services so performed, but the actual terms of his employment by Hugh Pfost as his "personal" attorney. Pfost claims that he entered into a definite oral agreement with plaintiff McCarthy, which, as finally agreed upon by the parties, was substantially that McCarthy was to take charge of the litigation involving defendant's interests in the Lewis A. Pfost estate then pending in the county court of Hamilton county, and prosecute an appeal to the district court from an order made in the county court involving the construction of clause two of the will of the deceased, defendant's father, and carry the same through the district court, and, if necessary, the supreme court, and should accept and receive for his compensation for all services required to be performed the sum of $300 and court costs. On the other hand, plaintiff McCarthy denied the making of this oral contract. He insisted that no oral agreement was ever entered into between Hugh Pfost and himself, except that he was orally directed to perform the legal services involved by the former; that he would employ Dryden, Dryden & Jensen as his assistants and pay them himself; that he was to go ahead and handle such litigation, and that at some future time they would agree on a fair fee for the services performed, but he (Pfost) would make no specific agreement as to fees. These contentions as to terms of employment by the respective parties receive support in the record from the testimony adduced by each. The correctness of the submission of the case to the trial jury by the instructions of the district court is unchallenged. It was by that trial jury resolved against Pfost and in favor of McCarthy. As to the amount of the recovery allowed by

them, it may be said to be amply supported by the only competent evidence in the record as to the value of the services performed.

The litigation in which these performed services were rendered by plaintiff largely had its origin in the following clause of the last will of Lewis A. Pfost, deceased:

"I give and devise to my Executors and their successors in trust the sum of Twelve Thousand ($12,000) Dollars, to be paid out of the personal property belonging to my estate, to be invested and kept invested by said Executor or his successor in trust in some safe investment during the lifetime of my said wife Lottie Pfost, all the interest or income from said Twelve Thousand ($12,000) Dollar trust fund to be collected by my Executor or his successor in trust and turned over to my said wife Lottie Pfost, as long as she shall live for her care, support and maintenance or to do with as she may see fit and upon the death of my wife Lottie Pfost, said trust fund of Twelve Thousand ($12,000) Dollars shall pass and go to and by said Executor or his successor in trust be divided equally, in equal shares, share and share alike between my son Hugh Pfost, and my twelve (12) grandchildren, said grandchildren being the eight (8) children of my daughter Iva L. Foss, and the four (4) children of my son Hugh Pfost."

Just prior to McCarthy's employment the county court of Hamilton county, on petition presented by Hugh Pfost, had construed this clause of the will as vesting in the petitioner but 1/13 of the $12,000 trust created thereby. Thereupon the attorneys representing Hugh Pfost sought to have the interpretation reviewed by the district court as a single issue, and filed a petition for that purpose. However, the guardian *ad litem*, theretofore duly appointed by the county court of Hamilton county to represent certain minor heirs of Lewis A. Pfost, deceased, also appealed in behalf of his minor clients, insisting that the entire order entered by the county court of Hamilton county be reviewed. The contention of the guardian *ad litem* prevailed, and the entire matter was presented to and determined by the district court

on appeal. Meanwhile Lottie Pfost, widow of the deceased Lewis A. Pfost, who had elected in due form of law to take her statutory rights of inheritance in lieu of the provisions made by the last will and testament, departed this life. McCarthy was then directed by Hugh Pfost to represent his interests in this enlarged scope of employment. The result of the entire proceeding in the district court was favorable to the interests of plaintiff's client. He was adjudged to be entitled to $6,000 out of the $12,000 trust fund in lieu of 1/13 thereof as allowed him by the county court. This determination was affirmed in the decision of the supreme court in the case of *In re Estate of Pfost,* 139 Neb. 784, 298 N. W. 739.

In view of the nature of the services required by reason of the extended scope of the review in the district court arising out of the action taken by the guardian *ad litem,* we do not find any substantial error of the district court in its ruling on the admission of evidence and in its conduct of the trial. Manifestly time and space forbid a recitation of each ruling on evidence challenged by the appellant. We are convinced that in view of the record as an entirety appellant suffered no prejudice from the admission of evidence claimed to be on points not within the issues. While the conduct of counsel for the plaintiff is not to be commended, the trial court was fully justified in denying appellant's motion to direct a mistrial. In consideration of the condition of the record, and the admonition of the trial court upon the action of plaintiff's attorney complained of that followed immediately, and the result of the trial. it cannot be said that the appellant suffered prejudice by reason thereof. An examination of the hypothetical questions in connection with the record discloses that they embrace nothing which is without express support in the record or the result of legitimate inferences therefrom. The judges of this court, as well as trial juries, in their respective spheres must determine questions of disputed facts exclusively from the record of the evidence adduced at the trial, where witnesses may be cross-examined and counter-

vailing proof produced. On this basis, it is clear that the record of the trial court is without substantial error, and its judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF ROBERT A. TYNAN.
JENNIE WOOD, APPELLEE, V. DELLA H. TYNAN ET AL., APPELLANTS.
7 N. W. (2d) 628

FILED JANUARY 6, 1943. No. 31484.

1. **Bills and Notes.** "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." Comp. St. 1929, sec. 62-201.
2. ———. "Value," as that term is here employed, is defined by statute as "any consideration sufficient to support a simple contract. An antecedent or preexisting debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." Comp. St. 1929, sec. 62-202.
3. ———. "Usually, there is a sufficient consideration if there is any benefit, profit, or advantage to the promisor, or any loss, detriment, or inconvenience to the promisee." 10 C. J. S. 601, sec. 148.
4. ———. The term "execution," as employed in contestants' pleading, is properly defined as follows: "By 'execution' is meant both the signing and the delivery of the bill or the note. The mere signing does not constitute 'execution.'" 8 C. J. 43.
5. ———. Evidence in the record examined, and *held* (1) ample to sustain the validity of the instrument in suit as based upon sufficient consideration; (2) wholly insufficient to sustain the defense of payment as set forth in contestants' pleading; and (3) to fully justify and sustain the action of the trial court in directing verdict for the claimant Wood.

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

Jean B. Cain, for appellants.

Archibald J. Weaver, Armstrong & McKnight and *Lowell E. Hahn, contra.*

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

EBERLY, J.

This is an action upon a negotiable promissory note in writing presented as a claim against the estate of Robert A. Tynan, deceased. From the judgment entered in the county court of Richardson county, an appeal was taken to the district court for that county wherein issues were joined by formal pleadings.

Claimant's petition sets forth a cause of action upon a promissory note dated March 16, 1939. A copy of the instrument sued on is made a part of the petition. J. F. Weddle, Effie M. Weddle, and R. A. Tynan appear thereon as makers of this note, which plaintiff alleges was made, executed and delivered, and by the terms whereof each of the makers "as principals, promise to pay to the order of Jennie Wood * * * Five Thousand and no/100 dollars," etc.; for which amount with interest as stated therein claimant prays judgment.

To this petition Della H. Tynan, Robert A. Tynan, Catherine T. Nutter, and Eugene H. Tynan, contestants and appellants herein, as representatives of Robert A. Tynan, deceased, for their answer to the petition on appeal of Jennie Wood, claimant and appellee herein, "deny each and every statement, allegation and averment in said petition contained, except they admit the execution of said note."

The contestants further allege: "That on March 2, 1925, J. F. Weddle, Effie M. Weddle, and R. A. Tynan gave Jennie G. Wood their certain promissory note for the principal sum of $6,000, a copy of which is hereto attached, marked exhibit 'A,' and made a part hereof; that the time of payment of the debt represented by said note was from time to time extended, but it was at all times the same debt." And further, "That said R. A. Tynan received no benefit or consideration directly or indirectly by way of any such transactions." Also, "That such original note and any extensions thereof, as were signed by said R. A. Tynan, were

signed by him as surety only." It was also alleged by these contestants that such note was secured by a real estate mortgage, and a copy of such mortgage is attached to contestants' answer. Further, "That on March 16, 1935, said J. F. Weddle and Effie M. Weddle, his wife, conveyed said mortgaged premises to said Jennie G. Wood in payment of said debt." Such answer concludes with the allegation, "That said note is outlawed, has been paid, is without consideration, and said R. A. Tynan (deceased) at the time of his death was not indebted to said Jennie Wood."

Claimant filed a reply consisting of a general denial.

On these pleadings there was a trial to a jury, at the conclusion of which, on motion of Jennie G. Wood, the court directed the jury to return a verdict for claimant in the sum of $5,710 with interest at 5 per cent. from date, and such verdict was returned, and judgment was entered thereon. From the order of the trial court overruling their motion for a new trial, the contestants appeal.

It thus appears that the defenses relied upon by contestants are, substantially, two: (1) Want of consideration; (2) payment.

The instrument in suit is a negotiable promissory note. By statute, "Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." Comp. St. 1929, sec. 62-201.

"Value," as that term is here employed, is defined by statute as "any consideration sufficient to support a simple contract. An antecedent or preexisting debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." Comp. St. 1929, sec. 62-202.

"Usually, there is a sufficient consideration if there is any benefit, profit, or advantage to the promisor, or any loss, detriment, or inconvenience to the promisee." 10 C. J. S. 601, sec. 148.

See, also, *Craver v. McPherson*, 106 Neb. 568, 184 N. W.

71; *United States Fidelity & Guaranty Co. v. Curry*, 126 Neb. 705, 254 N. W. 430; *Crawford State Bank v. McEwen*, 132 Neb. 399, 272 N. W. 226.

It appears uncontradicted in the record that at the time of the note and mortgage transaction of 1925, R A. Tynan was a banker (on which fact Jennie G. Wood relied), who assisted her not only in the initial transaction but in subsequent extensions and renewals of the promissory note thus delivered. It cannot be gainsaid that at the time of the making of this first note on March 2, 1925, Jennie G. Wood drew her check for $6,000 which amount Weddle testifies was applied on his indebtedness then existing. The necessary implication which arises from the circumstances disclosed by the evidence is that the business necessary to effect this credit of $6,000 on the indebtedness of J. F. Weddle was transacted by R. A. Tynan after the $6,000 check had been delivered by Jennie G. Wood. It is to be noted that expressly referring to the note of March 2, 1925, contestants' answer admits the "execution of said note." As that term, "execution," is employed in contestants' pleading, it is properly defined as follows: "By 'execution' is meant both the signing and the delivery of the bill or the note. The mere signing does not constitute 'execution.'" 8 C. J. 43.

In the light of the uncontradicted facts, it is clear, assuming that Tynan executed the first original note of $6,000 as surety only, that the contemporaneous receipt of the benefit of the $6,000 check by J. F. Weddle afforded ample consideration to support his liability. There is no evidence that Tynan signed this original obligation after it had been delivered or after the $6,000 check had been received by the party entitled thereto. Even on the basis of fact as contended for by contestants, the applicable rule would be:

"Generally, the undertaking of a person signing, or becoming a party to, a negotiable instrument after its execution and delivery must be supported by some new or additional consideration, as the original consideration for the instrument is insufficient to sustain such an undertaking.

This rule applies, however, only when the transaction of which the bill or note forms a part has been completely executed or consummated prior to the addition of the new signature. The subsequent signature is regarded as being made at the same time as the note, so as to constitute a part of the same transaction, and be supported by the same consideration, where it is added pursuant to a prior agreement between the maker and payee which has been relied on by the latter, even though the person subsequently adding his signature does not know the terms of the principal contract." 10 C. J. S. 600, sec. 145.

The unexplained fact that the real estate mortgage bears date (Saturday) February 28, 1925, and the note issued thereon having been dated (Monday) March 2, 1925, affords no logical basis for the conclusion that R. A. Tynan signed the note after delivery on March 2, 1925. It also follows that subsequent renewals of this instrument would be supported by the consideration actually received for the note of March 2, 1925, and would not be vulnerable to the defense here attempted.

The form of the issues tendered by the answer of contestants suggests that contestants are precluded from relying upon the nonliability of Robert A. Tynan as a party to the original $6,000 note. For, not only did the contestants claim that Tynan was not originally legally bound by this note, but, in adddition, complete payment thereof was pleaded by them.

Without in any manner deciding the legal question thus suggested by this claim, we are quite of the opinion that the evidence in the record is wholly insufficient to support a finding of the payment of the obligation in suit. As part of the transaction in which the original note of $6,000 was executed on March 2, 1925, defendant John F. Weddle and his wife Effie M. Weddle, as security for the indebtedness evidenced by said note, executed a real estate mortgage bearing date February 28, 1925, and thereby mortgaged to Jennie G. Wood 160 acres of land described therein. It was expressly provided in said instrument that "This mortgage is

made subject in all respects to a former mortgage made to Slocum and Evans in the amount of Fourteen Thousand Dollars." This mortgage was recorded in book 55, at page 304, of the mortgage records of Richardson county, Nebraska. On March 16, 1935, John F. Weddle and his wife, Effie M. Weddle, "in consideration of the sum of One and no/100 Dollars," remised, released and quitclaimed the mortgaged premises to Jennie G. Wood. At this time the $14,000 first mortgage still remained in full force and effect, and there is no claim in the record that it had ever been satisfied in whole or in part. R. A. Tynan signed this quitclaim deed as a witness thereto. Contemporaneously, in 1935, with the execution of the quitclaim deed, a note of $5,000 payable to Jennie G. Wood was executed by Mr. and Mrs. Weddle and by R. A. Tynan. It will also be noted in this connection that the evidence is undisputed that this $5,000 note so given was annually renewed by all the makers thereof until the note in suit was given, which bears date of March 16, 1939. R. A. Tynan died after the making of the note in suit. It also appears that after the execution of the note of $5,000 by the Weddles and R. A. Tynan, on March 19, 1935, "in consideration of the payment of the debt named therein," at the request of R. A. Tynan, Jennie G. Wood, plaintiff, executed a release of the real estate mortgage securing the payment of the $6,000 note, recorded in book 55, page 304 of real estate mortgages, of the mortgage records of Richardson county. R. A. Tynan signed this release as a witness. John F. Weddle testifies to this transaction, in part, as follows:. "Q. Who asked you to sign this note, Mr. Weddle? A. Mr. Tynan. Q. Mr. Tynan asked you to sign all the papers in this case, did he not? A. Yes; he did. Q. As a matter of fact, you never did talk to Miss Wood about it? A. No. Q. And this debt was originally six thousand dollars? A. Yes. Q. But when this note was signed, it was signed in the sum of five thousand dollars? A. Yes. * * * Q. How many times did you renew this note after 1935? A. Well, I couldn't say; it was renewed every year up until 1939. Q. I see,—now

do you have any written instrument between you and Miss Wood stating this note was paid in 1935? A. No; I haven't."

The testimony of Jennie G. Wood is, in part: "Q. Now, in the year 1935, Miss Wood, you signed some papers, did you not,—deeds? A. Yes. Q. And where was those instruments signed, at your home or at the bank? A. At the bank. * * * Q. And when you arrived at the bank, was those papers already prepared? A. Yes, sir. * * * Q. Did you sign those papers at the request and upon the advice of Mr. Robert Tynan? A. Yes, sir. * * * Q. Did you receive payment of this six thousand dollars? A. No, sir, I didn't. Q. Now, after 1935, was you given a new note? A. Yes. Q. And the new note that you received was in what sum? A. Five thousand dollars."

Further, Jennie G. Wood testifies that the title to the land quitclaimed to her was in her name a short time, when it was sold and transferred, but that she "realized" nothing when she sold it, and the original loan has never been repaid to her.

The validity of this claim becomes indisputable when the course of business carried out by the parties, disclosed by the record before us, is considered as an entirety. The proof absolutely establishes that the loan of $6,000 was originally made by Jennie G. Wood, and the proceeds were disposed of by R. A. Tynan by applying the same upon an indebtedness of John F. Weddle. Therafter, as a renewal thereof, the land encumbered by a first and prior mortgage was quitclaimed to Jennie G. Wood and a $5,000 renewal note given her, in consideration of which she, three days later, executed a release of mortgage effective to release the $6,000 mortgage, but not effective to release or discharge the $5,000 note, of which, under the record in this case, the note in suit is a valid renewal, and which remains of unimpeachable validity as against all the makers thereof.

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

AFFIRMED.

KNOX COUNTY, APPELLEE, V. EARL E. PERRY ET AL., APPELLEES: D. P. WETZEL ET AL., APPELLANTS.
7 N. W. (2d) 475

FILED JANUARY 6, 1943. No. 31497.

1. **Taxation.** When a county has purchased a tax sale certificate, held the same for two years, its foreclosure proceedings thereafter are governed by section 77-2040, Comp. St. 1929.
2. ———. In bringing a foreclosure of a tax sale certificate under section 77-2040, Comp. St. 1929, the proper procedure is to follow that provided for the foreclosure of real estate mortgages.
3. **Judicial Sales.** Under section 20-1530, Comp. St. 1929, providing for the redemption by the owner of real estate which has been foreclosed, he is required to pay the amount of the decree with interest and costs; but in case it has gone to sheriff's sale and been sold to a bidder who was not a party to the suit, the owner so redeeming must then pay, in addition, to such bidder 12 per cent. interest on the amount of his bid.

APPEAL from the district court for Knox county: LYLE E. JACKSON, JUDGE. *Affirmed.*

R. J. Shurtleff, for appellants.

W. Keith Peterson, contra.

Andrew D. Mapes and *H. G. Greenamyre, amici curiæ.*

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

PAINE, J.

This action involves a tax foreclosure brought by the county of Knox, the county having waited two years before bringing foreclosure of numerous tax certificates in this one action. Sheriff's sale was had, and a person not a party to the suit bid in one tract for $400, which was less than the amount of the decree on that item. The sole question involved is the amount which the owner of the land should be required to pay to redeem from this sale before confirmation.

No answer was filed by any of the defendants. The decree of foreclosure was in the usual form. No evidence was

taken by the district court, but the original tax sale certificate upon which the ninth cause of action was based was filed with the clerk of the court and canceled by him.

This decision is entirely in reference to the real estate set out in the ninth cause of action. After the sheriff's sale the owner filed objections to the confirmation on the ground that it did not sell for its fair market value and that a subsequent sale would bring a higher price, and further requested that before confirmation he be given an opportunity to redeem the real estate by the payment into court of the amount required by the laws of Nebraska, and that he be accorded a judicial determination of the amount necessary to redeem, and be given a reasonable time to comply with the order.

Thereafter the district court entered an order, giving such defendant five days in which to redeem said real estate by paying the full amount of said decree with interest and costs, including the attorney's fees. Thereafter, the owner having failed to redeem the premises on the terms set out, the sale was confirmed, and the sheriff directed to execute and deliver a deed to the purchaser, from which decree the owner of the property appeals.

The owner of the land sets out, as the error relied upon for reversal, that the court erroneously required him to make payment of the full amount of the decree, when he stood ready to redeem by the payment of the amount of the bid plus interest and costs.

Section 77-2047, Comp. St. 1929, is cited as his authority, and reads as follows: "Any person entitled to redeem any lot or parcel of land may do so at any time after decree of foreclosure and before sale by paying to the clerk of the court the amount found due against the same with interest and costs to date of redemption. *If redemption is made after sale and before confirmation* such person must pay the sum for which the land was sold, with interest and costs to that (date) of confirmation." (Italics ours.)

Appellant insists that he had the right to redeem, within the terms of this statute, up to the time of confirmation by

the payment of the amount of the bid with interest and costs.

There being a question as to which method of foreclosure was employed by the county in this case, it is necessary to set out the steps taken, as shown by the pleadings, before discussing the section of the statute applicable thereto, as well as some of the decisions of our court in relation to the foreclosure of delinquent taxes by counties.

The petition, which was filed November 19, 1940, alleged that the county of Knox purchased the tax sale certificate on November 7, 1938, for delinquent taxes for the years 1931 to 1937, inclusive, together with delinquent special improvement taxes, also the taxes which have become delinquent for the years 1938 and 1939, with lawful interest and charges, which all amounts to the sum of $456.56. Service by publication was made for four weeks.

On April 15, 1941, a decree was entered in the case, which, omitting portions thereof, finds generally in favor of plaintiff upon its cause of action; that the taxes for the years 1931 to 1937, inclusive, were duly levied and assessed against said real estate and were delinquent, and said real estate was on November 7, 1938, duly sold to the said county, and tax sale certificate No. 343 was issued by the county treasurer to said county, and plaintiff is now the owner and holder thereof; that thereafter taxes were levied for the years 1938 and 1939, which have become delinquent, and that there is due the said county the sum of $527.65 with interest at the rate of 7 per cent. per annum on account of said tax sale certificate and the subsequent taxes, which sum is a first and paramount lien upon the real estate; that the county of Knox is entitled to a foreclosure of its lien for taxes as found due.

On May 16, 1941, order of sale was issued, directing the sheriff to cause the real estate to be advertised and sold as upon execution to satisfy the tax liens, and on June 26, 1941, the sheriff's return states that he sold the real estate described to Vendelin Hanzlik for $400.

On June 30, 1941, defendant D. P. Wetzel, claiming own-

ership of real estate, filed objections to confirmation of sale, alleging that the real estate did not sell for its fair market value and that at a subsequent sale said real estate would sell for more than the decree, interest and costs. Said Wetzel requested the court that before confirmation he be given opportunity to redeem the real estate by payment into court of the amount required by law, and that he be accorded a judicial determination of the amount necessary to redeem, and a reasonable length of time in which to comply with any order the court might make as to said redemption.

On March 5, 1942, the court ordered that defendant be given until March 10, 1942, to redeem said premises by paying the full amount of the decree with interest and costs.

On March 26, 1942, order was issued, finding that the owners of the equity of redemption had failed to redeem said premises on or before March 10, 1942, and that said sale should be confirmed, and the sheriff was ordered to execute and deliver a deed to the premises to the purchaser.

We will now take up the several methods by which a county can foreclose its tax liens. The public revenue act of 1903 was a new and comprehensive act, set out in chapters 73, 74 and 75 of the laws of that year. In it the legislature provided several separate methods by which a county could enforce its lien for taxes against real estate.

The first method is set out in section 231, ch. 73, Laws 1903, and gave the county a lien for all taxes due all of the taxing bodies, with the right in the county to foreclose such general lien upon each tract of land for all taxes, without buying a tax sale certificate thereon, it having been held in *Logan County v. Carnahan,* 66 Neb. 685, 693, 92 N. W. 984, 95 N. W. 812, that the county must have a tax certificate to foreclose. This plan is set out in detail and with amendments in section 77-2039, Comp. St. 1929, and provides that the owner might redeem his property at any time within two years from the date of the sale by paying the amount of the taxes found due thereon with subsequent taxes, interest and costs. This section was discussed in *Commercial Savings & Loan Ass'n v. Pyramid Realty Co.,* 121 Neb. 493, 237 N. W. 575.

A second method for the foreclosure of delinquent taxes by counties is set out in section 232, ch. 73, Laws 1903, and provides that any person, county, city or village can buy a tax sale certificate for delinquent taxes and hold the same for two years, which would be until after the time for redemption had expired, and then foreclose such tax sale certificate, or tax deed in case one was secured, in the same manner as provided for the foreclosure of a real estate mortgage, and this method, with amendments, is now found in section 77-2040, Comp. St. 1929. See *City of McCook v. Johnson,* 135 Neb. 270, 281 N. W. 69; *Moffitt v. Reed,* 124 Neb. 410, 246 N. W. 853.

The third method was originally set out in chapter 73, Laws 1903, beginning with section 233, and is now found in section 77-2041, Comp. St. 1929, and provides that a foreclosure action may be brought by any county, city, village, school district, town, drainage district, irrigation district, or any other municipal subdivision or public corporation immediately after the purchase of a tax sale certificate. If brought at any time before the expiration of the two-year period for redemption, the owner or a lienholder may redeem his property by paying the amount for which such land sold, with interest and costs of suit.

It appears that the procedure to be followed under sections 77-2040 and 77-2041, Comp. St. 1929, is set out in sections 77-2042 to 77-2047. See *Lincoln County v. Shuman,* 138 Neb. 84, 292 N. W. 30.

The fourth method, in the order in which they appear in the present statute, was by a state tax suit under the scavenger tax law, found in Revenue Act, 1903, as chapter 75, in which redemption might be had by the owner by the payment of the amount for which the land sold, with interest, as set out in section 77-2127, Comp. St. 1929.

It is our opinion, from this analysis, that the second method was the one used by the county of Knox in the case at bar. In brief, this second method provided that the county could purchase and hold the tax sale certificate for two years and then foreclose the same in the same manner as a real estate mortgage would be foreclosed.

The redemption under mortgage foreclosure was first enacted as Laws 1875, p. 57, and has never been amended, and is set out as follows: "The owners of any real estate against which a decree of foreclosure has been rendered in any court of record, or any real estate levied upon to satisfy any judgment or decree of any kind, may redeem the same from the lien of such decree or levy at any time before the sale of the same shall be confirmed by a court of competent jurisdiction by paying into court the amount of such decree or judgment, together with all interests and costs; and in case the said real estate has been sold to any person not a party plaintiff to the suit, the person so redeeming the same shall pay to said purchaser twelve per cent. interest on the amount of the purchase price from the date of the sale to the date of redemption, or deposit the same with the clerk of the court where the decree or judgment was rendered." Comp. St. 1929, sec. 20-1530.

The first case reported under this section is that of *Swearingen v. Roberts*, 12 Neb. 333, 11 N. W. 325, in which case Judge Maxwell held in 1882 that, "Where real estate has been sold under a decree of foreclosure, to any person not a party plaintiff to the action, the owner of the equity of redemption may redeem the same at any time before the confirmation of the sale by paying to the purchaser the purchase money, together with twelve per cent. interest thereon, from the date of sale to the date of redemption."

Judge Maxwell held that courts in equity from an early period have held that until foreclosure the mortgagor might redeem the forfeited estate if he offered to pay the amount due and costs, and that this right to redeem, which could be enforced in a court of equity, was called the equity of redemption, and was a right which attached to every mortgage.

There was a sharp dissent by Chief Justice Lake, and Judge Maxwell, anticipating this, said: "It is very strenuously insisted that in any case a party redeeming must pay the amount of the decree, interest, and costs; and if the premises are sold to any person not the plaintiff in the

action he must, in addition, pay the purchaser 12 per cent. interest on the purchase money. There is no doubt the language used in the section above quoted, if taken by itself, will admit of that construction."

Examining the last part of section 20-1530, Comp. St. 1929, attention is called particularly to the words, "the person so redeeming," which must refer to the same person who has just redeemed it by first paying into court the amount of the decree. Is it not the intention of the legislature, although not clearly expressed, that the person then, after redeeming, must make the successful bidder whole by paying him 12 per cent. upon the money held to protect his bid?

We are inclined to adopt the reasoning of Chief Justice Lake in saying: "On a careful examination of this provision I think it will be conceded that it is somewhat peculiar, differing essentially from those ordinarily made for the redemption of lands from sales merely under decrees or executions. The privilege which it gives to the debtor is not to redeem his land from the sale alone, but from the 'decree or levy.' This, of course, can only be done in the mode directed, which is 'by paying into court the amount of such decree or judgment, together with all interest and costs;' and, if sale has been made to a person other than the plaintiff or judgment creditor, there must also be paid to the purchaser '12 per cent. interest on the amount of the purchase price from the date of the sale to the date of the redemption,' * * * . The precise meaning of the last clause may be somewhat obscure, but I think a little reflection will make it apparent that it is merely an additional requirement to the right to redeem in those cases wherein a stranger to the record becomes the successful bidder." *Swearingen v. Roberts, supra.* This construction of this statute is to be preferred.

The fundamental principle of statutory construction is to ascertain the intent of the legislature, and to discover that intent from the language of the act itself. It is not the court's duty, nor is it within its province, to read a

meaning into a statute that is not warranted by the legislative language. See *State v. School District,* 99 Neb. 338, 156 N. W. 641; *State v. City of Lincoln,* 101 Neb. 57, 162 N. W. 138.

"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.

In our opinion, the proper interpretation of section 20-1530, Comp. St. 1929, is that it gives the owner of real estate which has been foreclosed the right to redeem before sale by paying the amount of the decree, and after a purchaser has bid in the property at a sheriff's sale the party redeeming must, in addition, pay the purchaser 12 per cent. on the amount of the purchase price. See *Lincoln Savings & Loan Ass'n v. Anderson,* 115 Neb. 199, 212 N. W. 210.

In the case of *Mummert v. Grant,* 118 Neb. 651, 225 N. W. 773, District Judge Raper, in writing the opinion for this court, said in the syllabus: "Where an appeal has been brought to this court from an order confirming a sale under a tax *lien* foreclosure, the owner may redeem from such sale before a final order has been entered in this court; the amounts to be paid for such redemption shall be the same as fixed by law for redemption from sales under foreclosures of mortgages." But in the text of the opinion he set out clearly what amount was fixed by law: "A reasonable construction of section 6088, Comp. St. 1922 (present section 77-2040, Comp. St. 1929), giving a like effect to tax sale foreclosures as the law provides for mortgage foreclosures, where no other specific statute intervenes, makes it apply to redemption after confirmation and appeal to this court, with the same effect as redemption in this court from mortgage foreclosures. That requires the payment of the decree with interest, as found by the trial court, to the date of redemption, and costs, and 12 per cent. on the money ac-

tually paid by the purchaser on his bid, and which has been held by the sheriff, pending the appeal, from the time of such payment to date of redemption. This is in accord with the holding in the case of *Lincoln Savings & Loan Ass'n v. Anderson*, 115 Neb. 199, and *Trompen v. Hammond*, 61 Neb. 446."

Many cases have been cited under the third method of foreclosing tax liens, in which section 77-2041 provides a redemption by paying the amount of the bid, but those cases cannot be accepted as authority for redemption under section 77-2040 when the county of Knox after careful consideration decided to bring the foreclosure under the second method herein set out.

While a study of the excellent briefs submitted in the instant case shows abundant reason for doubt on the question submitted, which this court in some of the decisions cited may have failed to clarify, we are now convinced that the action of the district court, in denying appellant the right to redeem his real estate by paying simply the amount bid at the sheriff's sale, with interest and costs, was right, and it is hereby affirmed.

AFFIRMED.

Eberly, J., dissents.

CITY OF GRAND ISLAND ET AL., APPELLANTS, V. PEARL D. WILLIS, COUNTY TREASURER, ET AL., APPELLEES: STATE OF NEBRASKA, APPELLANT.

7 N. W. (2d) 457

FILED JANUARY 6, 1943. No. 31508.

1. **Pleading.** A demurrer admits all material facts alleged in the petition, and allegations of a petition must be taken as true on demurrer thereto.
2. **Taxation.** "Section 77-2039, Comp. St. Supp. 1937, provides a full, complete, and definite procedure by which a county may foreclose the lien of certain delinquent taxes." *Dawson County v. Whaley*, 134 Neb. 509, 279 N. W. 164.
3. **Statutes.** "It is an established rule of construction that special provisions in a statute in regard to a particular subject control

general provisions." *Dawson County v. Whaley*, 134 Neb. 509, 279 N. W. 164.

4. ———. "Where the language of a statute is clear and unambiguous it should be given effect according to its plain terms." *Gibson v. Peterson*, 118 Neb. 218, 224 N. W. 272.

5. ———. Section 77-2039, Comp. St. Supp. 1937, makes it clear that a county is obligated to foreclose tax liens, and account to other subdivisions of government for their *pro rata* share of taxes and make distribution accordingly. It is likewise required to institute, by its legal representatives, the proper proceedings in foreclosure and to make presentation, on motion, to the court for confirmation of sales of real estate, as contemplated by said section. In this connection, the county acts for the other subdivisions of government as trustee.

6. ———. In construing section 77-2039, Comp. St. Supp. 1937, a county, by and through its officers, is not privileged to go beyond the confines of the statute in endeavoring to protect itself, or other subdivisions of government to which it is accountable, for the *pro rata* share of taxes as contemplated by said section.

7. ———. Where a county, by and through its officers, has sales of parcels of real estate confirmed in it, without objection, receiving title thereto, subsequently selling such real estate to individual purchasers, receiving the moneys and retaining them, fails to make proportionate distribution thereof to the other subdivisions of government, as their share of taxes, as contemplated by section 77-2039, Comp. St. Supp. 1937, and raises the question of its own illegal acts, under such circumstances, equity and good conscience will intervene and not exempt the county from the common obligation to do justice which binds individuals.

8. **Counties.** The obligation to do justice rests upon all persons, natural or artificial, and if a county obtains money or property of others without authority, the law, independently of statute, will compel restitution or compensation.

9. **Estoppel.** Equitable estoppel rests largely on the facts and circumstances of the particular case and will be applied where the wisdom and justice of the principle are founded upon equity, morality and justice in accordance with good conscience, honesty and reason. Under such circumstances, the doctrine subserves its true purpose as a practical, fair and necessary rule of law.

10. ———. A county, like individuals, may be estopped by its acts in failing to do justice and equity, and estoppel will apply to such county when it is established by allegations of a petition that the county, by and through its officers, in its acts and conduct, is retaining a part of certain moneys to which it is not entitled.

11. **Pleading.** The allegations of the petition in the instant case state a cause of action, and a demurrer thereto should have been overruled.

APPEAL from the district court for Hall county: ERNEST G. KROGER, JUDGE. *Reversed.*

Herbert F. Mayer and *Walter R. Johnson, Attorney General,* for appellants.

Suhr, Davis, Heyde & Cronin and *Louis A. Holmes, contra.*

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

MESSMORE, J.

The city and school district of Grand Island brought this action against the treasurer and county of Hall, Nebraska, praying for an adjudication that said defendant county treasurer was acting as agent or trustee with respect to certain real estate, and to require an accounting for the proceeds from the sale thereof, and for general equitable relief. The state was made a party, it having an interest in the taxes and the real estate in question. The state answered, joined in plaintiff's petition and adopted the plaintiff's prayer for relief. The defendant treasurer and the county demurred to the petition for the reason that it failed to state a cause of action. This demurrer was sustained. The plaintiffs elected to stand upon the petition, and the action was dismissed. Motion for a new trial was overruled; hence, this appeal.

The plaintiffs (appellants) contend that the court erred in holding that the petition and the answer of the state, joining therein, did not state a cause of action. The case concerns the validity and effect of a course of action of Hall county in bringing tax lien foreclosures under section 77-2039, Comp. St. 1929, as amended. The county directed the county attorney to foreclose the lien for all taxes where the property had been offered for sale for three consecutive years and not sold for want of bidders. Sixteen of these

actions concerned real estate within the territory of the plaintiffs. Decrees of foreclosure were entered therein, and on April 4, 1939, the board of supervisors adopted the following resolution:

"Whereas, a large number of pieces of property are being sold for delinquent taxes under the tax foreclosure suits heretofore commenced in the district court of Hall county, Nebraska, and in order to prevent the property so sold from going at an unsatisfactory figure, and to secure some return therefrom; be it resolved by the County Board of Hall county, Nebraska:

"1. That the Finance Committee of this County Board be and they are hereby instructed to attend said sale and all future sales held under the present suits.

"2. That said Committee be and they are hereby authorized to purchase in the name of the County all property for which there are no other bidders, said purchase being solely and exclusively on the present actions; as Trustee for all the various different subdivisions, State, School Districts, City and County, and not for the use and benefits of the County alone.

"3. That said purchase shall be by the plaintiff as in protection of the first lien in the same effect as the purchase of real estate by the mortgagee at mortgage foreclosure sale.

"4. That said Finance Committee be and they are hereby authorized to withdraw from the sale such properties, as shall not, in the opinion of the Finance Committee, bring a sufficient sum.

"5. In general, said Finance Committee be and they are hereby given full power to act in connection with said tax foreclosure sales."

Thereafter, and pursuant to said resolution, sales were had, and some 1,200 pieces of property were sold to the county within the territory of plaintiffs' districts. The county was the only bidder, and with few exceptions the county bid the property in as trustee at 10 cents for each parcel thereof. Plaintiffs were advised that the county was purchasing the property as trustee and relied upon said ac-

tion. The sheriff did not require the county to pay the bid price, since it was the defendant that bought in the property as trustee for the benefit of the persons entitled thereto. The petition in each of the 16 cases contained a clause that the county of Hall was the owner and holder of the general real estate taxes and entitled to collect the same for the use and benefit of the various governmental bodies entitled to the same. The county waited the prescribed two years and, through its legal representative, moved for an order of confirmation, the motion containing the following: That in each case the property so sold was bid in by the county of Hall, as trustee for all collecting bodies at the price of 10 cents for each of said bids, being materially less than the amount in the decree of foreclosure for delinquent taxes, and in each instance being less than the amount of taxes levied and assessed against the premises, with interest and penalties. The sales were confirmed; sheriff's deed issued to Hall county, and recorded by it. The county did not pay subsequent taxes, but charged off the same on the books of the county treasurer, acting on the theory that it had purchased the property as trustee for the benefit of everybody who was entitled to a proportion of the taxes in all respects as though the defendant trustee had itself bid in the property in a mortgage foreclosure proceeding. The county sold certain of these properties without paying subsequent taxes and the amount of the bid, and refused to pay over the proportionate share of the purchase price paid to it which belongs to the plaintiffs and the state of Nebraska. The county treasurer has now in his hands a substantial amount of money, the exact amount unknown, to plaintiffs, received from the sales. The county claims the money as its own and disclaims any right of the plaintiffs and defendant state. The plaintiffs plead estoppel substantially as follows:

"These plaintiffs further allege that they have relied upon the good faith of the county of Hall; that irrespective of any claim that may be made now that said county of Hall was not in a position to act as trustee, that said coun-

ty of Hall was in truth and in fact trustee for the collection of said taxes and in none of said instances were tax sale certificates issued; that the proceedings were under section 77-2039, Compiled Statutes of Nebraska for the year 1929 as amended, and that said county of Hall is not now in a position to claim that it was not acting as an agent or trustee, or either or both of them, for the benefit of the tax collecting bodies, and is estopped from denying the same and should be compelled to act."

The appellants' contention is based solely on the parcels of real estate bid in by the county, the sale being confirmed in and subsequently sold by the county, money received by the county and retained by it, and the county refused to make a distribution of the proportionate share of taxes to which each of the plaintiffs and defendant state are entitled.

As said in *Payne v. Anderson,* 80 Neb. 216, 114 N. W. 148: "The demurrer admits all material facts alleged in the petition." Allegations of a pleading must be taken as true on demurrer thereto. *Roper v. Milbourn,* 93 Neb. 809, 142 N. W. 792. At this point it is well to consider section 77-2039, Comp. St. Supp. 1937. This section provides in part as follows:

"Counties shall have a lien upon real estate within their boundaries for all taxes due thereon to the state, county or any subdivision thereof. After any parcel of real estate has been offered for sale for taxes for three consecutive years, and not sold for want of bidders, the County Commissioners shall make and enter an order directing the County Attorney to foreclose the lien for all taxes then delinquent, in the same manner, except as herein provided, and with like effect as if such lien were a mortgage * * * . The sale shall be conducted in the same manner as sales of real estate upon execution, and each parcel shall be sold to the highest bidder for cash, provided, however, that no parcel shall be sold for a less sum than the amount of bid plus the costs apportioned against it to the date of sale. The purchaser shall pay all taxes which may thereafter be lev-

ied against the parcels purchased by him, as the same shall fall due. * * * The owner of the fee or any person * * * may redeem at any time within two years from the date of the sale * * * . At any time after the expiration of two years the court shall, on motion of the county attorney, examine the proceedings, and, if they are found to be correct, and if the subsequent taxes have been paid to date, shall make and enter an order of confirmation, and shall direct the sheriff to make and deliver to the purchasers without further cost to them, a sheriff's deed for any real estate not redeemed. No sales shall be confirmed and no deeds shall be ordered by the Court until all taxes accruing subsequent to the foreclosure have been paid. The delivery of such deed shall pass title to the purchaser free and clear of all liens * * * . From the proceeds of the sale of any separate parcel the costs * * * shall first be paid. The balance thereof, or so much as is necessary, shall be paid to the governmental subdivisions entitled thereto in discharge of their claims. * * * If the proceeds are insufficient to pay the costs and taxes, the amount remaining shall be prorated among the governmental subdivisions."

The judicial history of section 77-2039, Comp. St. Supp. 1937, is portrayed by the following cases. Prior to 1903 there was no provision of our statute analogous to said section. It first appears as section 231, ch. 73, Laws 1903. The reason for its passage is apparent in the holding in *Logan County v. Carnahan,* 66 Neb. 685, 92 N. W. 984, which was adopted in 1902. The court held: "As the law now stands, no action for the foreclosure of a tax lien can be maintained, unless based upon a tax deed or tax sale certificate." Consequently what is now section 77-2039 was passed by the legislature in 1903.

In the case of *Commerial Savings & Loan Ass'n v. Pyramid Realty Co.,* 121 Neb. 493, 237 N. W. 575, section 77-2039, *supra,* was held to be constitutional and also held to be an act complete in itself. In the opinion it was said (p. 500): "This act, section 77-2039, Comp. St. 1929, provides the only complete, independent method for the fore-

closure of delinquent tax liens by a county in case no administrative sale has been had prior thereto. Foreclosure of tax certificates purchased by counties or by individuals are conducted under sections 77-2041 to 77-2047, Comp. St. 1929, and should not be confused in any way with the procedure (as set forth in section 77-2039, *supra*)."

In *City of Plattsmouth v. Hazzard*, 132 Neb. 284, 271 N. W. 801, this court held: "The redemption from a tax lien foreclosure by the city under section 77-2039, Comp. St. 1929, cannot be made by paying the amount of the bid, but may be made only by paying the full amount of the taxes due with interest. Const. art. 8, sec. 4." See, also, *Commercial Savings & Loan Ass'n v. Pyramid Realty Co., supra.* In *City of Plattsmouth v. Hazzard, supra,* the court said that "the city stands in the place of the county and is a trustee for the other governmental subdivisions for the enforcement of the payment of the tax." Citing *County of Lancaster v. Trimble,* 34 Neb. 752, 52 N. W. 711. The latter case used the language that the county was a trustee for the benefit of the other subdivisions of government for the payment of the tax, in a tax certificate foreclosure.

In *City of Plattsmouth v. Hazzard, supra,* the court may have applied the wrong section of the statute. It properly interpreted the provisions of section 77-2039, *supra.* In this connection see *Lincoln County v. Shuman,* 138 Neb. 84, 292 N. W. 30. In *Dawson County v. Whaley,* 134 Neb. 509, 279 N. W. 164, the court said (p. 516): "It appears to the court that section 77-2039, Comp. St. Supp. 1937, is unambiguous. It is complete, and does not omit any necessary provision." The opinion quoted from the case of *Gibson v. Peterson,* 118 Neb. 218, 224 N. W. 272, a case involving tax sale certificates, and evidently adopting the construction of the statute with reference to tax sale certificates and applying it to section 77-2039, *supra.* In the *Gibson* case it was stated: "Where the language of a statute is clear and unambiguous it should be given effect according to its plain terms." In *Lincoln County v. Shuman, supra,* the tax sale certificate foreclosed was exclusively within the provisions of sections 77-2040 and 77-2041, Comp. St. 1929.

Without repeating the provisions of section 77-2039, *supra,* it is clear that the county is obligated to foreclose tax liens and account to other subdivisions of government for their *pro rata* share of taxes and make distribution accordingly. It is likewise required by its legal representative to institute the proper proceedings in foreclosure and to make presentation, on motion, to the court for confirmation of sales of real estate, as contemplated by said section. True, the statute makes the county trustee, but does not provide, nor can it be implied, that the county is privileged to go beyond the confines of the statute in endeavoring to protect itself, or the other subdivisions of government. The section does not provide for the county to bid a nominal sum in the event the real estate is not sold to other bidders. The act is specific with reference to subsequent taxes and that they must be paid. There is no provision of the act authorizing any officer to clear the tax books of subsequent taxes, or to waive the payment of costs in favor of the county. The act does not warrant or permit of the procedure followed by the county. If such construction be harsh, then the subject-matter involved must be addressed to the legislature and not to the court. Suffice it to say, the county, by and through its officers, in so bidding for the real estate under section 77-2039, Comp. St. Supp. 1937, acted beyond its authority and the scope thereof, and its acts in so doing are void.

According to the authorities heretofore cited, the county was trustee for other subdivisions of government for enforcement of payment of the tax. Regardless of the void acts on the part of the county and its officers, the result is that the county is in the following position: It owns certain parcels of real estate which it bid in and which were subsequently confirmed in it, sheriff's deed made, delivered and recorded. No objections were made to confirmation, and subsequently parcels of real estate were sold by the county, and the purchasers paid the county, the county retaining the proceeds therefrom and disclaiming that in any event it should be obligated to make distribution *pro rata*

of the sum so held by it to the plaintiffs and the defendant state. Under the provisions of section 26-104, Comp. St. 1929, "Each county shall have power: First. To purchase and hold the real and personal estate necessary for the use of the county, and to purchase and hold for the benefit of the county, real estate sold by virtue of judicial proceedings in which the county is plaintiff or is interested." The reason for section 26-104, *supra,* is obvious. Counties are not permitted to indulge in the real estate business on a competitive basis in sales or upkeep.

Equity and good conscience will intervene in a case presenting such a factual situation as in the instant case. The county, simply because it is a creature of statute and possessing only the powers and authority with which its creator endowed it, stands in no different relation to those to whom it does an injustice than do individuals. It has a moral and equitable status to maintain.

In *Pimental v. City of San Francisco,* 21 Cal. 351, 361, the court said: "The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation." See, also, *Lincoln Land Co. v. Village of Grant,* 57 Neb. 70, 77 N. W. 349, quoting from the California case.

In *Logan County Nat. Bank v. Townsend,* 139 U. S. 67, 11 S. Ct. 496, it was said (p. 75): "'The obligation to do justice,' this court said in *Marsh v. Fulton County,* 10 Wall. 676, 684, 'rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation.'"

The petition pleads estoppel. With reference thereto it is said in 10 R. C. L. 688, sec. 19, that, "While the attempted definitions of such an estoppel are numerous, few of them can be considered satisfactory, for the reason that an equitable estoppel rests largely on the facts and circum-

stances of the particular case, and consequently any attempted definition usually amounts to no more than a declaration of an estoppel under those facts and circumstances." And in 31 C. J. S. 193, sec. 3, it is said: "It is commonly stated in many decisions that estoppels are odious and are not favored in law because they exclude the truth. Nevertheless, the wisdom and justice of the principle of estoppel, especially estoppel *in pais*, * * * are generally recognized, the view being founded on principles of equity, morality, and justice, and in accord with good conscience, honesty, and reason; and, as such, the doctrine subserves its true purpose as a plain, practical, fair and necessary rule of law."

Estoppel applies to controversies between public bodies. As said in *State v. Haid*, 328 Mo. 739, 747, 41 S. W. (2d) 806: "As to the applicability of equitable estoppel to controversies between public bodies, the Court of Appeals properly said: 'As a usual thing, the doctrine of equitable estoppel cannot be invoked against a municipal or public corporation as to the exercise of governmental functions, but yet exceptions are to be made and where right and justice demand it, the doctrine will be held to apply, particularly where, as is true here, the controversy is between one class of the public as against another class.'"

In 31 C. J. S. 416, sec. 141, it is said that estoppel may exist where the controversy is between two or more public agencies; citing *State v. Haid, supra.*

This court in the case of *State v. Lincoln Street R. Co.*, 80 Neb. 333, 114 N. W. 422, held that the "state, like individuals, may be estopped by its acts or laches." And in *State v. McIlravy*, 105 Neb. 651, 181 N. W. 554, the court held: "The doctrine of estoppel *in pais has* application to municipal corporations, and city councils or public authorities will be estopped or not as justice and right may require." In the opinion the court said (p. 657): "The doctrine of estoppel *in pais* is applicable, and simply used to promote justice, equity and fair dealing between the parties involved. It resolves itself into a question of justice

and equity to prohibit fraud and inequity, and as a general rule, when equitable estoppel is once established by the evidence or the facts in a case, it operates as effectively as a deed or record. It is the law that estoppel is commensurate with the thing represented and operates to put the party entitled to its benefits in the same position as if the thing represented were true. It is a fundamental part of the doctrine of equitable estoppel that the estoppel extends only so far as may be necessary to protect from loss the party entitled to assail it."

In applying the doctrine of estoppel, it is quite apparent that it may be applied in a controversy between two or more public agencies. Such is this controversy. Definitely, it may be applied where the state, county or city or any other government agency is involved. The purpose of the doctrine has been heretofore set out. "It is based on the grounds of public policy and good faith, and is interposed to prevent injury, fraud, injustice, and inequitable consequences by denying to a person the right to repudiate his acts, admissions, or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to and did influence." 31 C. J. S. 248, sec. 63.

As previously stated, and as shown by the authorities, the factual situation in each and every case and the circumstances surrounding it are so distinctively different that, out of numerous definitions, not a single one would apply in all cases wherein the question of estoppel is raised, but, as pointed out, where the circumstances are such that a grave injustice or inequity or fraud would be perpetrated by failing to apply the doctrine, as appears in the instant case, then it may be applied.

In the case at bar the county, through its proper legal representative, moved the court to confirm in it the sales of certain parcels of real estate. There was no objection thereto; the sales were confirmed; the county became the title holder by virtue of the sheriff's deed to it. This case does not involve the question of title to such real estate as

between litigants; what it does involve is reflected by the following: The county sold part of the real estate confirmed in it, obtained the money therefor, seeks to keep it under the contention heretofore set out, and refuses to make proportionate distribution thereof to the plaintiffs and defendant state. For such purpose the county is trustee. The money is the subject-matter. It cannot unjustly enrich itself and then object to making distribution that is specifically stated in the statute.

In this connection, the petition states a cause of action, and the demurrer should have been overruled. It was not the duty of the subdivisions of government here involved to ascertain the power and authority which the county had in the premises, in proceeding as it did, and the instant case presents a different legal conception than do cases such as *Garfield County v. Pearl*, 138 Neb. 810, 295 N. W. 820.

REVERSED.

SCOTTS BLUFF COUNTY, APPELLEE, V. OWEN A. FRANK ET AL., APPELLANTS.
7 N. W. (2d) 625

FILED JANUARY 15, 1943. No. 31492.

1. **Taxation.** The listing of real property on the assessment records and tax lists in the name of a person not the owner does not render the tax void if the property be otherwise sufficiently described.
2. ———. It will not be assumed that county officials intended to omit any taxable real estate from the assessment records and tax lists.
3. ———. The legislature has directed that irregularities, informalities or omissions in describing real property on the assessment records and tax lists shall not in any manner invalidate the tax nor invalidate the sale of the same by the county treasurer for delinquent taxes, if the description is sufficiently definite to enable the county treasurer, or other officer, or other person interested to determine what property is meant or intended by the description.

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

Morrow & Miller, for appellants.

Jack L. Raymond and *Frank Glebe, contra.*

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

SIMMONS, C. J.

The question presented here is whether or not the description on the assessment records and tax lists is sufficient to sustain the tax sale certificate and to identify the property against which plaintiff proceeds. The trial court held that it was. Defendants appeal. We affirm the judgment.

The question arises out of the following situation. On March 30, 1894, United States patent was issued to Lorenzo S. DeMott for the northwest quarter (NW¼) of section 24, township 22, range 55. The Winter Creek canal went generally across the northeast corner of the quarter-section, dividing it so that some 8.41 acres were above and 150.4 acres were below the canal. Title to that part of the quarter-section below the canal passed to Clifton R. DeMott. He, on May 31, 1906, conveyed an undivided one-half interest in it to William Frank. On February 23, 1916, DeMott conveyed the other one-half interest to William Frank. On February 23, 1925, William Frank conveyed it to Owen Frank, who thereafter continued to own all of it, except three parcels totaling 18.88 acres which were conveyed by him to other parties in 1938 and 1939.

The question presented arises because the officials, for some years, carried the ownership of the land below the canal under two names, equal acreage, and unequal values, when in fact the land was owned entirely by one party, and the entire acreage so owned was liable to assessment and taxation as one unit under the name of one owner.

The assessment record for the years 1919 to 1929 carried the assessments on the quarter-section substantially as illustrated by the 1920 record as follows:

Name of Owner	Description Pt. of Sec.	Sec.	Twp.	R.	Total Acres	Assessed Value
DeMott, L. S.	Pt. NW¼	24	22	55	75.2	1960
Frank, William	Pt. NW¼	24	22	55	75.2	3061
Shiels, Thomas	Pt. NW¼	24	22	55	8 2/5	272

The description and acreage remained constant through the years. The value of each tract was different for each year and different as to each tract each year. An interlineation was made on the assessment record for 1925 changing the name William to "Owen" and thereafter a similar entry was carried as "Owen Frank" owner "Pt. N. W. ¼." Also the name L. S. DeMott was lined out on the assessment records for 1926 to 1929 and "Owen Frank" written in. When these interlineations were made is not material to our determination here.

From 1930 to 1932 the assessment records listed in duplicate entries Owen Frank "Pt. N. W. ¼," etc., "75.2" acres followed by a bracket with a single valuation for the two entries. Beginning with 1933 the assessment record lists Owen Frank "Pt. N. W. ¼," etc., 150.4 acres. The tax lists for those years were made up as to name of owner and description substantially the same as the assessment records.

The record shows that Owen Frank paid, at separate times, the taxes for 1927 and 1928 and that separate treasurer's receipts were issued. The taxes on the three parcels sold in 1938 and 1939 were segregated and paid.

In 1937 notice of tax sale was made wherein this land was described as "Pt. N. W. ¼, 24-22-55." The county treasurer issued a certificate of tax sale wherein this land was described as "Pt. N. W. ¼, Sec. 24, Twp. 22, Range 55, acres 150.4."

The plaintiff brought this action alleging the levying of the taxes against "All that part of the Northwest Quarter of Section 24, Township 22 North, Range 55 West of the Sixth Principal Meridian lying south of the Winter Creek Canal;" that it had purchased the real estate from the county treasurer at private sale, had been issued tax sale certifi-

cate therefor; the accrual of subsequent taxes; that the county was the owner of all the tax liens. Plaintiff prayed for an accounting of the amount due upon the tax sale certificate and for subsequent taxes and for foreclosure on that part of the land included in the above description less the three tracts sold.

Defendants answered admitting ownership of the land described in the petition, and deny generally as to allegations material here. By way of cross-petition defendants plead, among others, the facts herein recited, alleged that it is impossible to ascertain the land from the description contained in the assessment records and tax lists, that they are so indefinite and uncertain as to be meaningless and absolutely void and that the tax sale certificate is void; that claim of the plaintiff that the purported descriptions covered defendants' land cast a cloud upon defendants' title. Defendants pray that the petition be dismissed, that the alleged assessments, taxes, and certificate be declared void, and that their title be quieted as against the same and as against claims of the plaintiff.

The trial court found for the plaintiff and entered decree for the amount found due, together with attorney's fees and costs.

Defendants here contend that the description appearing upon the assessment rolls and tax lists for the years 1919 to 1929, inclusive, was not sufficient to identify the property described in the petition or any part thereof, and that the taxes alleged to have been assessed against the property for those years are void. They further contend that the validity of the assessments of the property for 1930, 1931 and 1932 "in two unidentifiable parts of 75.2 acres each connected by a bracket with a single valuation * * * is at least debatable."

Section 77-2034, Comp. St. 1929, provides: "No sale of real property for taxes shall be void or voidable on account of the same having been assessed in any other name than that of the rightful owner, if the property be in other respects sufficiently described." See *Grant v. Bartholomew,*

57 Neb. 673, 78 N. W. 314, and *Carman v. Harris*, 61 Neb. 635, 85 N. W. 848. So here the fact that the property was assessed in part in the name of DeMott does not render the sale void or voidable "if the property be in other respects sufficiently described." In the light of the statute the description of the property in the various assessment records and tax lists must be considered as though at all times the name Frank had been used where DeMott was used. Was the property sufficiently described?

Defendants in their brief state it "is therefore reasonable to suppose that the description opposite the name Thomas Shiels was intended to describe the land in said quarter-section above said canal," and that "the purported descriptions set opposite the names L. S. DeMott and William Frank referred to land below said canal."

It is stipulated that for the years mentioned these assessments are all that were made against land in the quarter-section involved. It will not be assumed that the assessor intended to omit any of the land from assessment. It is clear then that the assessor intended that "Pt. N. W. ¼" assessed following the name of Mr. Shiels relates to the land above the canal, and not involved here. It is also clear that he intended that "Pt. N. W. ¼" assessed following the name DeMott and "Pt. N. W. ¼" following the name Frank should together constitute the balance of the quarter-section.

The description is not void because of the use of initials, letters or abbreviations in describing the land. *City of Scottsbluff v. Kennedy*, 141 Neb. 728, 4 N. W. (2d) 878.

Defendants argue that the land was not sufficiently described because there is no way that any one can segregate that part assessed following the name of Frank from that part assessed following the name DeMott; that there are no defined boundaries; and no data by which either tract may be located.

The fallacy of defendants' argument lies in the fact that to sustain it they must rely on an ownership of part of this land by DeMott, and an inability to separate DeMott's in-

terest from Frank's; where in fact DeMott had no interest in the land and there were no different interests to segregate, as there was at all times here involved but one interest.

This is a matter of simple arithmetic. If the two "Pt. N. W. ¼"s are added together the total of the land below the canal owned by Frank is described. If 75.2 acres and 75.2 acres are added together the total of that acreage is shown. If the two assessed values are added together the total assessed valuation is had and if the two tax items are added together the total tax is determined.

Are these taxes void because of the fact that this addition was not actually done on the assessment records and tax lists, or was not done before those lists were made up and because of the fact that the totals were not used? We do not think so.

Section 77-2036, Comp. St. 1929, provides: "Irregularities in making or equalizing assessments, or in making the returns thereof, shall not invalidate the sale of any real estate when sold by the county treasurer for delinquent taxes due thereon, nor in any manner invalidate the tax levied on any property or charged against any person." The legislature did not leave it to the courts to determine what it meant by "irregularities" in the above section. It provided in section 77-2037, Comp. St. 1929: "The following defects, omissions and circumstances occurring in the assessment of any property for taxation, or in the levy of taxes, or elsewhere in the course of the proceedings from and including the assessment and to and including the execution and delivery of the deed of the property sold for taxes, shall be taken and deemed to be mere irregularities within the meaning of the preceding section, * * * any irregularity, informality or omission in any such assessment book, tax collector's book, or other record of any real or personal property assessed for taxation, or upon which any tax is levied, or which may be sold for taxes, provided such description be sufficiently definite to enable the county treasurer or other officer, or any person interested, to determine

what property is meant or intended by the description, and in such case a defective or indefinite description on the assessment or treasurer's book, or in any notice or advertisement may be made definite by the treasurer in the deed by which he may convey such property, if sold for taxes, by conveying by proper and definite description the property so defectively or indefinitely described."

The applicable test here established is: Was the description "sufficiently definite to enable the county treasurer or other officer, or any person interested, to determine what property is meant or intended by the description?" The tests are listed by the use of the disjunctive "or." But without regard to that the test is answered affirmatively by the fact that both the county treasurer *and* the person most interested, to wit, the owner, Owen Frank, were, when he paid the taxes for 1927 and 1928, both able to determine the property meant *and* intended by the description. We do not think that it may be held that Mr. Frank paid those taxes on two separate years without being able to and without having determined, from the records here assailed, that they were properly assessed against his property by proper and adequate description, so meant and so intended.

The case of *Spiech v. Tierney*, 56 Neb. 514, 76 N. W. 1090, supports this conclusion. There lots 6 and 7 were originally all owned by the Tierneys. The south 80 feet of the lots were conveyed to a railroad company. Thereafter the lots were listed under the description "parts of lots 6 and 7." It was contended that the tax was void "because it cannot be determined with certainty which part of the lots were assessed and taxed." There it was pointed out that the parts of lots 6 and 7 remaining, after the conveyance, were the only parts that, as to the Tierneys, were to be entered on the assessment rolls and valued for taxation. The Tierneys owned those remaining parts. It was held that "the public records afforded, at all times, pretty conclusive evidence of the identity of the land against which the efforts of the taxing authorities were directed." So here the public records show that the efforts of the taxing

authorities were directed against the land, and all of the land, lying south of the canal and owned exclusively by Mr. Frank. No other land was included, and no land owned by the Franks in that quarter-section was excluded. The payment of the tax for two years also establishes that Mr. Frank was not "misled" by the description. We have recently said: "A description of real estate is sufficient to sustain a tax if it does not mislead, and identifies or designates with reasonable certainty the property intended to be taxed." *City of Scottsbluff v. Kennedy, supra.* Defendants, however, contend that a succeeding part of the decision is applicable. It was also shown that the Tierneys owned all of lot 5 and it was all subject to taxation. The assessment was carried under the description of "Part of Lot 5." It was held that the tax was void, because it could not be determined which part of the property was charged with the tax. But here all of the property below the canal was owned by Mr. Frank, no part of it was omitted from the description, all of it was subject to taxation and all of it was taxed. See, also, *Concordia Loan & Trust Co. v. Van Camp,* 2 Neb. (Unof.) 633, 89 N. W. 744.

Decisions from other jurisdictions are not persuasive as against clearly expressed legislation to the effect that irregularities of this kind shall not be used by an owner as an implement with which he may lift the tax burdens from his property and thereby escape payment of its determined share of the expenses of government.

This conclusion as to the 1919 to 1929 taxes disposes also of the contention with reference to the subsequent taxes. The decree of the trial court is

AFFIRMED.

DANIEL M. O'DONNELL, APPELLANT, V. ELMA A. O'DONNELL, APPELLEE.

7 N. W. (2d) 647

FILED JANUARY 15, 1943. No. 31520.

1. **Divorce.** Demand for physical examination of a party should be made before the commencement of a trial, so that the proceedings may not be delayed thereby.
2. ———. If a demand for physical examination of a party is first made during the trial, it is addressed to the sound discretion of the trial court, and unless such discretion has been abused the denial thereof will not constitute reversible error.
3. ———. Section 20-1206, Comp. St. 1929, on privileged communications forbids any physician or surgeon giving testimony in relation to confidential matters entrusted to him by his patient in his professional capacity. This law would also apply to the hospital records made by a physician or surgeon, or under his direction.
4. ———: ALIMONY. "In fixing the amount of alimony, the court will take into consideration the estate of each party at the time of marriage, their respective contributions since marriage as well as the duration of the marriage, and the conduct of each party leading up to the divorce." *Phillips v. Phillips*, 135 Neb. 313, 281 N. W. 22.

APPEAL from the district court for Gage county: STANLEY BARTOS, JUDGE. *Affirmed as modified.*

Hubka & Hubka, for appellant.

Jack & Vette, contra.

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

PAINE, J.

This is a divorce action, in which the court granted a divorce to the wife upon her cross-petition, with alimony of $4,000 and attorney's fees of $200. Husband appeals.

In his amended petition plaintiff alleged that he and the defendant were married February 27, 1939, and are residents of Wymore; that no children have been born to the union; that plaintiff has at all times conducted himself as

a true and faithful husband, but that defendant has been guilty of gross mental cruelty towards plaintiff, as follows: That within two weeks after they were married defendant left the home of plaintiff and went to her home, and that since that time she has lived for much of the time at her own home, refusing to live with plaintiff, notwithstanding the fact that plaintiff had a good home in which he wanted her to live, and thereafter bought another home and offered to furnish it, but in which she refused to live and chose to rent so that she might collect the rents therefrom.

The petition further states that there is to the credit of plaintiff and defendant jointly in the State Savings & Loan Association of Beatrice an account of $1,163.40, with right of survivorship; that said money was actually earned by plaintiff, and he asks the court to decree the same to be the money of plaintiff. In addition, there stands of record in the names of plaintiff and defendant a lot in the city of Wymore, which property was actually bought and paid for by plaintiff. Plaintiff prays for an absolute divorce, that the account in the State Savings & Loan Association of Beatrice and the real estate in Wymore be decreed as the sole property of plaintiff.

The defendant in her answer admitted the marriage, and that about October, 1940, plaintiff and defendant resided at a hotel in Fairmont; charged that plaintiff had for a long time acted without love or affection towards defendant; admitted the account in the State Savings & Loan Association of Beatrice of $1,163.40, which money was the result of the savings made by defendant; that the lot in Wymore, standing of record in the names of plaintiff and defendant, was purchased with savings made by defendant, and defendant denies each and every allegation set out in the amended petition not specifically admitted.

Defendant admits that much of the time since her marriage to plaintiff has been spent at the residence of her parents, but that such arrangement did not arise from her choice, but because plaintiff failed to furnish her a home; that when plaintiff and defendant were married plaintiff

was stationed at Nebraska City and did not desire to establish a residence there, and for several months defendant spent part of the time at the home of plaintiff's mother, and went with her to Nebraska City as often as possible to see the plaintiff; that about July 4, 1939, they established a residence at Edgar, and resided there until about March 1, 1940, with the exception of a period of about three weeks; then the plaintiff, a locomotive fireman, was transferred to Wymore, and for about a month defendant spent a part of the time in the home of plaintiff's mother and a part of the time at her parents' home. After that plaintiff was transferred to Fairmont, and until October, 1940, plaintiff provided no home whatever for defendant, but in the beginning of said period would occasionally come to Wymore and take her and leave her at her parents' home, and the only opportunity defendant had to see the plaintiff then was when she would get a chance to go with plaintiff's mother to Fairmont, and before long plaintiff's mother made trips to Fairmont without giving defendant any chance to go along. The automobile which plaintiff's mother used was one purchased by plaintiff but licensed in the name of his mother. Plaintiff carried life insurance with his mother named as beneficiary, and declined to change any of said insurance to name defendant.

About the first week in October defendant went by train to Fairmont, out of which town plaintiff was working, but plaintiff failed to provide any place for them to live at Fairmont, and defendant obtained employment at the hotel where he was staying, paying part of the room rent and for all of her own board, and this continued until early in April, 1941, when plaintiff was transferred again to Wymore, and shortly thereafter to Table Rock, and plaintiff took defendant to her parents' home and left her there, and has never offered to provide a home for her since that time, although repeatedly requested to do so.

The defendant alleges that she has conducted herself toward plaintiff as a faithful, chaste and obedient wife, but plaintiff has been guilty of extreme cruelty toward defend-

ant in that he has failed to provide a home for her. Defendant alleges that, in addition to the real estate hereinbefore mentioned, which is of the approximate value of $1,200, plaintiff is the owner of a quarter-section of land in Gage county, Nebraska, and of 80 acres of land in Washington county, Kansas, and although the two tracts appear of record in the name of plaintiff's mother the fact is that said real estate is the property of plaintiff, was acquired and paid for by him, and reconveyance deeds from his mother to him have been made and delivered, and said tracts of real estate are of the fair value of at least $16,000.

Defendant claims that, aside from her interest in the lot and residence at Wymore and in the State Savings & Loan Association account, she has no other property of her own, that she has no trade or profession and is dependent upon the charity of her parents for support; that plaintiff is 42 years of age, in good health, and earning approximately $200 a month. Defendant asks for separate maintenance, and in the alternative that she be granted a decree of divorce and reasonable alimony.

Plaintiff's reply denied all of the charges of extreme cruelty, and denied that he has any right, title or interest in the real estate described in defendant's answer, which stands in the name of his mother, all of which was told to defendant prior to their marriage.

The court dismissed the amended petition of plaintiff, and granted an absolute decree of divorce to defendant, with permanent alimony in the sum of $4,000, which plaintiff is directed to pay as follows: The amount in the joint account in the State Savings & Loan Association of Beatrice to be assigned in writing by plaintiff to defendant concurrently with defendant executing and delivering a quitclaim deed to plaintiff for lot 4, block 12, Wymore's Addition to the city of Wymore. It was decreed that the balance of the alimony, or $2,836.60, should be paid as follows: $900 on on the 1st day of October in 1942, 1943 and 1944, and $136.60 on the 1st day of October, 1945, said instalments not to draw interest until after maturity. The court also

decreed, in addition to the payment of $50 already made, an additional sum of $150 as attorney's fee to defendant, together with costs.

In the bill of exceptions, of some 300 pages and many exhibits, nearly every allegation of the pleadings is contested. However, this opinion will be confined to the two main propositions,—first, that the court erred in refusing to order the defendant to submit herself to a physical examination, and, second, that the alimony awarded is excessive.

During the progress of the trial, plaintiff demanded that defendant submit to physical examination, as follows: "Mr. Hubka: At this time I want the record to show that the plaintiff makes request that this defendant submit herself for examination. * * * I think the evidence will prove * * * she will not be able to bear children."

Before the court ruled on a renewal of this request, he asked leave to cross-examine the plaintiff, who thereupon was recalled to the stand, and in answer to questions by the court he stated that there was no physical impediment or hindrance to his having intercourse with his wife.

Thereupon, the court denied the request on the grounds, first, that it had been made during the trial, and, second, in view of the fact that it is but one element of cruelty, the defendant need not submit herself to a physical examination.

This court has held that, where the request for a physical examination is first made during the progress of the trial, it is addressed to the sound discretion of the trial court, for there is no absolute right to such an examination, and a denial of such request is not prejudicial unless the ruling indicates an abuse of discretion on the part of the court. See *Ziskovsky v. Miller*, 120 Neb. 255, 231 N. W. 809.

"It is plain that whether the court should stop the progress of a trial for the purpose of ordering a physical examination, especially when no reason is shown why the application was not sooner made, is a matter which rests in the sound legal discretion of the trial court, and unless such discretion has been abused, the action of the court will not

constitute reversible error." *O'Brien v. Sullivan,* 107 Neb. 512, 186 N. W. 532. See, also, *Stuart v. Havens,* 17 Neb. 211, 22 N. W. 419; *City of Chadron v. Glover,* 43 Neb. 732, 62 N. W. 62.

In our opinion, there was no prejudicial error in refusing the request for a physical examination in the instant case.

We will now consider the question of the refusal to allow the introduction of the hospital chart in evidence.

Section 20-1206, Comp. St. 1929, on Privileged Communications, forbids any physician to give testimony of confidential matters entrusted to him in his professional capacity, and this has been held to include nurses' and hospital records.

In the case at bar, Reverend J. G. Kitzelman was called as a witness, and stated that he was general superintendent of the Lutheran Hospital in Beatrice, and that he had searched the hospital records and found a chart relating to the operation of the defendant, Elma Hughes, under date of March 20, 1935, which was prior to her marriage. He testified to the date of her admission and the date of the operation, and that he was acquainted with the signature at the bottom of the record, and that it was made by Dr. J. M. Moritz, and the plaintiff then offered as exhibit No. 6 such chart or operative record.

The objection of defendant was that it was a privileged communication or record, and making it public was objected to by her, and for the further reason that it was not made under oath of the party who made it. The court in making the ruling stated that the doctor himself would be disqualified to testify if he had been called as a witness, and that, if the doctor was disqualified, certainly any record kept by the doctor or the hospital would not be admissible, and the objection was sustained.

We recognize that the admission of hospital charts was approved by this court in *Willis v. Order of Railroad Telegraphers,* 139 Neb. 46, 296 N. W. 443, where we held that the official charts and records kept in the regular course of

business in a hospital are admissible in evidence when a proper foundation has been laid. In an examination of that case it appears that both the insured and his widow had waived all objections of their privilege and consented to the testimony of any physician being received, or the admission of any hospital records, and under these written waivers this court held that the district court was right in admitting the hospital charts and records when such a foundation had first been laid. An exhaustive annotation in 120 A. L. R. 1124, presents every phase of this question, with abundant citation of authorities. Under the evidence in this case, there was no error in the court refusing to receive in evidence the operative chart of the hospital.

We will now consider the error alleged that the alimony awarded the wife is greatly excessive. The plaintiff insists that the wife brought nothing whatever into the marriage except some clothes. He brought all the rest. The defendant was 30 years old when she was married and he was 39 years old. He was a locomotive fireman on the Chicago, Burlington & Quincy railroad, making his headquarters at Wymore, but he was running out of Nebraska City at the time of their marriage, and he drove back every week-end to Wymore. He turned over to her all the pay checks that he received, and she did all the banking business for the two of them.

There is no dispute that at the time of the divorce the parties had $1,163.40 in a building and loan association, had a house in Wymore, worth $1,200, purchased in 1941, two bank accounts of $449.04, a mortgage debt with $115 due plaintiff, and that defendant had $100 in a personal account. Some of these items were in their joint names. All were considered by the trial court, along with the fact that the wife had no property or means of support, while the husband was a fireman on the Burlington railroad, making $200 a month on the average.

The plaintiff and his mother denied upon the witness-stand that he owns the two farms, the titles of which stand of record in the name of his mother, who testifies as to how she acquired each of the two farms.

The defendant testified that time after time, when she was keeping company with him, he took her to see the two farms, and said they were his own, although they stood in his mother's name, and he had deeds to them from his mother. He told her when courting her that the two farms were his life's savings, and all he had to do was to put the deeds from his mother on record.

The mother had always had free transportation on the Burlington, and at one time an official wrote him about his mother's financial condition, and it appears that he wrote out a statement, which plaintiff claims was never mailed, but which his wife found. This exhibit No. 1 was a letter, which plaintiff admitted was in his own handwriting. It reads: "In reply to your letter requesting further statement of facts regarding my mother obtaining transportation I wish to state that I have taken care of mother for 23 years past, and have been her only support. My father died in 1920 leaving her a home but no means of li*veho*od. She at that time could not have kept up the taxes on her home. * * * I managed to acquire some property, * * * and to insure her against poverty in old age. I placed this property in her name. However I manage and supervise this property and the income reverts to me and I in turn admi*ns*ter to my mother in a kind and generous way. * * * I wish to add that I possess warrantee deeds to this property that I have in mother— name and any time I record these deeds I gain possession of my life's savings."

The evidence cannot be said to have justified the trial court in finding that these farms were owned by plaintiff, and were probably of the value of at least $10,400. The court is of the opinion that alimony in the sum of $2,500 is all that is warranted by the evidence.

This court said: "In fixing the amount of alimony, the court will take into consideration the estate of each party at the time of marriage, their respective contributions since marriage as well as the duration of the marriage, and the conduct of each party leading up to the divorce." *Phillips v. Phillips*, 135 Neb. 313, 281 N. W. 22.

The decree of the trial court is therefore modified to fix the total alimony at $2,500, payable in amounts proportional thereto, as in the original decree.

AFFIRMED AS MODIFIED.

REUBEN BORDY, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLANTS.

7 N. W. (2d) 632

FILED JANUARY 15, 1943. No. 31502.

1. **States.** The legislature may properly waive the immunity of the state from suit by the adoption of a resolution to that effect.
2. **Constitutional Law.** The legislature may not create liability on the part of the state as to a part of a class. To conform with section 18, art. III of the Constitution it must be in the form of a statute operating uniformly on all within the class.
3. ———. The attempt of the legislature to create liability on the part of the state for fraud by its officers or agents is ineffectual where it appears that such liability is created only for a favored few of a class.
4. **States.** The state is not liable to an individual for the fraudulent acts of its officers and agents unless made so by legislative enactment.
5. **Constitutional Law.** The provision of the Constitution prohibiting the taking or damaging of private property for public use (Const. art. I, sec. 21) is self-executing and no waiver of the immunity of the state from suit is required to bring action thereunder.
6. **States.** A suit against the state for the taking or damaging of private property for public use must be commenced within two years from the time the taking or damaging of the property occurred. Comp. St. 1929, sec. 20-218.
7. **Constitutional Law.** Neither can the legislature properly waive the statute of limitations in a case where it has become a bar to the commencement of suit, unless constitutional provisions requiring uniformity as to class and prohibiting the granting of special privileges are satisfied.
8. **Case Distinguished.** *Lancaster County v. State*, 74 Neb. 211, 104 N. W. 187, distinguished and certain language used in the opinion is disapproved.

9. Indians. The act of congress relating to the laying out and opening of roads across certain Indian reservations in this state (38 U. S. St. at Large, p. 1188, ch. 161) is an act complete and independent in itself and, on compliance therewith by the state, the taking of the restricted lands of Indians is authorized.

APPEAL from the district court for Thurston county: ADOLPH E. WENKE, JUDGE. *Reversed and dismissed.*

Walter R. Johnson, Attorney General, Herbert T. White and *Alfred D. Raun,* for appellants.

Alfred A. Fiedler and *Robert G. Fuhrman, contra.*

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

CARTER, J.

This is a suit in equity in which plaintiff, individually and as trustee for thirty other persons similarly situated, petitions the court to set aside the waivers of damage and deeds to the land used by the state in the construction of a highway, on the ground that they were procured by the fraud of the state and its agents. By stipulation of the parties only two causes of action were tried. The trial court found for the plaintiff and the state appeals.

The record shows that in 1931 and 1932 certain residents of Thurston and Burt counties, being desirous of having a state highway constructed from Decatur to Winnebago, orally petitioned the state highway department to build such a road. The department through its officers offered to build the road if waivers of damage and deeds to the right of way were procured without cost to the state. The waivers and deeds were procured by interested citizens of the two counties without cost, and the road constructed. Plaintiff contends the persons obtaining the waivers and deeds orally represented that the building of the highway would help local conditions, that all persons owning land along the proposed highway were donating the necessary land and waiving all claims for damages, that no person would be paid for right of way across his lands, that the highway was not

built where it was represented that it would be built, that local Indian labor was to be used and that local persons with teams were to be employed in constructing the road. There is evidence in the record that the highway was not built in accordance with all of the alleged representations herein detailed. On February 23, 1939, the plaintiff procured for himself, and other landowners for whom he acts as trustee, a resolution of the legislature waiving the sovereignty of the state and authorizing the commencement of suit in Thurston, Burt or Douglas counties, to determine the rights of the parties. The resolution further recites: "And the legislature intends by this resolution to make the state of Nebraska liable to respond in damages to the persons named herein for the damage to their respective properties if it appears that such property was taken without just compensation or damages since it is alleged that said property was obtained by the department of roads and irrigation of the state of Nebraska and its agents and representatives upon the false and fraudulent misrepresentations and warranties as set forth in the preamble hereof." The attorney general was directed by said resolution to defend any suit brought by virtue of the resolution and to make each and every defense thereto except laches and the statute of limitations.

This suit was commenced on December 22, 1939, more than two years after the waivers and deeds were executed and the highway constructed. The district court for Thurston county, after a trial on the merits, found for plaintiff on the two causes of action tried and the state brings the case to this court for review.

The attorney general contends that the resolution of the legislature violates constitutional legislative restraints in that it attempts to create liability on the part of the state to a part of a class without creating such liability for the whole class, contrary to section 18, art. III of the Constitution.

The right of the legislature to waive the immunity of the state from suit is unquestioned. But an attempt on the

part of the legislature to waive the immunity of the state from liability raises an altogether different proposition, unless, of course, that it be in the form of a statute operating uniformly on the whole class. This principle was clearly announced in *Cox v. State,* 134 Neb. 751, 279 N. W. 482. If the resolution with which we are concerned attempts to create liability on the part of the state, in addition to the granting of a waiver of the immunity of the state to suit, such attempt to create liability offends against section 18, art. III of the Constitution.

The state is not liable for the torts, misfeasance, or the unauthorized exercise of power by its officers or agents, unless such liability exists by constitutional provision or statute. *Gibbons v. United States,* 8 Wall. 269, 19 L. Ed. 453; *Bush v. State Highway Commission,* 329 Mo. 843, 46 S. W. (2d) 854; *Davis v. State,* 30 Idaho, 137, 163 Pac. 373; *James Stewart & Co. v. State,* 121 Misc. 827, 201 N. Y. Supp. 334. We find no such provision or statute imposing liability upon the state for fraud perpetrated by its officers or agents. And, as we have before said, such liability cannot be created by a resolution of the legislature, although it may be created by statute uniform as to class. We think the resolution was ineffective to create a liability for fraud which did not previously exist.

It is urged, however, that this suit is based on section 21, art. I of the Constitution, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." We call attention to the fact that this is a self-executing provision of the Constitution, which requires no resolution waiving the immunity of the state from suit to authorize the commencement of action. If the plaintiff had a cause of action under this constitutional provision, it became unenforceable two years after its accrual. Comp. St. 1929, sec. 20-218. It is not disputed that the two-year period elapsed before the suit was commenced and, in our opinion, any liability on the part of the state which may have theretofore existed terminated by operation of the statute of limitations.

It is contended that the direction of the legislature that the defenses of laches or the statute of limitations should not be pleaded is effective to save plaintiff's cause of action from the operation of the statute. We think not. Constitutional restraints upon the exercise of the legislative power are such that special privileges to the few cannot be granted. If the legislature desired by a general statute, uniform in its application to all within the class, to provide a different limitation period on cases arising under this provision, a different matter would be presented. But the legislature is prohibited from waiving the limitation period to a few within the class and leaving it to operate on all others in the same situation.

Plaintiff cites two cases in support of his position: *Lancaster County v. State*, 74 Neb. 211, 104 N. W. 187, and *Commonwealth Power Co. v. State*, 104 Neb. 439, 177 N. W. 745.

In the first opinion in the *Lancaster County* case the court said: "The statute of limitations as a defense is a personal one, and may be waived, even if the claim has been barred by statute." But on rehearing, in its opinion appearing at 74 Neb. 215, 107 N. W. 388, the court departed from this conclusion and, as evidenced by the first paragraph of the syllabus, held: "If one having a claim against the state cannot prosecute the same without leave of the legislature or one branch thereof, the statute of limitations will not begin to run against an action on such claim until such leave to sue the state has been given." We agree with the soundness of this holding. In the opinion on rehearing, however, the court made the following statement with reference to its former opinion in the same case: "It was not intended to pass upon the question whether the general statute of limitations would, necessarily, be waived by the authority given to sue the state under the resolution of the senate, without language in the resolution which expressly or impliedly waived that defense." The statement shows on its face that it was not necessary to a decision of the case. In so far as the implication contained therein to the

effect that the defense of the statute of limitations could be waived by express provision in a resolution of the legislature authorizing suit is concerned, we do not think that it correctly states the law and that part of the opinion is disapproved.

The *Commonwealth Power Company* case reaffirms the *Lancaster County* case in holding that, where a claim against the state cannot be prosecuted without leave of the legislature, or one branch thereof, the statute of limitations will not begin to run against an action on such claim until such leave to sue the state has been given. We find nothing in this case supporting the claim that the legislature may waive the general statute of limitations as to a group within a class without waiving as to all within such class.

We necessarily conclude that, if the suit at bar is based on section 21 of article I of the Constitution, it is barred by the statute of limitations. Comp. St. 1929, sec. 20-218. And the attempt of the legislature to waive the statute as to a few within the class is violative of the uniformity provisions of the Constitution. *Cox v. State*, 134 Neb. 751, 279 N. W. 482. If the suit is based upon the fraud of the officers and agents of the state, the petition does not state a cause of action, for the reason that liability on the part of the state does not exist under the constitutional and statutory law of this state, the only source of legal liability; and for the further reason that, while the legislature has the power to waive the state's immunity from suit, it is prohibited by constitutional provision from waiving the state's immunity from liability, unless such liability be established by general law uniform in its application to all within the class.

It appears from the record that some of the lands used by the state in building the highway belonged to members of the Omaha and Winnebago Indian tribes. One of the causes of action before this court on appeal involves the rights of Grace G. Hollowell, an Omaha Indian. It is contended that Grace G. Hollowell as such lacked the capacity to deed any part of her lands to the state. The treaty with

the Omaha Tribe of Indians under date of March 16, 1854, provides: "The Omahas agree that all necessary roads, highways and railroads, which may be constructed as the country improves, and the lines of which may run through such tract as may be reserved for their permanent home, shall have a right of way through the reservation, a just compensation being paid therefor in money." 10 U. S. St. at Large, p. 1043, art. 14. Applicable federal statutes authorized the secretary of the interior to issue patents to the Indians for their allotted lands and to hold the lands for twenty-five years in trust for the Indian to whom the allotment was made. Extensions of the twenty-five year period were authorized and made. The statute then stated: "And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." 25 U. S. C. A. sec. 348. On March 4, 1915, the following statute, quoted in part, was enacted: "That the legal road authorities, charged with the duty of laying out and opening public roads and highways under the laws of the state of Nebraska, having jurisdiction over any territory embraced within the Winnebago Indian Reservation, the Omaha Indian Reservation * * * are hereby authorized and empowered to lay out and open public roads within any of the said Indian reservations * * * Provided, That such road authorities shall, in addition to notifying the landowners * * * likewise serve notice upon the superintendent in charge of the restricted Indian lands * * * and shall also furnish him with a map drawn on tracing linen showing the definite location and width of such proposed road, and no such road shall be laid out until after it has received the approval of such superintendent." 38 U. S. St. at Large, p. 1188, ch. 161.

The record shows that notice was given to the superintendent of the Omaha Indian Reservation. Communications between the state highway department and the Department of the Interior, Office of Indian Affairs, appear

in the record which indicate that full notice was had. On October 31, 1932, the highway plans were submitted to and approved by the superintendent of the Omaha Indian Reservation. It appears to us that full compliance was had with the statute necessary to the securing of valid conveyances from the Indian grantors. We think that the federal act (38 U. S. St. at Large, p. 1188, ch. 161) is an act independent and complete in itself and a total authorization for the state of Nebraska to build a state highway across the Omaha and Winnebago Reservations if compliance is had with the terms of that statute. The record indicates that such compliance was had.

For the reasons stated, the plaintiff has no cause of action against the state on either of the two causes before the court. In view of the conclusion reached, other assignments of error will not be discussed or determined.

REVERSED AND DISMISSED.

IDA B. BOWERMAN, APPELLANT, V. NATHAN H. GREENBERG ET AL., APPELLEES.

7 N. W. (2d) 711

FILED JANUARY 15, 1943. No. 31488.

1. **Trial.** "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence." *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163.
2. **Negligence.** "In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it." *Miller v. Abel Construction Co.*, 140 Neb. 482, 300 N. W. 405.
3. ———. "'The proprietor of a store is not an insurer against accidents to customers, but is bound to exercise reasonable care

and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose.' *Glenn v. Grant Co.*, 129 Neb. 173, 260 N. W. 811." *Rankin v. J. L. Brandeis & Sons*, 135 Neb. 86, 280 N. W. 260.

4. ———. "Negligence is not presumed; the mere happening of an accident does not prove negligence." *Bowers v. Kugler*, 140 Neb. 684, 1 N. W. (2d) 299.
5. ———. "The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured." *Bowers v. Kugler*, 140 Neb. 684, 1 N. W. (2d) 299.
6. ———. Record examined, and evidence found insufficient to warrant submission of the cause to the jury. Motion for a directed verdict properly sustained.

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

Arthur C. Pancoast, for appellant.

Gaines & Shoemaker, contra.

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

MESSMORE, J.

This is a damage action for personal injuries sustained by the plaintiff in a fall on a rubberized mat, stripped and woven together with wire, that is spread before the entrance into the defendants' store at 1518 Farnam street in the city of Omaha, Nebraska. At the conclusion of the plaintiff's evidence, a motion for a directed verdict was sustained. Motion for a new trial was overruled. The plaintiff appeals.

The record discloses that the plaintiff, a widow, employed in a clerical position at the Supreme Council of the Woodmen Circle for about the past eight years, left her place of employment, together with other employees, in a cab at Thirty-third and Farnam streets in Omaha for a down-town district, on June 18, 1941, the plaintiff having a half-hour for lunch between 12 and 12:30. After arriving at her down-town destination, she proceeded to the defendants'

store, which is between Fifteenth and Sixteenth streets on Farnam, facing south, to have her glasses repaired. She entered the store without noticing the rubberized mat, or that it had any raises in it or corners curled, and, having 10 minutes to spare, she left the store with the intention of turning west, crossing the intersection and then proceeding north to the Brandeis store. It was while she was leaving the store that the accident happened. As the question involved is the sufficiency of the evidence to take the case to the jury, we shall recite the evidence which deals with the fall, causing plaintiff's injury.

The mat in question is made from reclaimed rubber-tire casings, stripped and woven together with wire, and is about 30 inches wide. The entrance to the doorway of the store is approximately four feet in width, which would leave nine inches on each side of the mat, with windows and show cases on either side. The mat is fastened with pins or pegs at the top end, next to the door leading into the store, that hold the mat in place. One pin was missing and had been missing for a number of years. It had worked loose from the cement and was removed by the defendants. The mat had been in use for several years. It extended the length of the ramp and a few inches beyond the entrance. There was a steep incline into the door from the entrance, 10 feet in length. The plaintiff was just nearing the end of the mat, was going to make the turn to the west, and was not off the mat, when she fell.

With reference to the accident plaintiff testified as follows: "Q. Did you get clear out of the entrance way? A. No, I had not left the entrance way. I was just nearing the end of the runner, or this mat, and was conscious of going to make this turn, but I had not left, or was not off that mat. I was nearing the end of it, just the same as if you were approaching the street and starting across, you are conscious of watching those lights. Q. What happened then? A. Something caught me and jerked my feet out from under me and pitched me out onto the sidewalk. (It might be remarked here that the plaintiff was wearing

shoes with Cuban heels, about one and three-fourths inches in height and known as a sensible heel.) Q. How did you land there as to your arm and hand and so on? A. I am left-handed and was carrying a white under-arm bag. I was carrying it under this arm, holding it like this (indicating), and as it pitched me I threw out my left hand to break the fall, and came down on my knee, square, breaking the patella bone of the knee cap. Q. Of course, at the time you didn't know that? A. No, I didn't know what had happened, but I was injured and in excruciating pain. I knew that. * * * Q. Well, just tell us a little more in detail how this happened. A. Something jerked my feet out from under me. I don't know which foot it was, but it just jerked me and pitched me head first out on the sidewalk. Q. What was it that jerked? A. It was the mat. Q. What was the mat doing when it jerked you? A. Well, it evidently slipped, because it threw me with terrific force." This answer was objected to but was permitted to stand. Cross-examination: "Q. You don't have a definite recollection then as to how far from the end of the mat you were, or how far from the side of the mat you were when you fell? A. I know I had not made the turn, and I know I was near the end of the mat. * * * Q. So that any slipping of the mat would have to be in a north and south direction? A. Not necessarily. If I was ready to make the turn, it would have pulled me. Q. Ready to make the turn? A. Yes, if I was nearing the turn. I wouldn't have been out beyond the line, but at the same time, ready to take the step for making the turn. Q. But you don't know, except from your own conclusion, just what you were doing, do you? A. Yes, I do. I know that my feet were jerked out from under me." "Q. Did you see anything unusual on the mat at all when you were coming out? A. No, nothing unusual at all. I don't recall anything. * * * Q. You don't know which foot it was? A. No, I am not positive."

A brother-in-law of the plaintiff, who was a building inspector for the city, inspected the mat the day after the plaintiff's fall. When asked about the condition of the mat,

he stated: "The mat is made of strips of rubberized cloth, fastened together with wires, and at the time I saw it right after the accident, there was quite a marked curl at the edges. The mat wasn't laying perfectly flat on the ramp going into the store. The edges were slightly curled, and apparently, at that time, the lower end was loose, so that the mat could be moved backward and forward if a person stepped on it." "Q. Did you notice anything further about the mat except the curling of the corner, when you saw it the next day? A. Oh, nothing,—the mat shows considerable wear, but not so bad. * * * Q. Have you seen the mat at different times, Mr. Bowerman? A. Yes, I have noticed it several times since then. Q. Did you notice at times when it was changed, as to its curled corners, and so on? A. No, each time I have seen it, it apparently has that curling on the edges. I have never seen it when it was turned over." When shown exhibit 2, a picture of the mat, the witness was asked: "What part of that did you see on the next day that curled up? Does it show on that photograph? A. What do you mean? Q. That is the corner, can you observe that? A. Well, that is pretty hard to tell from the picture whether there is any curl in that mat or not. I would say, however, that the edges still show a curl." With reference to the peg that was missing, the witness was asked on cross-examination: "And that peg or pin you have spoken of was up near the door, wasn't it? A. Yes." The foregoing constitutes the material evidence as to the manner in which the accident happened.

Plaintiff's allegations of negligence, briefly summarized, are as follows: That defendants negligently and carelessly placed a narrow combination steel and rubberized fabric matting, eight or ten years old, on the ramp, the deep and wide corrugations of which extended lengthwise; that the mat was narrow, not fastened to the floor, covered the central portion of the ramp, and allowed by defendants to be and remain in a worn, loose, dangerous and unsafe condition, and defendants knew or, by the exercise of reasonable care, should have known of its defective condition, in

that the corrugations of the matting, as it extended into Farnam street, were so worn and defective that they were spread apart and did not adhere firmly to the ramp, causing it to slide from side to side; that the rim or sides, the ends and corners of the matting "were defective and worn and curved upward;" that the matting extended about four inches beyond the ramp onto the sidewalk and was loose and movable; that as the plaintiff "reached the end of said ramp and as she partially turned westward to enter Farnam street, and without any fault or negligence on her part, her foot tripped on said loose defective matting and the matting and her feet slipped out from under her throwing her violently and with great force to the cement pavement;" that her injury was caused solely and only by the negligence of the defendants "in not exercising reasonable care and prudence to keep the said ramp or passage way safe for the plaintiff and the public invited to use the same."

In considering a motion for a directed verdict the law is well settled. In *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163, this court held: "A motion for a directed verdict must, for the purpose of a decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the facts in evidence."

Applying the foregoing holding to the instant case, the burden of proof, by a preponderance of the evidence to prove negligence, is on the plaintiff as reflected by our holding in *Miller v. Abel Construction Co.*, 140 Neb. 482, 300 N. W. 405, as follows: "In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of plaintiff's injury or a cause which proximately contributed to it."

The burden of proof is upon the plaintiff, in a personal

injury action, to establish that some of the acts charged in the petition are the proximate cause of the injury of which the complaint is made. In this connection, this court held in *Rankin v. J. L. Brandeis & Sons,* 135 Neb. 86, 280 N. W. 260: " 'The proprietor of a store is not an insurer against accidents to customers, but is bound to exercise reasonable care and prudence to keep the premises, which the public is tacitly invited to use, safe for that purpose.' *Glenn v. Grant Co.,* 129 Neb. 173, 260 N. W. 811."

In the instant case, the plaintiff suffered a fall, the cause of which is not known to her or to any one else. There is no evidence that the mat was in any way misplaced after the fall, or that it was not in the same position as when the plaintiff entered the store. She was not stepping on or off the mat at the time she fell; nor was she close to the corners of the mat, but she was nearing the end, intending to turn to the west. This does not support her allegation that the edges of the mat were worn and curled upward. There is no evidence that there were any depressions or raised places or defects of any kind in the mat, nor evidence that the mat slid from east or west, as she had not made the turn. She did not know which foot caught, or exactly what happened.

The plaintiff has failed to establish by the evidence that the negligence of the defendants was the proximate cause of her injury. The trial court could not escape the necessity of directing a verdict for the defendants in the case at bar. If it had allowed the case to go to the jury and a verdict had been returned for the plaintiff, the court would have been compelled to set it aside on the motion for a new trial, because of the failure of the plaintiff to prove actionable negligence. See *Smith v. Epstein Realty Co.,* 133 Neb. 842, 277 N. W. 427.

The evidence fails to disclose the cause of the plaintiff's fall. We can only surmise and speculate as to its cause, and a verdict cannot be based on mere speculation or conjecture. As held in *Bowers v. Kugler,* 140 Neb. 684, 1 N. W. (2d) 299:

"Negligence is not presumed; the mere happening of an accident does not prove negligence.

"The burden of proving a cause of action is not sustained by evidence from which negligence can only be surmised or conjectured."

We conclude from an analysis of the record and the authorities as set out herein that the action of the trial court in directing a verdict in favor of the defendants is correct.

AFFIRMED.

JOSEPH L. FISHER, APPELLEE, V. ORA A. KEELER ET AL., APPELLANTS.

7 N. W. (2d) 659

FILED JANUARY 15, 1943. No. 31432.

1. **Appeal.** On appeal in an equity action, the findings of the district court on the evidence are not conclusive or binding, but in view of the fact that the judges see the witnesses and observe their demeanor when testifying, the result of such observations as reflected in the findings should not be considered lightly.
2. ———. "While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Johnson v. Erickson*, 110 Neb. 511, 194 N. W. 670.
3. **Trusts.** "A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." Restatement, Trusts, sec. 1e.
4. ———. "Where the owner of an interest in land transfers it *inter vivos* to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor, if

"(a) The transfer was procured by fraud, duress, undue influence or mistake." Restatement, Trusts, sec. 44.

5. **Fraud.** "Fraud in its generic sense, especially as the word is used in courts of equity, comprises all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another." 26 C. J. 1059.

6. **Fraudulent Conveyances.** "It is a general rule that a court of equity will not aid a fraudulent grantor to recover from his grantee property or its proceeds transferred in fraud of creditors." *Goodman-Buckley Trust Co. v. Poulos*, 124 Neb. 697, 248 N. W. 64.

7. ———. "The object of the rule is not to protect the fraudulent grantee, but to protect society and its purpose cannot be achieved without allowing the grantee to retain his ill-gotten gains." 27 C. J. 656. See *Goodman-Buckley Trust Co. v. Poulos, supra.*

8. ———. In an action by a transferor of real estate against a transferee under an oral agreement of retransfer, the purpose of which action is to have declared a constructive trust, the defendant will not be allowed to show that the transfer was in fraud of creditors if he has participated in the fraud.

9. ———. In an action by a transferor of real estate against a transferee under an oral agreement of retransfer, the purpose of which action is to have declared a constructive trust, the plaintiff will not be allowed to recover if in making his *prima facie* case it be shown that the transfer was made in fraud of creditors.

APPEAL from the district court for Holt county: DAYTON R. MOUNTS and ADOLPH E. WENKE, JUDGES. *Reversed and dismissed.*

J. J. Harrington and *Flansburg & Flansburg*, for appellants.

Julius D. Cronin and *Frederick M. Deutsch*, *contra.*

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

YEAGER, J.

This is an action in equity instituted by Joseph L. Fisher, plaintiff and appellee, against Ora A. Keeler, defendant and appellant, and other nominal defendants and appellants, the purpose of which is to obtain a decree declaring

a trust in behalf of the plaintiff in a certain 720 acres of real estate in Holt county, Nebraska, which real estate is particularly described in the petition, that the defendant Ora A. Keeler and his wife be required to execute and deliver a deed of conveyance to an undivided one-half interest in the said real estate to the plaintiff, and that title thereto be quieted therein in said plaintiff, and for an accounting.

The decree of the district court was in favor of the plaintiff and in accordance with the prayer of the petition. From the decree the defendants have appealed.

The issues here directly concern only the plaintiff and the defendant Ora A. Keeler, hence the parties will be referred to as plaintiff and defendant, or appellant and appellee.

The historical background of this action is substantially as follows: Some years prior to the incidents involved here the plaintiff became the owner of the real estate described in the petition and he held the title thereto until 1926. In 1926 plaintiff, by deed, conveyed title to the real estate to Henry A. Fisher, his brother. He says that the deed was not absolute, but was given to secure indebtedness by him to his brother, which indebtedness, in whole or in part, still exists. Prior to and into 1925 plaintiff was engaged in the banking business in Ewing, Nebraska. He was an officer and was engaged in the management of the affairs of the bank. He, as well as the bank, became financially involved and the state banking department took over the bank in 1925. It appears rather certain that the plaintiff was insolvent and continued so at least to the month of February, 1934. From 1919 to February, 1934, the defendant was a tenant upon the real estate. At least to 1926 he was the tenant of the plaintiff and plaintiff claims that he so continued to 1934, but defendant insists that after 1926 he became the tenant of Henry A. Fisher and that he accounted for rents for this latter period to the plaintiff as agent for Henry A. Fisher. It may also be stated here that defendant has been in continuous possession since 1934. In

February, 1934, the defendant took title to the real estate by warranty deed from Henry A. Fisher and his wife. The deed was subject to two mortgages, one for $7,000 and one for $2,000. These mortgages were in default and certain taxes against the property had not been paid. The deed was delivered to defendant by plaintiff. Henry A. Fisher and his wife filed a disclaimer of any interest in the land or the controversy and assert that the deed from plaintiff was given as security for indebtedness and that plaintiff was at all times the owner of the land.

It is the contention of the plaintiff that through negotiations between himself and defendant an oral agreement was entered into whereby he agreed to convey title to the real estate to the defendant, whereupon defendant was to attempt to obtain a reduction of the two named mortgages, and in case he was able to obtain a sufficient reduction so that they could be liquidated from the proceeds of a new loan from the Federal Land Bank, then he would procure the new loan, liquidate the old mortgages and then convey an undivided one-half interest in the real estate to the plaintiff. If he could not do so he would convey the entire title to plaintiff, and that pursuant to this agreement he delivered the deed from Henry A. Fisher and his wife in February, 1934, and that thereby a constructive trust came into being. He further contends that the loan from the Federal Land Bank and the other mortgages were liquidated and released, but that defendant has failed and refused to comply with the agreement to convey to him the interest agreed upon.

In the answer the defendant denied the agreement asserted by plaintiff, and contended, among other contentions, that the agreement for reconveyance of the real estate was within the statute of frauds and was not taken out by part performance and that there was not a constructive trust. These contentions will receive first consideration here.

The district court found that the agreement for reconveyance was not within the statute of frauds, or, if it was,

that it was taken out by part performance and also that there was a constructive trust. The findings the defendant says were erroneous.

Preliminary to a discussion of these two assignments of error, it will be stated that we are convinced from the facts set forth in the bill of exceptions and in the light of the disclosed circumstances that the oral agreement contended for by the plaintiff was entered into between the parties. It is conceivable that a landlord would turn over to a valued tenant something which might have some value to the tenant, but could be of no value to the landlord, but we cannot on this record believe that the landlord, bankrupt, heavily involved, and hardly able to obtain sufficient income for his own needs, would take and apply from an income hardly sufficient for his own needs to protect that which had been given without expectation of anything in return. We are supported in this view by the findings of two judges of the district court who presided *en banc* at the trial. It is true that their finding is not conclusive or even binding here, but they saw the witnesses and observed their demeanor when testifying and the result of their observations should not be considered lightly.

"While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying." *Johnson v. Erickson,* 110 Neb. 511, 194 N. W. 670. See, also, *Gentry v. Burge,* 129 Neb. 493, 261 N. W. 854; *Higgins v. Adelson,* 131 Neb. 820, 270 N. W. 502; *Ohme v. Thomas,* 134 Neb. 727, 279 N. W. 480.

In the light of our conclusion that an agreement was entered into as claimed by plaintiff, did the trial court properly find that a constructive trust existed?

The latest expression of this court, similar in controlling principle to the case at bar, is found in *Wilcox v. Wilcox,*

138 Neb. 510, 293 N. W. 378, wherein the following was quoted with approval:

"A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property." Restatement, Trusts, sec. 1e.

"Where the owner of an interest in land transfers it *inter vivos* to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor, if

"(a) the transfer was procured by fraud, duress, undue influence or mistake." Restatement, Trusts, sec. 44.

The evidence here does not disclose duress, undue influence or mistake. If there was fraud it depended on the state of mind of the defendant at the time the agreement was entered into. By his own statement the defendant, at the time he received the deed in question, had an intention never to reconvey any real estate to the plaintiff. He concealed his true intention from the plaintiff.

Fraud has been defined as follows:

"Fraud in its generic sense, especially as the word is used in courts of equity, comprises all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another." 26 C. J. 1059.

"Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." Black's Law Dictionary (3d ed.) p. 813. See, also, 1 Story, Equity Jurisprudence (13th ed.) sec. 187; *Morgan v. Gaiter*, 202 Ala. 492, 80 So. 876; *Jones v. Snyder*, 121 Okla. 254, 249 Pac. 313.

Measured by this standard, the defendant was guilty of fraud in concealing from the plaintiff his true intention to the disadvantage of plaintiff and thereby under the authority of *Wilcox v. Wilcox, supra,* a constructive trust came into being.

The next defense urged, which was resolved by the trial court in favor of the plaintiff, which defendant claims was error, was that the plaintiff is entitled to no relief in equity for the reason that the transfer and the claimed agreement for retransfer of this real estate was in fraud of creditors.

There can hardly be any question about the general rule in such cases. It is well stated in the first paragraph of the syllabus in *Goodman-Buckley Trust Co. v. Poulos,* 124 Neb. 697, 248 N. W. 64, as follows: "It is a general rule that a court of equity will not aid a fraudulent grantor to recover from his grantee property or its proceeds transferred in fraud of creditors."

In the same case with regard to the purpose of the rule, this court quoted the following with approval from 27 C. J. 656: "The object of the rule is not to protect the fraudulent grantee, but to protect society and its purpose cannot be achieved without allowing the grantee to retain his ill-gotten gains."

The appellee insists that on the facts this rule can have no application, since at the time of the transfer he owned nothing of value in the real estate, the mortgages against the land having far exceeded its value, thus there was nothing that could have been obtained for the satisfaction of the claims of creditors.

On this limited aspect we must agree that there was nothing which could have been obtained for the benefit of creditors, but we cannot properly so limit our observation.

On plaintiff's testimony it is clear that the plaintiff was the recipient of the rents from the land, and for the period over which the land was rented for cash the rate varied from $500 to $1,000 a year. Up to the date of the deed of February, 1934, he received the rent, and from that date to

the date of the commencement of this action he seeks an accounting of rents. Can it be said that these rents flowing from the land were of no value? Can it be said that this transfer was not made for the purpose of preventing the rents from becoming available to creditors? The plaintiff does not so state. He said: "At that time I had some judgments against me and I couldn't take it in my name."

The defendant was not a creditor of the plaintiff, and in this connection we are mindful of the rule that the defendant is in no position to assert and show affirmatively that the transfer by plaintiff was in fraud of his creditors. The controlling rule in such circumstances is quoted in *Goodman-Buckley Trust Co. v. Poulos, supra,* as follows: "If plaintiff can make out his case without disclosing the alleged fraud, defendant will not be allowed to show, as a reason why plaintiff should not recover, the fraud in which defendant himself participated." 27 C. J. 657.

The plaintiff, in making his case, did not do so without showing the fraud against his creditors. It is true that his evidence indicated substantially that, while the brother held the title, he held it as security for an indebtedness and in the nature of a preference. Under certain conditions such preferences are not condemned as fraudulent by the law. "A debtor has a right to satisfy or secure one or more of his creditors by the transfer of a reasonable amount of his property as security or payment of a *bona fide* debt; and the debtor has the right to make such preference of his creditors, even though the effect thereof be to defeat, hinder or delay other creditors in the collection of their debts; and this is so even though the parties knew that such would be the effect, and even though the property so taken as security was all the debtor had, if the value of the property so transferred is reasonably proportionate to the amount justly owing to the creditor so preferred, and was taken by the creditor for the sole and only purpose of protecting himself in the collection of his debt." *Blair State Bank v. Bunn,* 61 Neb. 464, 85 N. W. 527. See, also, *Costello v. Chamberlain,* 36 Neb. 45, 53 N. W. 1034; *Bank of Ply-*

mouth v. Ritchey, 115 Neb. 493, 213 N. W. 587; *Nebraska Wheat Growers Ass'n v. Johnson,* 130 Neb. 99, 264 N. W. 165; *Luikart v. Tidrick,* 126 Neb. 398, 253 N. W. 414.

The conveyance to defendant was not a preference, hence this rule, despite the contention therefor, can have no application to this controversy.

The clear effect of plaintiff's evidence was that the transfer to defendant, among other things, was to prevent judgment creditors from obtaining the avails of the land and the increase in value, if any, over the encumbrances upon the land. In making his own *prima facie* case he demonstrated his own fraud against his creditors. Since this is so, the plaintiff has no recourse in a court of equity and he will be left where, by his own acts, he has placed himself.

Since we have come to this conclusion on the errors discussed, no reason exists for discussion of other errors assigned or the further contentions advanced by the parties.

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

REVERSED AND DISMISSED.

SUE M. CRANDALL, ADMINISTRATRIX, APPELLEE, V. CHARLES F. LADD ET AL., APPELLANTS.

7 N. W. (2d) 642

FILED JANUARY 15, 1943. No. 31478.

1. **Automobiles.** When two automobiles approach an intersection from opposing directions at lawful rates of speed at approximately the same time, the right of way to which is not otherwise controlled by statute or ordinance, the one to the right has the right of way in the intersection.
2. **Negligence.** "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." *Casey v. Ford Motor Co.,* 108 Neb. 352, 187 N. W. 922; *Moncrief v. Interstate Transit Lines,* 129 Neb. 168, 261 N. W. 163.

3. **Automobiles.** In an action by a widow for her own benefit to recover for pecuniary injury which she has suffered by reason of the death of the husband, her own negligence contributing to the death should be submitted to the jury.
4. ———: NEGLIGENCE. The negligence of a husband while driving an automobile with his wife as a guest may not be imputable to her, but she may be responsible for the consequences of her own negligence in failing to warn him of known approaching danger or for failure to protest against his recklessness.
5. **Trial.** The instructions construed together on the issues submitted *held* to be sufficient and without prejudicial error.

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

Baylor, Tou Velle & Healey, for appellants.

Harry R. Ankeny, contra.

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

YEAGER, J.

This is an action for damages by Sue M. Crandall, administratrix of the estate of Lawrence G. Crandall, deceased, who was the wife of the deceased, plaintiff and appellee, against Charles F. Ladd and Minnie Ladd, defendants and appellants.

The case was tried to a jury with the result that a verdict was returned in favor of the plaintiff and against defendants for the sum of $8,200. Judgment was entered on the verdict and the defendants have appealed.

Since the appeal the defendant Charles F. Ladd has died and his death has been suggested but no further steps have been taken.

The action grows out of an automobile collision which occurred in the intersection of Sixteenth and Q streets in Lincoln, Nebraska, at about 3 o'clock p. m. on February 23, 1941. At the time of the accident Lawrence G. Crandall was driving a Lincoln Zephyr automobile eastward on Q street, which automobile was occupied by three persons other than himself They were Sue M. Crandall, owner of

the automobile and plaintiff here, Kenneth Leroy King and Esther King, his wife. Mr. King was to the right in the front seat, Mrs. King to the left in the rear seat and Mrs. Crandall to her right. At the same time the defendant Minnie Ladd was driving a Ford automobile north on Sixteenth street. She was alone in the automobile. The automobile she was driving belonged to the defendant Charles F. Ladd, her husband, and was used generally by the defendants as a "family purpose" car. The automobile of the defendants came into collision with the right rear fender of the one in which plaintiff was riding. As a result of the collision the Crandall automobile was overturned, resulting in injuries to Lawrence G. Crandall from which he died.

The plaintiff has brought this action as administratrix and for her benefit as widow and sole heir of the deceased, Lawrence G. Crandall. She claims that the collision and the consequent injury and death of her husband were the result of the negligence of the defendant Minnie Ladd, and that by reason of the ownership and use to which the automobile was put the defendant Charles F. Ladd became chargeable with such negligence.

Briefly summarized to the extent necessary to be set forth here, the plaintiff charged that the defendant Minnie Ladd was guilty of negligence in the following particulars: She drove her automobile at an excessive rate of speed; she failed to have her automobile under proper control; she failed to keep a proper lookout; she, after observing the danger in which plaintiff's decedent was placed, or being in a position to make such observation, failed to act in such manner as to permit the plaintiff's decedent to extricate himself from such danger; and she failed to yield to the plaintiff's decedent the right of way which had been forfeited by her on account of the excessive rate of speed at which she was driving.

The defendants jointly and severally answered the petition. In the answer the collision is admitted and also that Lawrence G. Crandall died as a result of the collision. They denied that the defendant Minnie Ladd was responsi-

ble for the collision. Further answering they charged that the collision was caused and contributed to by the negligence of plaintiff's decedent as follows: That he failed to yield the right of way to the defendant Minnie Ladd; that he drove at a high and excessive rate of speed; that he failed to slacken his speed; that he failed to see the automobile operated by defendant Minnie Ladd, or if he did see it he acted in disregard of the knowledge thereof; that he did not have his automobile under control; and that he drove his automobile in disregard of warning signs erected pursuant to ordinance of the city of Lincoln. They further charged that the plaintiff was guilty of negligence which contributed to the accident as follows: That she failed to keep a proper lookout for traffic and particularly of the automobile operated by the defendant Minnie Ladd, or if she did keep such proper lookout she failed to warn the decedent of its approach; and that she failed to caution, warn or protest to the decedent either concerning the manner of his driving or the existence and manner of other traffic on the highway. There are other allegations of negligence, but they either find no support in the evidence or are of like import to the allegations summarized herein.

The reply controverts the affirmative allegations of the answer which are inconsistent with the allegations of the petition.

Numerous errors are assigned as grounds for reversal. They are arranged in groups in appellants' brief for discussion, and to the extent that it is necessary to discuss them we will follow this arrangement. The first four deal with the question of whether or not the evidence is sufficient factually and legally to support a verdict in favor of plaintiff.

For a discussion of these assignments it is necessary to discuss the evidence as to the rates of speed that the two automobiles approached the intersection, the relative time of the respective approaches and the duties devolving upon the parties growing out of the relative direction of approach.

There can be no question and it is substantially agreed that if the two automobiles had approached at approximately the same time and at lawful rates of speed, the Ladd automobile under the law and facts of this case, having been to the right of the Crandall automobile, would have had the right of way in the intersection. Comp. St. 1929, sec. 39-1115; Comp. St. Supp. 1941, sec. 39-1148; Ordinance, City of Lincoln, No. 3787, sec. 701; *Schrage v. Miller*, 123 Neb. 266, 242 N. W. 649; *Plotkin v. Checker Cab Co.*, 133 Neb. 1, 274 N. W. 198; *Parks v. Metz*, 140 Neb. 235, 299 N. W. 643. The evidence of the parties on this point is in sharp conflict. The evidence of the defendants varies to some extent, but it may be said generally to indicate that the two automobiles approached the intersection at about the same time. The evidence of the plaintiff varies in considerable degree, but certain of the witnesses testified that the Ladd automobile was approximately a half block away and others that it was a lesser distance but some distance back when the Crandall automobile was entering the intersection. All of them testified that the Crandall automobile was in the intersection ahead of the Ladd automobile.

The evidence as to rates of speed is also in sharp conflict. The defendant estimated the speed of her own car at 20 miles an hour. Others estimated it as high as 35 miles an hour. A witness or witnesses estimated the speed of the two cars as about the same and at from 20 to 25 miles an hour. Witnesses estimated the speed of the Crandall car from 15 to 30 miles an hour.

It follows, therefore, that on these essential propositions, the evidence being in dispute and the theory of the plaintiff finding substantial support in the evidence, issues of fact on the existence of negligence and contributory negligence in the light of the pleaded and proved ordinances of the city of Lincoln were presented for determination by a jury.

By ordinance No. 3787 of the city of Lincoln, Nebraska, section 106, the intersection in question is within the "congested district," and by section 720 of the same ordinance

the maximum speed allowed in the "congested district" is 15 miles an hour. Paragraph (a), sec. 701 of the ordidance, provides: "When two vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right, except as otherwise herein provided." Paragraph (h) is as follows: "The driver of any vehicle traveling at an unlawful rate of speed shall forfeit any right of way which he might otherwise have hereunder."

The following rule laid down by the court is applicable in these circumstances: "Where different minds may reasonably draw diverse conclusions from the same facts as to whether or not they establish negligence or contributory negligence, those issues must be submitted to the jury." *Casey v. Ford Motor Co.*, 108 Neb. 352, 187 N. W. 922; *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163.

It appears to be the theory of the defendants that it is conclusively established that the two automobiles approached the intersection at approximately the same time, and that the plaintiff's decedent having seen the defendants' automobile, or in the exercise of proper care should have seen it, took no precaution to avoid a collision, and therefore he was guilty of such negligence as would preclude a recovery as a matter of law.

The case of *Nelson v. Plautz*, 130 Neb. 641, 265 N. W. 885, is cited and quoted from as follows: "If both cars had been driven with due care, the collision would not have occurred. It is not enough to prove that the driver of defendant's car was guilty of negligence if the evidence shows that the driver of plaintiff's car was also negligent and that his negligence was more than slight."

The following from *Klement v. Lindell*, 139 Neb. 540, 298 N. W. 137, is called to our attention: "After entering the intersection the plaintiff still had a duty to perform; to use reasonable care in driving his car with respect to approaching traffic, and to consider the condition of the highway and the protection of life, limb and property."

Relying on these cases and others cited, it is contended by defendants that the applicable rule here is that a driver approaching an intersection at approximately the same time as another approaches from his right is negligent as a matter of law if he fails to see such vehicle, or seeing it disregards the knowledge thus acquired.

Assuming that this is a correct and soundly stated rule, it can have no application here. The location of the Ladd car when the Crandall car approached the intersection was not conclusively established. Here was a jury question, and under the evidence the jury could reasonably have found that the Ladd car was so far distant when the Crandall car entered the intersection that plaintiff's decedent was in no wise negligent in attempting to pass through the intersection ahead of the Ladd car. It could have found that either or both of said parties violated the ordinances pleaded, and that no such violation was actionable negligence for the reason that the ordinance violation was not the proximate cause of the accident.

It was proper for the court to submit the negligence of the defendants to the jury.

The defendants complain that the court erred in refusing to submit the question of the contributory negligence of the plaintiff to the jury.

This was an issue tendered by the answer of the defendants, and the theory of the defendants was supported by evidence. The plaintiff testified that she saw the Ladd car coming toward the intersection before it had reached the Virginia apartments, the closest line of which was 100.2 feet from the intersection, and that it was approaching at a speed of 35 miles an hour; that at all times Mrs. Ladd was looking up over the buildings to the west and not in the direction of the Crandall car; that she remarked to Mrs. King that she hoped that Mrs. Ladd would look where she was going, but that she did not warn her husband who was driving.

In *Tucker v. Draper*, 62 Neb. 66, 86 N. W. 917, it was stated: "But in an action by the father for his own benefit

to recover for the pecuniary injury which he has suffered by reason of the death of the child, his own negligence contributing to the death will defeat his recovery." This rule was reaffirmed in the recent case of *Jones v. Union P. R. Co.*, 141 Neb. 121, 4 N. W. (2d) 875. The rule laid down there is applicable here where the action is for the benefit of the wife.

That the plaintiff was under a duty to warn her husband of danger known to her there can hardly be any doubt. In *Murphy v. Shibiya,* 125 Neb. 487, 250 N. W. 746, it was stated: "The negligence of a husband while driving his automobile with his wife as his guest may not be imputable to her, but she may be responsible for the consequences of her own negligence in failing to warn him of known approaching danger and to protest for her own safety against his recklessness." Other cases supporting this view are *Tomjack v. Chicago & N. W. R. Co.*, 116 Neb. 413, 217 N. W. 944; *Behr v. Duling,* 128 Neb. 860, 260 N. W. 281; *Bergendahl v. Rabeler,* 133 Neb. 699, 276 N. W. 673; *Fischer v. Megan,* 138 Neb. 420, 293 N. W. 287.

We conclude that the trial court erred in refusing to submit to the jury the question of contributory negligence on the part of the plaintiff.

Next the defendants urge that the court erred in giving instruction No. 10 of its own motion, and in refusing to give instruction No. 3 requested by the defendants.

We find no merit in the contention. Instruction No. 10 fully and fairly states the rules of law relative to the duties of persons approaching intersections from opposite directions at approximately the same time. It does not recite the effect of violations of speed regulations, but this is set forth in instruction No. 7 by quotation from the City of Lincoln ordinance. Instruction No. 3 requested by the defendants contains a statement of the rules and goes further and requests an interpretation of the rules. The rules themselves are plain and clear and do not require interpretation. The court did not err in this respect.

Defendants urge that the court erred in the failure to

properly instruct with regard to the failure of the deceased to have a driver's license. In this contention we think there is no merit.

The evidence indicated that the deceased had no driver's license. The court instructed that this evidence was "admitted by the court for your consideration merely for whatever you may consider it worth in determining whether or not Crandall was negligent at the time."

If this was error no reason is observable why it was prejudicial to the defendants. There is no word in any of the testimony from which even an inference of casual connection between the accident and the failure to have a driver's license could be drawn.

We are not unmindful of the rule that a violation of a statute or ordinance enacted in the interest of public safety is evidence of negligence (*Walker v. Klopp,* 99 Neb. 794, 157 N. W. 962; *Stevens v. Luther,* 105 Neb. 184, 180 N. W. 87), but the rule cannot be made applicable unless there is some causal relation between the violation and an accident.

Complaint is made that there was error in instruction No. 9 in that the court instructed the jury that, "If you find that Minnie Ladd was guilty of negligence, as claimed by the plaintiff, then her husband would be equally and jointly liable with her for any damage that might result therefrom," without taking into consideration the contributory negligence of plaintiff or of plaintiff's decedent, or the question of proximate cause. This contention does not take into consideration the full purport of all of the instructions. The instructions as to Minnie Ladd and plaintiff's decedent were proper under the comparative negligence rule; hence, since it was admitted that the automobile driven by Minnie Ladd belonged to Charles F. Ladd and was a "family purpose" automobile, by reference to the other instructions it is clear that instruction No. 9 was correct on the theory on which the case was submitted.

The contention is made that the court erred in refusing to give a proper instruction on the measure of damages. We find no error here.

The remaining material assigned errors do not require consideration and discussion since they refer to the verdict of the jury.

For the reasons herein stated, the verdict and judgment are reversed, and the cause remanded for a new trial.

REVERSED.

VELMA FANDERS, APPELLEE, V. JAMES DAVISON, APPELLANT.
7 N. W. (2d) 652

FILED JANUARY 15, 1943. No. 31479.

1. **Negligence.** A party who tenders an issue of negligence has the burden of sustaining the charge by a preponderance of the evidence.
2. ———. The burden of proof of negligence rests upon the party who alleges it and this burden does not shift during the trial.
3. ———. Where a party alleges an emergency created by the negligence of his adversary, he is required to assume the burden of proving such negligence and in consequence the emergency.

APPEAL from the district court for Gage county: CLOYDE B. ELLIS, JUDGE. *Affirmed.*

Rinaker, Hevelone & McCown, for appellant.

Hubka & Hubka, contra.

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

YEAGER, J.

This is an action for damages for personal injuries instituted by Velma Fanders, plaintiff and appellee, against James Davison, defendant and appellant. The case was tried to a jury. The jury returned a verdict in favor of plaintiff and judgment was entered on the verdict. Motion for new trial was duly filed and overruled by the court. From this judgment the defendant has appealed.

The appeal presents but one assignment of error. The appellant urges as his assignment of error that the court

erred in the giving of the following which appears as a part of instruction No. 3:

"You are further instructed that the defendant in his answer also alleges, in substance, that his automobile was being driven with due care; that he was suddenly confronted with an emergency and that he used all the skill at his command but was unable to avoid the accident.

"You are instructed that these latter allegations of said answer are affirmative in their nature and before defendant can avail himself thereof he must prove the same by a preponderance of the evidence.

"If you find that the defendant has proved either or both of his said affirmative defenses by a preponderance of the evidence, then your verdict will be in favor of the defendant."

The accident in question occurred on April 12, 1940, at about 4:30 o'clock p. m., at or near the intersection of highway No. 3 with another road a short distance north of the village of Harbine in Gage county, Nebraska. Highway No. 3 is an oil mat surfaced road, and extends in a northeasterly and southwesterly direction. The other road has a gravel surface and extends north and south.

The plaintiff drove her husband's automobile from a filling station, which station is on the north side of the highway, onto highway No. 3 a short distance west of the intersection of the two roads. The defendant coming from the southwest on highway No. 3 ran into the rear of the automobile operated by plaintiff. Plaintiff in her petition claimed that the defendant was guilty of negligence.

The defendant filed an answer and cross-petition. In his answer the defendant generally denied that he was guilty of negligence. Further, he made the following allegation which is paragraph 6 of the answer. "That while the plaintiff was driving her husband's said automobile diagonally across the traveled portion of said state highway No. 3 and while she and her husband's said automobile were still on the traveled surface of said highway she suddenly, and without warning, and recklessly and negligently reduced

the speed of said automobile which she was driving, and brought said automobile almost to a stop upon the traveled surface of said state highway No. 3 and immediately in front and in the path of the defendant and his said automobile; that thereupon the defendant, confronted with the imminent and immediate peril of a collision between his automobile and the automobile driven by the plaintiff, turned and swerved his said automobile to the left, or northerly direction, in an effort to avoid such collision, but was unable to prevent such collision."

It is the contention of appellant that on this allegation in the answer the court, by the instruction complained of, improperly placed the burden of proof of the emergency charged on the defendant.

From a full and fair examination of this portion of the answer, it is clear that the contention of the appellant is without merit. The inescapable purport of the language contained in the allegation is that by and through the negligence of the plaintiff, which was the proximate cause of the accident, the defendant was placed in a position wherein it was impossible for him to act so as to prevent the accident. In other words, it is an affirmative charge of negligence against the plaintiff.

The charged negligence against the plaintiff in this respect was a material issue tendered by the defendant and hence the burden was upon him to sustain the charge by a preponderance of the evidence. *Pierce v. Miller,* 107 Neb. 851, 187 N. W. 105; *Fenske v. Strait,* 121 Neb. 177, 236 N. W. 441; *Gutzmer v. Nelsen,* 121 Neb. 214, 236 N. W. 614; *Cohen v. Swanson Petroleum Co.,* 133 Neb. 581, 276 N. W. 190; *Hole v. Hamp,* 134 Neb. 259, 278 N. W. 480; *Fairchild v. Fairchild Clay Products Co.,* 141 Neb. 356, 3 N. W. (2d) 581.

The general rule is fully applicable in negligence cases. In *Knies v. Lang,* 116 Neb. 387, 217 N. W. 615, it was stated: "In this connection it is to be also remembered that in this jurisdiction, upon the issue of negligence, the burden of proof rests upon him who alleges it, and the burden

of proof does not shift during the trial." See, also, *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb. 720, 62 N. W. 68; *Swift & Co. v. Haloubek*, 60 Neb. 784, 84 N. W. 249; *Riley v. Missouri P. R. Co.*, 69 Neb. 82, 95 N. W. 20; *Lincoln Traction Co. v. Shepherd*, 74 Neb. 369, 104 N. W. 882.

From an examination of the quoted portion of the instructions alone without reference to the allegation of the answer, it would appear that there is force in the contention that the trial court wrongly placed the burden of proof upon the defendant, since no mention is made therein of the allegation that the emergency complained of was alleged to have been created by the negligence of the plaintiff.

To have properly reflected the allegation of the answer and the theory on which the case was presented by the defendant, the last clause of the first quoted paragraph of the instruction should have been in substance the following: That he was suddenly confronted with an emergency *created by the negligence of the plaintiff* and that he used all the skill at his command but was unable to avoid the accident. The italicized words did not appear. This failure to fully reflect this issue tendered by the answer was not prejudicial to the defendant since it imposed no additional burden. The additional words would only have been explanatory of the burden imposed by the instruction.

Finding no error in the instruction complained of, the judgment of the district court is affirmed.

AFFIRMED.

THOMAS WALLS V. STATE OF NEBRASKA.
7 N. W. (2d) 709

FILED JANUARY 22, 1943. No. 31483.

Burglary. The defendant was convicted of breaking and entering a filling station. We have reviewed the entire cause, considered the assignments of error presented here, and find that no substantial miscarriage of justice has occurred.

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

Neighbors & Danielson, for plaintiff in error.

Walter R. Johnson, Attorney General, and *John H. Comstock, contra.*

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

SIMMONS, C. J.

Defendant was charged with breaking and entering a filling station with intent to steal. He was tried and by a jury found guilty of the crime. He appeals. We affirm the judgment of the trial court.

Defendant at the trial and on his appeal here had the service of able counsel, who died after the case was briefed. Defendant appeared personally at the bar of this court and orally submitted his case upon the brief prepared and presented here by his counsel.

The evidence establishes that on the night in question the defendant and two women companions went to a night club in Scottsbluff. He was there for some time drinking beer and whisky and dancing with his companions. Sometime after midnight one of the women, because of his drunken condition, left him and went home. The other remained for some time and finally, for the same reason, she left him and went home. The defendant then visited another night club, continued his drinking and sometime around 3 o'clock in the morning entered a café, ate and met friends. These friends, two young men, had also been drinking. They proposed to drive to Denver and asked defendant to go with them. They discussed the need of money and where they could get it. They left the café, entered a car owned by the father of one of the men, drove around a bit, and finally went to the service station where one of the men worked. There defendant kicked out a glass in the door, then it was opened by reaching through the opening made by the broken glass, the defendant and the employee entered, opened

the safe and took out a bag containing currency, coins and checks. The third man entered before the job was done. Following that they left the building taking the bag and contents with them, and drove to Morrill. On the way the defendant opened the sack, took out the contents, took the coins and currency himself and gave the checks to the others. The coin sack was thrown out of the car window. It was later found on the highway west of Scottsbluff. At Morrill they bought gas, and cashed a check. They went to Torrington where one of them, not the defendant, got coffee and cashed a check. Starting for Cheyenne, the defendant got into the rear seat and went to sleep. They drove to Cheyenne, to Laramie, to Fort Collins, where on mid-morning they stopped at a tavern, and while being served beer, one of the men, not the defendant, told what had been done and their arrest followed. There is no substantial dispute as to the above facts.

The defendant testified in his own behalf that he had some money when he started the evening. This he thought was pretty well spent before the evening was over. He testified as to his drinking and generally told where he had been during the evening, down to the time he got into the car with the others under the "impression" that he was going to Denver. From that time on he testifies that he remembers nothing until he woke up at Fort Collins. Defendant's leg was cut during the night. He testified that he does not remember when or how it happened. When arrested defendant had coins and currency in four pockets. The evidence of the degree of drunkenness of the three men when at the café and before is conflicting. It ranges from testimony that defendant was staggering drunk to he had been drinking but was by no means as drunk as the other two, who remembered fairly well all that happened, and in particular what happened when the crime was committed.

Defendant's principal contention is that he was too drunk to remember what happened, too drunk to form the necessary criminal intent, and too drunk to distinguish between right and wrong. The evidence is conflicting, but no more

so than might be expected under the circumstances. The other men testified that while in jail at Fort Collins, the defendant told them that he was a "four-time loser," and that if one of them would assume responsibility they, being young and with a good record, could get a parole. This defendant denied, as he did other parts of their testimony. He admitted on cross-examination that he previously had been convicted of a felony. The jury had the right to determine the credibility of defendant.

It is patent, if reversible error was not committed at the trial, that the evidence sustains the "guilty" verdict.

Section 29-2308, Comp. St. 1929, provides: "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."

Defendant complains about some 20 rulings of the court on the admission or rejection of evidence. These we have reviewed and find that prejudicial error was not made.

Defendant next complains that there are inconsistencies in the state's evidence. These matters were for the consideration of the jury in determining the issues presented. Reversible error is not shown.

The court gave the usual instructions as to the elements of the crime, including intent, the presumption of innocence, the testimony of accomplices, the credibility of witnesses, and the reasonable doubt rule. The court further instructed the jury as to intoxication with relation to the question of criminal intent, and gave an instruction as a guide to determine whether or not the defendant intended to commit the crime, and the consideration which should be given to evidence of excessive intoxication by which the party is wholly deprived of reason. No complaint is made here as to any of these instructions.

The trial court refused to give an instruction, requested

by the defendant, concluding with the proposition that, if the jury found that defendant had sufficient mental capacity to understand what he was doing, but if they had a reasonable doubt that the defendant had the mental capacity to distinguish right from wrong at the time he broke and entered the filling station, then the jury should acquit. Defendant complains about the refusal of the trial court to give the tendered instruction, and its failure to give one covering the above proposition. Defendant bases this assignment upon the decision in *Knights v. State*, 58 Neb. 225, 78 N. W. 508, and supporting decisions. Defendant's evidence did not call for such an instruction. His evidence was that from the time he left the café until he woke up at Fort Collins his mind was a complete blank. Considering the instructions given, we find that prejudicial error was not made by the trial court either in refusing to give the requested instruction or one of similar import.

The evidence believed by the jury is ample to sustain the verdict. We have examined "the entire cause" and find that "no substantial miscarriage of justice has actually occurred."

The judgment of the trial court is

AFFIRMED.

Rose and Eberly, JJ., not participating.

STATE, EX REL. WALTER R. JOHNSON, ATTORNEY GENERAL, APPELLANT, V. COMMERCIAL STATE BANK, APPELLEE.
7 N. W. (2d) 654

FILED JANUARY 22, 1943. No. 31491.

1. **Public Lands.** Sections 72-219 and 72-220, Comp. St. 1929, were enacted for the protection of the state in enforcing the remedies therein provided. They create no liabilities other than those contained in the contracts of the parties.
2. ———. A person claiming an interest in a school-land lease under an assignment from a lessee is liable upon the covenant to pay rent only if privity of estate exists between such person and the lessor.

3. **Landlord and Tenant.** Where a lessee assigns his whole estate in the demised premises, the assignee is ordinarily liable to the lessor for the whole of the rent reserved in the lease.
4. ———. But where the lessee assigns a lease as security for a loan only, and the whole estate consequently is not assigned, the assignee is not ordinarily liable for the rents reserved in the lease in the absence of a binding contractual provision to that effect.
5. **Public Lands.** Whether an assignment of a lessee's interest in school-lands destroys the privity of estate existing between the lessee and the lessor and creates that relation between the assignee and the lessor depends upon the estate demised and the estate assigned being identical.
6. ———. When an assignment of a school-land lease is made to secure a loan, such assignee is not liable to the lessor for the rent reserved until he enters into possession.
7. ———. A school-land lease, absolute in its terms, may be shown by parol evidence to have been given as security for the payment of a loan, and as between the parties, if established, it will be so construed by the courts.

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

Walter R. Johnson, Attorney General, and *Robert A. Nelson,* for appellant.

George B. Hastings, contra.

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

CARTER, J.

The state of Nebraska commenced this action to recover the payments and interest due by the terms of a school-land lease. The trial court found for the defendant bank and the state appeals.

The evidence shows that the school-lands in question were leased to one Ben Brinkema on December 31, 1924, for a period of 25 years and the lease recorded in the office of the board of educational lands and funds. On June 29, 1927, the lessee assigned his interest in the lease to L. E. Smith, this assignment also appearing of record in the of-

fice of the board of educational lands and funds. On March 1, 1928, the lease was assigned to the defendant Commercial State Bank of Elsie and the assignment recorded in the office of the board of educational lands and funds. After the lease was assigned to the bank, the semiannual rentals due under the lease after March 1, 1928, and prior to July 1, 1930, were paid. On or about November 12, 1932, the board of educational lands and funds forfeited the lease for nonpayment of rent, at which time there remained due and unpaid the sum of $949.29. In February, 1934, the improvements on the school-land were sold for $50 and the amount credited on the rentals due, leaving due and unpaid the sum of $899.29. It is for this amount with interest for which this action was commenced.

The defendant bank alleges and the evidence shows that on March 1, 1928, L. E. Smith borrowed $5,500 from the defendant bank and gave a mortgage on a quarter-section of land and the assignment of the school-land lease hereinbefore referred to, as security for the loan. On February 21, 1929, Smith paid off the $5,500 loan and the bank executed and delivered to him an assignment of the lease. This assignment does not appear to have been recorded in the office of the board of educational lands and funds. The evidence is undisputed that Smith lived on the school-land during all the times herein mentioned and that the defendant bank never had actual possession of the leased lands. The president of the bank testifies that the bank had no interest in the school-lands other than the assignment of the lease for security and that the bank never paid any rentals due under the lease. The rentals paid while the bank held the assignment of the lease appear to have been paid by Smith.

Our statute provides that, if any lessee of school-lands be in default of the semiannual rental for six months or more, the board of educational lands and funds may, after giving a 90-day notice, forfeit the lease. For the purposes of this statute the person whose title appears last of record will be recognized as the owner of the lease. Comp. St. 1929, sec. 72-219. It is also provided that no assignment of a school-

land lease shall be valid until recorded in the office of the board of educational lands and funds and shall not be eligible to such record if there are any payments of interest or rental due at the time the assignment is offered for record. Comp. St. 1929, sec. 72-220. The foregoing statutes were enacted for the protection of the state by insuring that the state might transact with certainty its business with the lessees of school-lands and protect itself against the claims of unknown assignees. Assignments of school-land leases are permitted, but in order to be effective against the state the state must be informed of them in the manner which the statute prescribes. *Langan v. Binfield,* 49 Neb. 857, 69 N. W. 123; *Hile v. Troupe,* 77 Neb. 199, 109 N. W. 218.

As between the parties, therefore, the assignment of the school-land lease to Smith, after the payment of the loan, was valid, although, in the event of default, the state could enforce the remedies contained in the statute without regard to such assignment. The assignment to the bank did not contain provisions by which the bank assumed and agreed to pay the rentals due under the lease. The only remaining question is whether the covenant to pay rent runs with the land. This depends entirely on the question whether there was privity of estate between the assignee bank and the state. This in turn depends on the question whether the assignor assigned all of his interest in the lease to the bank. *Hogg v. Reynolds,* 61 Neb. 758, 86 N. W. 479.

The evidence shows that the assignment was made to the defendant bank as security for a loan. This being true, the whole interest of the assignor was not assigned. Under these circumstances there was no privity of estate between the state and the assignee bank and no obligation to pay rent accrued to the bank. Whether an assignment of a lessee's interest in school-lands destroys the privity of estate existing between the lessee and the lessor and creates that relation between the assignee and the lessor depends upon the estate demised and the estate assigned being identical.

The state contends, however, that parol evidence is not admissible to show that the assignment was given as security. With this we are not in accord. This court has many times held that a deed, absolute in its terms, may be shown by parol evidence to have been given for the purpose of securing the payment of money, and that, in such case as between the parties, such deed will be construed to be a mortgage. *Names v. Names*, 48 Neb. 701, 67 N. W. 751. And in *Gregory v. American Bank Bldg. Co.*, 108 Neb. 507, 188 N. W. 191, it was held: "It is competent to prove by parol evidence that the parties to an assignment of a lease of real estate, though absolute in form, intended it as collateral security for a debt." We see no difference in principle in the case at bar. It is also generally held that, where a mortgage is considered a mere security for the debt, such mortgagee is not liable to the lessor for the rent of the demised premises unless and until he enters into possession. 36 C. J. 376. We think this rule is also applicable in principle to the case at bar. The evidence shows conclusively that the assignee bank never went into possession of the school-lands in question, they being at all times herein mentioned in the exclusive possession of defendant's assignor, Smith.

While our statute, section 72-219, Comp. St. 1929, authorizes the state to treat the last lessee shown on the records of the board of educational lands and funds as the proper person to be served with notice in forfeiture proceedings, the liability of any lessee is dependent upon the contract of the parties and the law that existed when such contract was made. For the reasons hereinbefore given, we conclude that the trial court correctly held that the defendant bank was not liable for delinquent rentals due by the terms of the school-land lease under the undisputed facts of the case.

AFFIRMED.

Rose and Eberly JJ., not participating.

JOHN WILLIAM JAMES, APPELLANT, V. HARRY KREBEK ET AL., APPELLEES.

7 N. W. (2d) 637

FILED JANUARY 22, 1943. No. 31198.

1. **Automobiles.** "Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1931, means negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Morris v. Erskine*, 124 Neb. 754, 248 N. W. 96.
2. ———. The burden of proof is upon a guest, riding in an automobile by invitation, to prove by a preponderance of the evidence, if he seeks to hold the owner or operator thereof liable for damages, that such owner or operator was guilty of gross negligence. Failure to so prove, or the fact that the operator of the automobile may have been guilty of ordinary negligence, is insufficient to warrant a recovery in favor of the guest.
3. ———: APPEAL. In reviewing a peremptory instruction in favor of defendant, issuable facts which the evidence in favor of the plaintiff tends to prove will be regarded as established, and if such facts, when so considered, are insufficient to prove by a preponderance of the evidence gross negligence on the part of the operator of an automobile, in a suit by a guest, then such motion for a directed verdict was properly sustained.
4. ———. The violation of a statutory provision is not, in and of itself, negligence, but may be taken into consideration, together with all other facts and circumstances in the case, to determine the question of negligence.
5. **Appeal.** Where the gravamen of an accident is negligence, and the facts and circumstances with reference thereto are controverted and in conflict, in that reasonable minds might draw different conclusions in an analysis of such facts and circumstances, the question is one for the jury and will not be set aside unless clearly wrong.

APPEAL from the district court for Antelope county: ADOLPH E. WENKE, JUDGE. Opinion on motion for rehearing of case reported in 141 Neb. 73. *Former judgment of reversal vacated and judgment of district court affirmed.*

M. S. McDuffee and *Elmer C. Rakow*, for appellant.

Jackson & Rice, Peterson & Devoe, Matzke & Bek and *Ralph M. Kryger, contra.*

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

MESSMORE, J.

This case is before us on rehearing. Former opinion is reported in 141 Neb. 73, 2 N. W. (2d) 629.

The mother and next friend brought this action to recover damages for personal injuries sustained by her son, a minor, 19 years of age, in an automobile collision on a public highway between two automobiles driven by defendants while he was a gratuitous guest in one of the cars.

Plaintiff's petition alleges that his injuries were caused by the negligence of the defendants approximately concurrent in time and each contributing to his injuries; that defendant Wright, the driver of the car in which plaintiff was riding, was guilty of gross negligence in not having his automobile under control, in not keeping a proper lookout, in turning to the left in front of defendant Krebek's automobile, in not being on his own right side of the highway, and in not avoiding the accident; that defendant Krebek was guilty of negligence in driving his automobile on his left-hand side of the highway at an excessive rate of speed, such as to endanger the life and limb of other persons generally using said highway, in not keeping a proper lookout, in not having his automobile under control, and driving it into the Ford. Defendants' answers are, in effect, a general denial.

The accident occurred on highway No. 275, surfaced with oil mat or black top, 24 feet in width, and about a mile and a half east of Meadow Grove, Nebraska, on May 1, 1940, at approximately 11:30 a. m., in front of the Haskell Osborn farm. The highway for the most part near the place of the accident is smooth and practically level. Defendant Wright was driving a Ford automobile east on said highway and defendant Krebek a Buick sedan, proceeding west thereon. The day was clear, the wind blowing, and the visibility good. The highway runs out of Meadow Grove from the east on a section line, and near the Osborn farm there is a

wide turn, taking the road southeast from the section line. A few rods west of the Osborn house is a concrete culvert wider than the oil mat. On the south side of the highway, east of the culvert, there is a curve sign, and east of this sign is the Osborn driveway on the opposite side of the highway, and where the highway leaves the turn south it angles in that direction for a half mile where it connects with the half-section line, then proceeds straight west in what amounts to a large "S" curve for a half-mile. The land is level and there are no trees of any size on the south side of the highway for some distance west of the Osborn place and for some distance southeast. A grove, some trees and shrubs near and about the Osborn farm and along the highway will be referred to later.

On the morning in question plaintiff, as a guest of Wright, proceeded from Tilden, Nebraska, on highway No. 275 in an easterly direction, and as they approached the Osborn farm, Wright called plaintiff's attention to a car coming toward them from the east. Plaintiff testified they were then just west of the culvert, and Wright said: " 'Look at that car,' and he wondered if it was ever going to get over;" that, considering the highway at that point as an "S" curve, the approaching car was coming out of the curve about half-way around it. The witness explained that "after you get past the Osborn farm there is a short curve to the south and then the road runs in a southeasterly direction for about a half-mile, then there is another more wide, sweeping curve that turns into the straight-away going on east;" that plaintiff and Wright were on the straight east and west road when Wright made the remark, and they continued thereon until they were somewhere past the Osborn driveway and west of a bridge. Plaintiff saw the Buick approaching, and it was on the south side of the road when his attention was called to it, and when the Buick came out of the curve, he remembered sliding down in his seat because he felt that an accident was unavoidable. He placed the Krebek car on its south and left side, and the Wright car on its right and south side, of the highway. Plaintiff

stated that he did not pay any attention to the car coming from the east until Wright called his attention to it. The curve sign is seven feet south of the south edge of the mat. The distance from the west side of the culvert to the curve sign is 360 feet, and the distance from the curve sign to the beginning of the curve where the road takes off to the southeast is 180 feet. The height of the road above the ditch on the south side near the curve sign is four feet, and there is a four-foot fill above the adjacent ground in the center of the grade. The distance from the curve sign to the driveway into the Osborn place is 125 feet, and the distance to the beginning of the curve to the right from the bridge on the highway is 540 feet; that is, where the road begins to curve to the southeast. The bridge is the same width as the highway and a 10-foot span.

At the time of the collision Osborn was in front of his barn sacking wool. He did not see the accident, but heard the cars come together and was the first person on the scene. The only witnesses to the accident were the plaintiff and the two defendants. The Ford car stopped right on the fence line on the north side of the highway, 60 to 70 feet from Osborn's driveway and a little west thereof. The Buick was upside down over by the curve sign, lying on its top, facing almost straight north and a little to the northwest. Most of the Buick car was south of the white line, pointing north. Glass and débris on the highway were well scattered. Osborn stated there was a little more north of the center of the highway than in other places, and he noticed grease spots of Prestone coming from the Buick over the road to the south side. The shoulders on each side of the highway were approximately six feet wide; on the south side there was a ditch four or five feet deep where dirt had been apparently taken to fill in other parts of the highway. The Ford came to rest off the grade on level ground northeast of the curve sign on the south side of the highway, a little more east than north. The grade, compared to the low spot where the Ford was, is four or five feet and stops where the Ford car laid on the fence line.

The witnesses testified as to glass on the highway, but there was no unanimity of observance as to the quantity and location of the glass. One witness testified that there was a little more glass north, while others testified that there was a little more south, of the white line. The point of impact of the Buick was the right front corner, right front wheel and fender, and the part thereof which came into contact with the Ford was practically torn off. The whole right corner of the car was crushed and bent back. There was a dent on top where the Buick came into contact with the road when it turned to the left and rested on its top.

A mechanic, who went after the Wright car, testified that the Ford was lying "on the north side of the road just at the bottom of the grade," north of the turn, a little west of the Osborn driveway, on the fence line, on its right side, facing west; with reference to the right front wheel or front door of the Ford, that "the main part came just behind the front wheel" and just in front of the front door, indicating the most serious damage to the Ford; that its whole right side was destroyed; that "just about the cowl and front door took the worst part of the blow."

The witness Gardiner, two and a half hours after the accident, went to the scene for the purpose of picking up the Krebek car, but it was gone. He observed what he took to be burned rubber tracks in two places just about in the center of the highway, which looked as if the burn might have been made by two wheels of one car and two wheels of the other, where they came together, and the impact had skidded the cars a little. The witness believed "the Buick was about straddle of the mark" in the middle of the highway. There was a burn mark north of the white line which proceeded over to the south thereof, and which would be the mark of the Buick; one mark was just about on the white line, and one mark 20 inches north of the line, which would be the north mark of the Ford, and that the marks were those of the rear wheels of the Buick and a wheel of the Ford. The witness did not know whether it was the front

or rear wheel of the Ford, but "it looked like the front." On cross-examination, this witness stated that all of the marks were on the north side of the center line of the highway, and there is some confusion with reference to whether there were four burn marks or three. There seems to be little dispute as to the respective positions of the cars immediately after the accident.

At this juncture, the plaintiff rested, and the defendant Wright moved for a directed verdict, challenging the sufficiency of the evidence to prove gross negligence on his part. This motion was sustained.

In the case of *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96, which is the first case in this court defining "gross negligence" under the guest law (Comp. St. Supp. 1931, sec. 39-1129), the court held: "Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1931, means negligence in a very high degree, or the absence of even slight care in the performance of a duty." On page 755 of the opinion the court said:

"We are of the opinion that in adopting the guest act the legislature used the term 'gross negligence' as indicating a degree of negligence. Negligence may be slight, ordinary or gross. Gross negligence means great or excessive negligence; that is, negligence in a very high degree. It may be said that it indicates the absence of even slight care in the performance of a duty, and such, we think, is the meaning intended by the legislature."

With respect to reviewing a peremptory instruction, the law is well settled that, where such instruction is in favor of defendant, issuable facts which the evidence in favor of the plaintiff tends to prove will be regarded as established. *Gilbert v. Bryant,* 125 Neb. 731, 251 N. W. 823.

The question presented is: Is the evidence sufficient to submit to the jury the question of gross negligence on the part of defendant Wright?

It appears from the evidence that Wright saw the Krebek car when the Wright car was over 600 feet distant therefrom. The distance from the west side of the culvert

to the curve is 540 feet; the Wright car was west of the culvert some distance, and the Krebek car was half-way around the curve when Wright first saw Krebek and made the remark to the plaintiff about the on-coming car. The Wright car must have traveled over 400 feet, while the Krebek car must have traveled 300 feet, from the time that Wright made the remark to the plaintiff. At the time, he was some distance west of the bridge, and he made this remark before he collided with the Krebek car at or near the curve sign.

The plaintiff testified that Wright said he could not meet the Krebek car head-on, so he turned to the left; he did not turn to the right because of the culvert; and Krebek said he could not meet the Wright car head-on and turned to the left to avoid an accident. Both the Wright and Krebek cars turned to the left and both cars were on the south side of the road.

There is no competent evidence of speed of the Wright car. The only eyewitness testifying to the accident was the plaintiff. It will be noted that the other witnesses testified to the position of the two cars after the accident and to the condition thereof, and as to the débris, fragments of glass and Prestone. There was no evidence as to any of the acts of Wright in driving his automobile or of his conduct in connection with its operation. Plaintiff stated that Wright was driving on the south side of the highway and continued to so drive. There was no evidence before the plaintiff rested that Wright was on the wrong side of the highway, unless it would be the testimony of the plaintiff that Wright turned to the left to avoid a head-on collision; he did not turn to the right because of the culvert. Plaintiff testified that Krebek had been on his wrong side of the highway. Then there is the evidence given by the witness Gardiner, with reference to the burned tire marks, observed two and a half hours after the accident, which testimony is confusing as to whether there were four or three burn marks, and is speculative as to which tire marks would be attributable to either the Buick or to the Ford car. It is

not clear in disclosing that the accident happened 20 inches to the north of the center line of the highway. The witness Gardiner attempts to back up his statement on the theory as to what he believes constitutes tire marks attributable to each car.

From a careful review of this evidence up to the time that the plaintiff rested, and further considering the fact that the record does not disclose any offer to withdraw the rest, or the offer of any further testimony in behalf of the plaintiff at any time, we hold that the record is void of sufficient evidence to disclose gross negligence on the part of Wright.

After the motion for a directed verdict was sustained in favor of Wright, the case proceeded as to the negligence, if any, of Wright and Krebek, and which, if either, was guilty of negligence that constituted the proximate cause of the accident.

Krebek, a man 65 years of age, was returning from Norfolk with his son-in-law, leaving there at 10:55 a. m., and driving between 45 and 50 miles an hour. He testified that there was an exceptionally high wind, with sufficient force to interfere with the operation of his automobile, so that he was obliged to be careful. As he proceeded west on the highway he first saw the Wright car as he came around the turn and "got onto the straight-away," and as he came into the east and west road he saw the Wright car coming at a distance of approximately 600 feet. The Wright car was on the west side of the bridge; Krebek was driving on the north side of the highway, which was his own right side, and the Wright car was on its own side of the highway. Krebek stated that he was driving along and noticed the Wright car coming, and when it seemed to get behind a grove of trees it just came across the road in front of him, and his thought was how was he going to miss it. The grove of trees was the box elder and cottonwood grove, the north side of which is straight north of the culvert; a row of willows in a draw that is bridged by the culvert, and an "L"-shaped grove around the farm buildings, with larger

trees to the north; along a fence of the yard is a row of mulberry trees, a little bushy and uneven, at some distance apart,—in some instances 30 or 40 feet and in some not over 20 feet. Part of the buildings and the house on the Osborn farm extend east to the driveway, and south along the driveway are some trees and east thereof are some old and rather large trees. If this distance is correct and the position of Krebek's car was as he testified, it is apparent that if there was much wind blowing the trees as described would lessen the force of the wind at that particular point. When Krebek first turned to the left, he did not know how close the Wright car was before he was on top of it, and on the north side of the road at the time, until he turned his wheel, believing he could miss the Wright car. He stated that his left front wheel was probably over the white stripe in the center of the highway, and his right front wheel hit the Wright car by the right front door, but at that time it was still on the north side of the white line; that he was driving 50 miles an hour; that Wright made a sudden turn to the left onto Krebek's side of the highway; that Wright was on his side of the highway and Krebek on his until Wright was even with the grove of trees; at that point the Wright car shot across the highway in front of Krebek's car, which stopped right in the center of the road, rolled to the south, which would be to the left; the Wright car proceeded 60 feet across the highway northeast, and the accident happened 25 or 30 feet west of the curve sign. Krebek stated that he could not turn to the right because the Wright car was suddenly in front of him. His son-in-law was unable to tell anything about the accident.

A state patrolman testified that in his opinion the two cars came together approximately 33 feet east of the curve sign; that the markings where the two cars came together consisted of skid scratches on the oil mat, and were on the south side of the center of the highway. Wright testified that the wind did not whip his car across the highway from the south to the north; did not bother him, and he did not know how far he was west of the culvert; that he watched

the Krebek car and it was being driven on the south side; that he, Wright, did not change his position and that Krebek's car remained on the south side of the highway; that he saw the Krebek car from the time he turned east past the bridge, and that it was on the south side at all times; that the cars came together pretty close to the middle line of the highway; that he, Wright, was driving not to exceed 45 miles an hour. The jury returned a verdict in favor of defendant Krebek.

Again considering the measurements, the curve sign is 180 feet west of the curve and 360 feet east of the bridge. The cars collided at a distance of within 20 feet west of the curve sign, or, as stated by the patrolman, 33 feet. Krebek would then have traveled 180 feet to 220 feet, while the Wright car was traveling 320 to 360 feet, immediately preceding the collision. If Krebek was proceeding at 50 miles an hour, as he testified, then Wright must have been going at a greater speed.

We have this situation: A controverted issue of fact with reference to the position of the two cars on the highway, Krebek stating that he was on the north or his own right side of the highway at all times, and Wright testifying that he was at all times on his own right or south side of the highway, and that Krebek was at all times on the south side of the highway. We then have the controverted issue of fact as to the exact distances traveled, between the Krebek car and the Wright car, when Krebek first observed the Wright car and Wright first observed the Krebek car. This must be ascertained from the measurements. Next we have the damage to the two cars, where the greatest degree of impact manifested itself on each car, both on the right side. Then we have the question as to how either or both of the drivers could have avoided the accident. Each saw the other at such a distance that there was no apparent emergency, except that Krebek testified that Wright suddenly turned to the left and he believed that the best way for him, Krebek, to avoid an accident was to turn to the left.

No exceptions are taken to the instructions. If either of the defendants violated the law with reference to speed, or by his failure to keep a proper lookout, or by failure to have his car under control, such a violation, independently, is not negligence in and of itself, but may be taken into consideration, together with all of the other facts and circumstances in the case, to determine the question of negligence. *LaFleur v. Poesch,* 126 Neb. 263, 252 N. W. 902; *Gleason v. Baack,* 137 Neb. 272, 289 N. W. 349.

The gravamen of the accident is negligence. The record discloses a sharp conflict in the evidence. The question was one for the jury. The plaintiff requested an instruction on the issue of negligence. The instructions were not assailed in the presentation of this question to the jury. If negligence constituted a question of fact, it was a jury question under the circumstances. The jury resolved the question in favor of defendant Krebek, and unless it is manifestly and clearly wrong this verdict cannot be set aside.

For the reasons given in this opinion, the motion for a directed verdict at the close of the plaintiff's evidence is sustained and the judgment thereon affirmed. The question of negligence as between defendants Wright and Krebek presented a jury question, which was terminated in favor of defendant Krebek. The verdict and judgment in this respect are affirmed. Our former opinion is vacated and set aside.

AFFIRMED.

Rose and Eberly, JJ., not participating.

SIMMONS, C. J., dissenting.

In my opinion the evidence was sufficient to present a jury question as to the gross negligence of defendant Wright. Accordingly, I dissent from that holding of the majority.

ANGELO ROCCAFORTE, APPELLANT, V. STATE FURNITURE COMPANY, APPELLEE.

7 N. W. (2d) 656

FILED JANUARY 22, 1943. No. 31436.

Workmen's Compensation. Record examined and *held* insufficient to show with reasonable certainty that the employee sustained an injury from an accident which arose out of and in the course of his employment, and shows only mere exertion which is not greater than that ordinarily incident to his employment. And if the same, under the circumstances, combines with preexisting disease to produce disability, it is not a compensable accidental injury.

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

Carnazzo & Kazlowsky and *G. H. Seig,* for appellant.

Gaines & Shoemaker, contra.

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

MESSMORE, J.

This is a compensation case. The plaintiff's petition was dismissed by a judge of the workmen's compensation court. On rehearing granted, the compensation court awarded the plaintiff compensation for the complete loss of vision of his right eye by virtue of an accident occurring while in the course of his employment. On appeal to the district court, plaintiff's action was dismissed. Plaintiff appeals.

The plaintiff, a man 51 years of age, in good health, was employed by defendant as a cabinetmaker and refinisher of furniture and had been so employed for approximately 15 years. His work consisted of uncrating furniture, staining, polishing, or spraying and getting it in condition to be delivered. To do this work a bench was used, the furniture being lifted onto the bench, to enable the workman to work without being required to do too much stooping. At various times pieces of furniture, such as tables, buffets, dressers, refrigerators, some of it heavy, weighing 300 pounds

or more, would be lifted onto the bench, then uncrated, the plaintiff using a hammer for such purpose, and if any scratches or mars or damage appeared on the furniture it would then be sprayed, polished or stained as its condition required. In lifting heavy pieces of furniture the plaintiff would have help; in lifting lighter pieces, such as chairs, he would do it himself. The benches used for this purpose were about four feet long and three feet wide, and occasionally were moved by the workmen to enable them to set a piece of furniture more easily on the bench. The shop comprised a large room, and on the south side, partitioned off, was a small spray room which was not on the floor level with the shop room, being some seven or eight inches higher.

On December 30, 1939, at about 5 o'clock in the evening, the plaintiff, while working alone, was cleaning up the shop, and endeavored to move into the spray room to put away a spray bench, about four and a half feet long, two and a half feet wide, two feet high, and weighing 49 or 50 pounds, which was two feet distant from the door of the spray room. The bench could not be moved in sidewise but would go in lengthwise. Plaintiff testified: "Q. You tried to lift it endwise? A. Endwise. Q. And tried to lift the end that was away from you up? A. Yes. Q. The distance of seven inches, to put it in the spray room? A. Seven or eight inches, yes, sir. Q. And you lifted it the first time, and didn't lift it high enough? A. No, the leg catch on the step. Q. You tried a second time to lift it? A. That's when it happened to the eye. Q. You felt a pain in the eye? A. Yes. Q. Just like a rubber ball hitting it? A. Yes. Q. And then? A. I see clouds. Q. Then it got dark? A. That's right." He stated he had never lifted the bench in this manner before, but had always had help. This statement is contradicted by a witness who worked with the plaintiff, and who testified that he had seen plaintiff move the spray bench in and out of the spray room on many occasions.

Plaintiff put the bench in the spray room. It was about 5 o'clock; he changed his clothes, went across the street,

got into his car, proceeded to drive it home. His eye felt hazy. He could see from it a little. He reached a grocery store at Seventeenth and Nicholas streets where he called his son by telephone to come and drive him home. After eating his evening meal he went to the basement to smoke, and after 15 or 30 minutes everything grew dark; "it felt like a flame across the eye again" and he could not see. He went upstairs and told his wife. Later, when his son arrived home, a doctor was called, who came and treated him and recommended that the eye be massaged at intervals during the night. The next day plaintiff went to the doctor's office, was sent to a hospital and was operated on December 31. He remained in the hospital three days and returned home. He now has permanent total loss of vision in his right eye.

The experts differed as to whether the loss of vision was due to or associated with exertion when lifting the spray bench, or pressure caused thereby, or was caused by the natural development of an advanced disease. On this point, briefly summarized, the evidence by the expert who performed the emergency operation is that the occlusion of the retinal artery was due to an embolism; the arteries had become smaller, due to the thickening of the walls as a result of arteriosclerosis, and that an embolism somehow became dislodged by his exertion in lifting the bench and evidently was deposited in the central retinal artery, which caused the failure of the blood supply. The testimony of Doctor Judd was to the effect that the inferior temporal artery had become occluded when it crossed the vision and that occlusion occurred on account of this fact, the walls of the arteries contracted as a result of the exertion and that the artery failed to open up again because of the loss of elasticity of the wall itself, due to disease; while Doctor Swab was of the opinion that the occlusion of the artery was due to the development of disease, for the reason that the occlusion of the inferior temporal artery, where it crosses a vein, would not cause total blindness; that the central retinal artery was not entirely closed, and the loss of vision

in the right eye, instead of in the left eye, was contrary to the usual situation, and did not occur immediately when the sensation first developed in the eye, but occurred several hours later; that the strain or exertion causing increased blood pressure would tend to inflate and not deflate the arteries; that both eyes were affected by the same disease; that the size and position of the retinal arteries are such that they are little affected by the results of exertion and change in blood pressure.

There is no question but that before and at the time of the injury the plaintiff had a condition of arteriosclerosis. Without repeating the evidence, but to summarize briefly, there is no dispute that the plaintiff, during his period of employment, worked in and about this bench, or one similar thereto, and would move it from place to place as occasion required, to enable him to perform his duties without too much stooping. He daily lifted pieces of furniture onto such a bench, weighing as much as or more than the bench; in lifting some pieces that were larger and of more than usual weight he had assistance. The bench weighed 49 pounds, and when he attempted to lift it it caught, and on the second attempt he tipped it, as shown by the evidence; at that time he felt the sensation in his right eye, as though he had been struck by a rubber ball. He was engaged in cleaning up the shop. There was nothing unusual in moving the spray bench into the spray room; nothing more or less than would be expected of him by his employer, and as one witness testified, he had seen the plaintiff move this bench on several occasions. He did not slip or fall or bump against the bench, but was performing ordinary duties incident to his employment. There is no evidence to show that the exertion or pressure was such as would be connected in any manner with the disease which he had. He might have lost the vision of his right eye without any exertion, or on any occasion, even in his sleep.

Section 48-152, Comp. St. Supp. 1939, reads in part: "(b) The word 'accident' as used in this act shall, unless a different meaning is clearly indicated by the context, be

construed to mean an unexpected or unforeseen event happening suddenly and violently with or without human fault, and producing at the time objective symptoms of an injury."

The question to determine is whether or not the loss of vision of the plaintiff's right eye was due to an accident, within the meaning of said section 48-152, Comp. St. Supp. 1939, or whether the moving of the bench constituted nothing more than an exertion incident to the plaintiff's employment.

The burden of proof, under the Nebraska workmen's compensation law, is on the claimant to show with reasonable certainty that he sustained an injury from an accident which arose out of and in the course of his employment. It cannot be left to surmise or conjecture, or based on probabilities or possibilities, but must be established in the legal way and not by guess or speculation. This principle of law is too well established to require citation of authority.

"Mere exertion which is not greater than that ordinarily incident to employment, but which combines with preexisting disease to produce disability, is not a compensable 'accidental injury.'" *Rose v. City of Fairmont*, 140 Neb. 550, 300 N. W. 574. Proof must be met by substantial evidence leading to the direct conclusion or legitimate legal inference that such fact caused the disability. See *Wayne County v. Lessman*, 136 Neb. 311, 285 N. W. 579; *Gilkeson v. Northern Gas Engineering Co.*, 127 Neb. 124, 254 N. W. 714; *Brown v. City of Omaha*, 141 Neb. 587, 4 N. W. (2d) 564; *Rose v. City of Fairmont, supra.*

We conclude that no award can be supported by the evidence in this case, and the judgment of the trial court is affirmed.

AFFIRMED.

Rose and Eberly, JJ., not participating.

O. M. CAMPBELL, DOING BUSINESS AS CAMPBELL AUDITING COMPANY, APPELLANT, V. DOUGLAS COUNTY, APPELLEE.

7 N. W. (2d) 764

FILED JANUARY 29, 1943. No. 31485.

1. **Counties.** Here the plaintiff entered into a contract with the defendant, whereby plaintiff agreed to make a thorough and complete investigation and verification of all matters pertaining to the records of officials of defendant county as requested by a grand jury, then in session, or the attorney general, and report to the defendant's board of commissioners, the attorney general and the judges of the district court of defendant county. It is *held* that the services which the plaintiff contracted to perform are not those which the legislature has required to be performed by either the state auditor or the county comptroller of defendant county; and that the defendant is not limited to the use of those means and agencies in having such an examination made.
2. ———. The defendant, under the circumstances recited in the opinion, is liable for the reasonable value of the services rendered, the benefits of which it has received and retained.

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

Abrahams & Frenzer, for appellant.

James T. English and *Oscar T. Doerr, contra.*

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

SIMMONS, C. J.

This is a suit to recover an amount alleged to be due for services rendered as an accountant and auditor. The defendant demurred to plaintiff's petition. The demurrer was sustained. Plaintiff elected to stand on his petition, and the action was dismissed. Plaintiff appeals. We reverse the decision of the trial court.

On November 12, 1941, a grand jury, then in the performance of its statutory duties in Douglas county, recommended to the board of commissioners of defendant that it considered necessary a complete investigation and verification of various matters pertaining to the records of officials

of defendant county, and that plaintiff, a competent and qualified public accountant and auditor, be employed to conduct such investigation and verification. The board of defendant were not personally able or qualified to make such an investigation, and such an investigation had not been made by the auditor of public accounts of the state nor by the county comptroller of defendant.

That day the defendant, by its board of commissioners, acting upon the report and recommendation of the grand jury, entered into a written contract with the plaintiff who agreed to make a complete investigation and verification of the records of such officials as might be requested by the grand jury, or as directed by the attorney general after the adjournment of the grand jury, and to report with respect thereto to the defendant's board of commissioners, to the attorney general and to the judges of the district court of defendant county not later than March 15, 1942. A per diem compensation for plaintiff and his assistants was stipulated. The defendant agreed to make available a maximum of $10,000 "appropriations or budgets" for the purpose of carrying out the request of the grand jury, and compensating the plaintiff upon the fixed per diem basis. $2,500 was to be payable out of the moneys appropriated up to and including December 31, 1941. The defendant agreed to include in its 1942 budget such sums, up to the maximum of $10,000, as may not have been earned and paid on the service to December 31, 1941.

Upon the date the contract was made there was, and thereafter remained, an unexpended and unencumbered balance of $3,690 in defendant's general fund, which had been appropriated in the 1941 budget for miscellaneous activities, which sum was available for and subject to the payment of plaintiff's claims for the services rendered in 1941 involved in this litigation.

Thereafter the plaintiff entered upon and fully performed his obligations under the contract. Plaintiff, subsequent to the date of the contract, furnished defendant with a list of his staff members and their compensation, he agreed to de-

duct from their compensation taxes due the defendant, and obtained a statement from them that they understood that they were not employees of the county or entitled to workmen's compensation from the county, and furnished a bond to cover any failure on his part to perform.

Subsequently for services rendered up to and including December 20, 1941, plaintiff filed itemized claims for services rendered in compliance with the contract totaling $1,994.37, which claims as filed were charged against said balance of $3,690. These claims were true and correct and covered services rendered in the auditing of the books and records of the defendant's treasurer. These claims were for the agreed and fair and reasonable value of the services rendered during the period covered by the claims. The defendant's board on December 23, 1941, disallowed the claims. Plaintiff appealed to the district court from the disallowance of the claims.

Notwithstanding its disallowance of the claims defendant treated the contract as valid and in force. On January 13, 1942, it adopted the statutory budget, and included therein and appropriated the sum of $7,500 for payment for this special audit and investigation. Plaintiff continued his performance and on March 14, 1942, delivered his complete report in writing to the board, the attorney general and the judges of the district court. The defendant received, accepted and retained the report of the plaintiff made on March 14, 1942.

These facts, alleged in the petition and admitted to be true by the demurrer, are the basis of plaintiff's claim of a right to recover the sum of $1,994.37, and upon which his claim that defendant is estopped to deny plaintiff's right to recover is based.

The defendant takes the position that the contract is void because, (1) the services to be performed by plaintiff, a private person, are services which the law imposes upon the state auditor and the county comptroller, and (2) the contract is an attempt to evade the provisions of the budget and other laws intended to prevent expenditure of or

contract to expend moneys not available when the contract was made.

Plaintiff's position is that under the provision of section 26-105, Comp. St. Supp. 1941, the defendant has express authority to contract for the work covered by the instrument in question, and likewise that it has an implied authority to do so in order that the commissioners may properly perform the duties of their office. The above section specifically gives a county board power "To manage the county funds and county business *except as otherwise specifically provided,*" and "To examine and settle all accounts against the county, and *accounts concerning receipts and expenditures of the county.*" (Emphasis supplied.) Defendant here does not question the power of the board to require that the audit and investigation be made, but takes the position that the law has imposed the performance of these duties upon the state auditor and county comptroller, and that the defendant is without authority to contract with a private person to perform tasks which the law requires be performed by a public official.

The precise question then is, has the legislature required that these officials make the investigations and audits here involved, so as to exclude the employment of other persons to do that work?

The general duties of the state auditor are set out in section 84-303, Comp. St. 1929, and section 84-304, Comp. St. Supp. 1941. An examination of the statutes clearly indicates a legislative intent that this official is primarily charged, in his field, with service to and responsibilities for the interests of the state as a distinct governmental agency. True, he is required as defendant urges, "To audit, settle and adjust the accounts of all collectors of the state revenues and other holders of public money who are required by law to pay the same into the state treasury." Section 84-304, *supra.* To perform this duty would require that he examine the records of the county treasurer of defendant. This examination, however, is one to be made primarily to determine that the state has received the public moneys to

which it is entitled. It is an examination made from the standpoint of the interests of the state. It is made by an official of the state, and is in no wise made by the county. Section 26-1309, Comp. St. Supp. 1941, provides that by direction of and under the supervision of the auditor of public accounts there shall be made a biennial examination of the books, etc., of all county officers and a "complete and comprehensive annual audit" of the books, etc., of the county treasurer and clerks. The time when this examination is to begin is a confidential matter. Clearly it is an examination, when made, conducted by and primarily for the interests of the state. Only a summary of the result of the examination is to be placed on file with the county clerk. This summary, including "suggestions" as to how the office "should be conducted," appears to be the only report which the legislature contemplated the county should receive. Comp. St. Supp. 1941, sec. 26-1311.

We conclude that the legislature has not directly nor by implication by the acts cited taken from the counties the power of examination of their own records, nor placed the power to make a comprehensive examination, audit or investigation of county officials, or the county treasurer's office, exclusively in the auditor of public accounts.

Section 26-1101, Comp. St. Supp. 1941, provides for the office of county comptroller in defendant county. His duties are outlined in that section and sections 26-1102 to 26-1104, Comp. St. 1929. The statute specifically provides that the comptroller shall "examine and check the reports of all officers of the county." Certainly an examination of the "reports" of county officers would not embrace a complete audit, examination or investigation of a county official's doings and records. Other duties are defined in the statute. At no place do we find specific requirements that the county comptroller make an audit or examination of the scope and for the purpose of the one here undertaken. Without undertaking to define the outside limits of the duties of the county comptroller, it is patent that the legislature did not place upon that official the duty of making the examination

for the defendant's board, which they and the grand jury deemed necessary in the public interest.

We do not find in the acts cited any authority vesting in the county board any power to require of either named official that they make such an examination as defendant's board here determined to have made, nor do we find any direction to those officials to comply with such a request if made.

It is to be noted that section 26-1104, *supra,* provides, "that no duty required to be performed or power exercised shall be taken from any county official which shall be necessary for the proper performance of any duty required by law, of such official which is not hereby made the *special duty* of the county comptroller." It is further to be noted that the legislature in 1941 (Laws 1941, ch. 48, sec. 2) reenacted the provisions of section 26-105, hereinbefore quoted, with reference to the power of county boards. This reenactment is subsequent to the enactment of the provisions defining the duties of the auditor of public accounts and the county comptroller.

We conclude that the services which the defendant employed the plaintiff to perform are not those which the legislature has required to be performed by either the state auditor or the county comptroller, that the defendant is not limited to the use of those means and agencies in securing the examination it determined to have made, and that the contract is not void for the reasons advanced.

Defendant next contends that by the contract the board undertook to charge the 1942 revenues with the payment of $7,500 before the budget for that year had been adopted, and before an appropriation for that year had been made, and that accordingly the contract was void.

Defendant bases this contention upon the provisions of section 26-116, Comp. St. 1929, and sections 26-2107 and 26-2109, Comp. St. Supp. 1941. The argument of the county is predicated upon the fact that the county, in addition to the sums available, contracted to include in its budget and to appropriate sufficient additional funds in 1942 to pay whatever might be earned and payable in 1942.

It is to be remembered that the board of commissioners were not personally qualified to make this examination; that under the contract the plaintiff agreed to make the investigation and verification of the records on a per diem basis; that the defendant was to pay only for such services as rendered with a maximum limit of $10,000; that $2,500 was to be due and payable out of moneys then available and appropriated; that sufficient funds to pay the amount of the claims in suit had been appropriated, was and remained available and ear-marked for the payment of these claims when they were filed; that the claims filed were for services rendered and in an amount within the budgeted available funds; that the demurrer admits that the claims represent not only the agreed but also the fair and reasonable value of the services rendered, and that the defendant received, accepted and retained the report compiled as a result of the services represented by the claims.

The defendant, under the circumstances here shown, is liable for the reasonable value of the services, the benefits of which it has received and retained. See *Omaha Road Equipment Co. v. Thurston County*, 122 Neb. 35, 238 N. W. 919; *Scheschy v. Binkley*, 124 Neb. 87, 245 N. W. 267; *Western Chemical Co. v. Board of County Commissioners*, 130 Neb. 550, 264 N. W. 699; *Sorensen v. Chimney Rock Public Power District*, 138 Neb. 350, 293 N. W. 121; *Darnell v. City of Broken Bow*, 139 Neb. 844, 299 N. W. 274.

The demurrer should have been overruled. The judgment of the district court is reversed and the cause remanded.

REVERSED.

Rose and Eberly, JJ., not participating.

STATE, EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. GEORGE H. MERTEN, RESPONDENT.

7 N. W. (2d) 874

FILED JANUARY 29, 1943. No. 30638.

1. **Executors and Administrators.** In equity, the assets which pass into the hands of an executor are treated as trust funds, and held by him for the benefit of all persons entitled thereto.
2. ———. The district court is one of general jurisdiction, and its powers are ample in cases of fraud by executors to compel the proper application of trust funds committed to their care.
3. **Judgment.** The district court, having jurisdiction over trust funds in the hands of an executor, has power to enter such decree and judgment as is required in equity and good conscience in case of misapplication or conversion of such funds by the executor.
4. **Attorney and Client.** The legal existence of the Nebraska State Bar Association may not be collaterally attacked in an action for disbarment.
5. ———. Power exists in the judicial department of government to formulate and approve procedure for the bringing of lawyers to account for professional misconduct.
6. ———. Lapse of time since the act or acts on account of which disbarment of a lawyer is sought may not be available to him as a defense when no remorse is shown and no effort is made to right the wrong or wrongs of which he has been guilty.

Original proceeding by the state, on the relation of the Nebraska State Bar Association, against George H. Merten. *Judgment of disbarment.*

Walter R. Johnson, Attorney General, and *John H. Comstock,* for relator.

George H. Merten, pro se.

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

YEAGER, J.

This is a disciplinary action instituted by the state of Nebraska, on relation of the Nebraska State Bar Association, against George H. Merten, respondent, a duly licensed at-

torney at law, wherein it is sought to bring disbarment because of illegal, improper and unethical practices and conduct which have been engaged in by him. A complaint containing the charges against the respondent was filed in this court on which issues were joined, whereupon the matter was referred to Harold A. Prince, a practicing lawyer of Nebraska, as referee, whose province it was under the reference to make findings of fact and conclusions of law and to make report thereof to this court. The proceeding is now before the court on the report of the referee and the exceptions taken thereto by the respondent. The report contains a finding and a conclusion that the respondent has been guilty of illegal, improper and unethical practices and conduct and a recommendation that he be disbarred on account thereof.

The complaint is signed by George W. Pratt, Jack W. Marer, Carroll O. Stauffer and Clarence T. Spier, the members of the Committee on Inquiry of the Fourth Judicial District of the Nebraska State Bar Association. It is sworn to by Clarence T. Spier, Chairman of that Committee. Because of its length it will not be quoted herein.

The substance of the complaint and the factual situation to the extent disclosed is that one Thomas Dean, a resident of Douglas county, Nebraska, died testate on April 12, 1923. By his will he left his estate in trust for his sister, Maria Lund, for her lifetime, with provision that on her death it be divided among a brother and two sisters, by name John Dean, Deborah Barrett and Julia Conway. The respondent, with another, qualified as administrator with the will annexed. As a part of the assets of the estate there was a promissory note of the face value of $12,000 which was secured by a mortgage on certain lands in Box Butte county, Nebraska. R. M. Worley was maker of the note. Thomas Dean, in his lifetime, had pledged the note as collateral security for a loan in the amount of $3,500. The note was held at the Alliance National Bank. It appears that there remained unpaid on the indebtedness for which the $12,000 note was pledged as collateral $3,165. When respondent

filed his inventory as administrator, he failed to describe the note as an asset at all. He made reference to it, but claimed for the estate only a probable equity in the note. His reference and description is the following: "Probably equity in one note which was deposited by deceased as a pledge. Note not—possession of administrators." The inventory was filed August 9, 1924. A final report was filed on which a decree was entered by the county court on September 2, 1924. No mention was made of the note in the final report or at any other place in the probate proceedings except as above indicated in the inventory. On this final report the administrators received their discharge. On the closing of the probate proceedings the respondent became trustee, the trustee named in the will having refused to accept the trust.

In 1925 R. M. Worley refinanced the loan and it was reduced to $11,000. The record here does not disclose what disposition was made of the difference of $1,000. Prior to this the $12,000 note had in some manner come to the First National Bank of Omaha to some alleged owner thereof. Just how alleged ownership had been transferred is not made clear. Respondent claims to have had no part in it. On refinancing however two mortgages were given to secure the indebtedness, one a first mortgage for $6,000 and one a second to secure ten notes of $500 each.

The first mortgage was liquidated by a net payment of $5,650. The reason for this net amount is not made clear here. The check for this net amount was made to respondent. On the face of the check appeared the statement that it was for Sam Riseman. Respondent stated that he indorsed the check, cashed it and immediately turned the proceeds over to Riseman. How Riseman became entitled to this money is not made clear. The ten notes for $500 each were made payable to Riseman. The first six were paid, but the check or draft in each instance was made payable to respondent. He says that he obtained the payments but immediately delivered the money less about $2.50 in each instance which was paid to him for his trouble. Respond-

ent disclaims any interest on the part of the Thomas Dean estate in this asset, at least from the date of refinancing, and insists that at no time did he come into possession or control of the $12,000 note. He suggests that there was some character of foreclosure by the holder of the note for $3,500 which took away the interest of the estate in it. Just how this was done respondent does not clearly or sufficiently explain, especially since all collections after refinancing passed through his hands.

Maria Lund having died as had also Julia Conway, Thomas Reilly, as heir of Julia Conway, who became a beneficiary of the will of Thomas Dean, and others in 1931 instituted action in the district court for Douglas county, Nebraska, against respondent for an accounting in which they charged him with fraudulent conversion of the $12,000 note and mortgage.

In that action, first by motion and again in his answer, the respondent challenged the jurisdiction of the district court, which challenge was overruled.

A trial was had to the court and in a decree and supplemental decree the court found that respondent fraudulently caused the $12,000 note and mortgage to be assigned to one Sam Riseman; that he obtained his discharge as administrator in the county court by fraud; and that by his fraudulent acts there was lost to the estate of Thomas Dean $5,365 and interest. The decree purported to set aside the discharge as administrator and in the decree judgment was rendered against respondent for $8,315.15 for property lost to the estate by fraud. Appeal was taken to the supreme court which was dismissed (*Reilly v. Merten,* 125 Neb. 558, 251 N. W. 114) thus leaving the decree of the district court in full force and effect.

Respondent has not satisfied this judgment either in whole or in part, and in this action he insists that in the premises he has been guilty of no fraud or wrong-doing.

On the record as briefly outlined here the referee in his report recommended disbarment of the respondent.

To the report the respondent filed numerous exceptions, some of which require discussion and some do not.

In his argument respondent contends that an order striking from his answer the statement that the complaint did not state a cause of action was prejudicial. It may be said that this statement might well have remained in the answer, but there was no prejudicial error in the striking, since clearly the complaint did set forth good and sufficient grounds upon which to base a hearing for disbarment.

Respondent pleaded that the decree and judgment of the district court wherein he was held to have defrauded the estate of Thomas Dean was null and void and of no force or effect. This plea was stricken. Respondent claims that this was error. As grounds for this contention he asserts that his discharge as administrator was a final determination of his relation to the estate and that the approval of his final report and discharge by the county court was a bar to any action except an action in the county court to set aside the judgment of that court.

It may be true that the portion of the decree of the district court which purports to vacate and set aside the final judgment of the county court is null and void, and that the district court was without jurisdiction to that extent, but necessity does not arise for a determination of that question here. Certain it is that the district court had jurisdiction to render the portions of the decree and judgment that are material here.

As has already been observed, the will of Thomas Dean created a trust of all of the assets of the estate, subject of course to legitimate claims and the expenses of administration. In due course respondent became trustee. Before he became trustee for the purpose of carrying into effect the provisions of the will, his relation to the assets of the probate estate was, in equity, that of a trustee. In *Blake v. Chambers*, 4 Neb. 90, this court said: "In equity, the assets which thus pass into the hands of an executor are treated as a trust fund, and held by him for the benefit of all persons interested therein, according to their relative priorities, privileges and equities." In the same opinion it is further stated: "As to the jurisdiction of the district

court, over the subject-matter of the action there is no doubt. That court is one of general jurisdiction, and its powers are ample, in all cases of fraud by executors or others holding a fiduciary relation, to compel the proper application of trust funds committed to their care." See, also, *Wunder v. Crane,* 100 Neb. 446, 160 N. W. 892; *In re Estate of Frerichs,* 120 Neb. 462, 233 N. W. 456. There can be no question that the district court had jurisdiction over the subject-matter in the case of Reilly v. Merten, hereinbefore referred to, and to enter such decree and judgment as was required agreeable to equity and good conscience.

It can make little, if any, difference that the conversion took place before or after the closing of the probate estate, and this point is not made quite clear, but the most forceful inference is that it took place after. This being probably true, no court but the district court did have jurisdiction.

Next respondent complains that the Nebraska State Bar Association is not the proper party to maintain this action; that it has no legal existence.

In passing it will be said that by virtue of the case of *In re Integration of Nebraska State Bar Ass'n,* 133 Neb. 283, 275 N. W. 265, the association came into being and it has continued henceforth. This legal existence cannot be properly attacked collaterally as respondent seeks to do in this action.

One of the fundamental purposes of the integration of the bar was, through the association and its subordinate and controlled agencies, to bring to the attention of this court departures of members of the bar from the high standards of rectitude demanded in the true relationship of attorneys to courts, clients and the public generally. It is not reasonable to recognize this purpose and at the same time defeat it by denying the association power to make presentation formally of such departures.

In the opinion in the case of *In re Integration of Nebraska State Bar Ass'n, supra,* it was stated:

"The primary duty of courts is the proper and efficient administration of justice. Attorneys are officers of the

court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of this state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. The practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government."

A necessary and specific complement of this pronouncement is that the power exists in the judicial department of government to formulate and approve procedure for the bringing of lawyers to account for professional misconduct. The method of presentation herein employed is approved.

Coming now to the issue of misconduct charged against the respondent, the evidence fairly shows that the $12,000 note was an asset of the probate as well as of the trust estate; that respondent never at any time reported it in any legal proceeding, or ever indicated that he knew definitely of its existence, of the security behind it, of the charge against it, or that the charge against it was less than one-third of its face value; that there is a final judgment finding that respondent fraudulently converted and disposed of the note and converted the proceeds to his own use; that the evidence taken before the referee supports this judgment in that it clearly shows that all of the proceeds obtained after refinancing came into the hands of respondent.

Respondent's explanation is that the $12,000 note was foreclosed, sold and refinanced and that he collected the proceeds for the holder of the notes on refinancing. In the light of the difference between the face of the note and the charge against it which, in the light of the refinancing for $11,000 which indicated a real value of almost $6,000, it can be said with conviction that respondent was either guilty of fraud in the disposition of the note, or of gross and inexcusable dereliction of duty in failure to protect the interest represented by him, either of which would clearly

show that he lacks those qualities so necessary to a proper performance of the true functions of a lawyer.

By either culpable design or pernicious neglect of duty this large sum of money was lost to the estate and at no time since has respondent manifested any degree of remorse. His entire defense has been technicality, denial and self-exculpation.

It has been many years since the occurrence of the acts complained of and the date when the judgment was rendered against respondent, but no effort appears to have been made by him to correct his wrong. This makes peculiarly applicable here the following from former decisions of this court:

"When the misconduct of an attorney has been practically continuous, and there is no evidence of reformation or change of conduct, disbarment will not be barred by lapse of time as to any of such misconduct." *State v. Fisher,* 103 Neb. 736, 174 N. W. 320.

"Where the unprofessional and unethical conduct of an attorney has been continuous over a period of years, and there is no satisfactory evidence of reformation or improved conduct, a disciplinary proceeding will not be barred by lapse of time as to any of such misconduct." *State v. Basye,* 138 Neb. 806, 295 N. W. 816.

The lapse of time may not be permitted to avail respondent anything in defense of the proceeding here. In the entire record nothing is found which would justify a conclusion other than that arrived at by the referee.

The order of admission of George H. Merten to the bar of this state is annulled, and his name is ordered stricken from the roll of attorneys and counselors at law.

Judgment of disbarment.

Rose and Eberly, JJ., not participating.

CLIFFORD W. CALKINS, APPELLEE, V. RUDOLPH YECHOUT ET AL., APPELLANTS.

7 N. W. (2d) 715

FILED JANUARY 29, 1943. No. 31417.

1. **Trial.** In an action at law it is error for the trial court to direct a verdict on an issue of fact or to sustain a motion for judgment and discharge the jury when there is a substantial conflict in the evidence.
2. **Brokers.** In an action for breach of an agency contract to negotiate a lease, the measure of recovery by the agent is the compensation he would have earned had the contract not been breached, and the action may be on contract or in damages for breach.
3. ———. A landowner, having entered into an agency agreement for the leasing of his premises, may not secretly lease the premises himself, and thereby terminate the agent's right to effect a lease and by remaining silent permit the agent to expend further time and effort in attempting to obtain a lease, and escape liability under the agency agreement.

APPEAL from the district court for Douglas county: HENRY J. BEAL, JUDGE. *Affirmed.*

S. L. Winters, for appellants.

Young & Williams, contra.

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

YEAGER, J.

This is an action by Clifford W. Calkins, plaintiff and appellee, against Rudolph Yechout, Antonia (Antonette) Yechout, Anna M. Yechout and Joseph F. Yechout, defendants and appellants. The action is, first, for damages for breach of an alleged agreement whereby defendants engaged the plaintiff, a licensed real estate broker, to obtain a tenant and to negotiate a lease for a term of years for premises owned by defendants, which premises were situate in that part of Omaha, Douglas county, Nebraska, known as Benson; second, for damages for alleged breach of agree-

ment with one James T. Allan, an architect, to pay for preparation of plans, drawings and architectural work necessary to remodeling the building on the premises referred to, which cause of action was assigned to the plaintiff; and, third, for expense incurred by plaintiff which was authorized by the defendants.

The action was tried to a jury. A verdict was returned in favor of plaintiff for $1,440 on the first cause of action, $450 on the second, and $12.50 on the third. Thereafter on motion interest was added *nunc pro tunc* by the court and with interest so added judgment was entered on the verdict. Motion for new trial was duly filed and by the court overruled. The defendants have appealed.

There are seven assignments of error. The first two are formal and general and do not require consideration separate and apart from those which follow.

For their third assignment the defendants assert that the court erred in refusing to sustain the motion of defendants to remove the first cause of action from consideration by the jury and for judgment for the defendants for the reason that the cause of action pleaded had not been sustained.

For his first cause of action the plaintiff substantially alleged that on or about October 10, 1939, he entered into an oral agreement with the defendants through the defendant, Rudolph Yechout, to obtain a suitable tenant and to negotiate a lease for a term of years for the premises in question and that the defendants agreed to remodel to suit the needs of the tenant whom plaintiff might obtain; that the agreement was exclusive and that during the period of negotiations all prospective tenants would be referred to plaintiff; that for his services the plaintiff would be paid the customary compensation charged by real estate brokers; that immediately thereafter plaintiff made contact with F. W. Woolworth Company and entered into negotiations for a lease of the premises; that F. W. Woolworth Company was satisfactory to defendants as a prospective tenant; that the negotiations for a lease to the F. W. Woolworth Company continued to June 26, 1940, when a lease

tendered by defendants through the plaintiff was signed by the said F. W. Woolworth Company; that while these negotiations were in progress, in violation of their agreement and without notice to plaintiff, the defendants entered into a lease upon the premises with another to the damage of plaintiff, which damage the plaintiff claims is the amount of the commission he would have received had the lease with F. W. Woolworth Company been consummated.

The substance of the answer of the defendants was a general denial of the allegations of the petition, an admission that an oral agreement was entered into, but that it was not exclusive and that it contemplated only negotiations with F. W. Woolworth Company, and a further allegation that negotiations came to an end with the said F. W. Woolworth Company prior to the time that they finally entered into the lease upon the premises and after the plaintiff had notified them that no obligation existed in favor of the plaintiff and against the defendants.

Assuming that this cause of action for damages was proper and the jury were properly instructed, the sole question for determination here is that of whether or not the plaintiff has adduced sufficient evidence to sustain the verdict of the jury.

In such situations this court has consistently followed the rule announced in the case of *Doyle v. Franek*, 82 Neb. 606, 118 N. W. 468, as follows:

"In a law action it is error for the trial court to direct a verdict for either of the parties on an issue of fact on which the evidence is conflicting. Such issue should be submitted to the jury for its determination." See *Scott v. New England Mutual Life Ins. Co.*, 128 Neb. 867, 260 N. W. 377; *Stevens v. Fall*, 133 Neb. 610, 276 N. W. 401; *Dworak v. Shire*, 126 Neb. 474, 253 N. W. 655; *Coryell v. Robinson Outdoor Advertising Co.*, 140 Neb. 855, 2 N. W. (2d) 106.

An examination of the bill of exceptions discloses that there was a substantial conflict in the evidence. The plaintiff gave testimony fully supporting all of the allegations pertaining to this cause of action and most of them find support in documentary evidence as well.

The defendants' interpretation of what occurred, as disclosed by the brief filed herein, tends to support the contention of plaintiff that the agency was exclusive and to defeat the contention of defendants that it was limited to an attempt to negotiate a lease with F. W. Woolworth Company. A paragraph on page 54 of the brief is the following:

"Calkins first met Yechout in the month of October, 1939, at Calkins' office. Yechout told Calkins that he had a piece of property in Benson that was occupied by the Safeway Store, which was going to leave, and he wanted a good tenant, and would prefer a chain store. That Yechout had been advised to come to Calkins because he was a specialist in that line. Calkins told him he represented quite a few of the chain stores naming some of them. Calkins also said he knew Woolworth, and he said Yechout told him he wanted him to handle the matter exclusively. He also said that no matter who it was who approached him he would send him to Calkins."

This is not conclusive of any issue in the case, but it goes far to show that there was a question of fact for determination by a jury.

The defendants contend substantially that the first cause of action was upon contract, whereas the recovery was allowed on *quantum meruit*. This contention is without merit.

Under the instructions recovery was allowed on the basis of 3 per cent. of the gross rental for the term of the negotiated lease with F. W. Woolworth Company. It is true that 3 per cent. of such gross rental was not set forth in the original agreement between plaintiff and defendants, but the claimed agreement did provide, as shown by the evidence of plaintiff and without dispute or contradiction, that plaintiff should receive as commission the regular Omaha real estate board rate and it was further shown that such rate was 3 per cent. of the gross rental for the term of the lease. Certainly the parties contracted with reference to this rate and the court properly instructed the jury in this respect.

Was then the action of the plaintiff properly predicated? In the opinion, *Staats v. Mangelsen,* 105 Neb. 282, 180 N. W. 78, which was a case similar to this one, it was stated:

"Some distinction is attempted to be drawn between compensation under and by virtue of the contract and damages for the breach of it. The distinction is academic and unsubstantial. It makes no difference to either party whether plaintiff is considered to have earned the compensation provided in the contract by performing it, or has been damaged by the loss of the stipulated commission by the owner's preventing performance. The result would be the same in either view."

The reasoning is sound and we perceive no reason for the adoption of a different rule.

The defendants insist as to the first cause of action that the court erred in giving instructions Nos. 5, 7 and 8. Instruction No. 5 is the submission of the contract, its claimed violation and the matter of damage therefor. Because of what has already been set forth herein, no discussion of the instruction is required.

Instruction No. 7 is as follows:

"If you find from the evidence that plaintiff informed the defendants some time prior to their entering into the lease with Petersen that the deal with the F. W. Woolworth Company was off and that there was no further obligation on the part of the defendants under said lease or oral agreement with plaintiff, the defendants were free to enter into a lease with Petersen and the plaintiff cannot recover.

"However, if you do not find the above to be true, then the defendants were under a legal obligation to the plaintiff to give plaintiff a reasonable notice that they were canceling said negotiations and also plaintiff's agency to negotiate a lease for them before plaintiff's agency could legally be terminated."

It will be noted that in this instruction the jury were told that, if they found that plaintiff informed defendants that the deal with F. W. Woolworth Company was off and there was no obligation under the agreement, then the de-

fendants were free to enter into the lease entered into by them, but if they did not so find, they were under obligation to give reasonable notice of cancelation of the agreement.

Segregated from the rest of the charge this instruction might be considered erroneous, but when examined in the light of the entire charge to the jury no error is apparent. The legal burden upon the plaintiff to sustain his cause of action was properly imposed and was never shifted by any instruction. This instruction in plain effect told the jury that notwithstanding proof of continuance of negotiation for lease by the plaintiff there could be no recovery if plaintiff informed defendants that negotiations for a lease had come to an end, also if they found that reasonable notice of their intention to cancel the agency agreement had been given before entering into the lease no recovery could be had.

Nothing in this affects unfavorably the defendants. The defendants contend that they could cancel the agency agreement without liability to plaintiff at any time and that it was not incumbent upon them to give notice of their intention so to do. This contention finds no support in the decisions of this court. Our decisions support the contrary view. This subject is quite fully discussed in *Staats v. Mangelsen, supra.* We quote here but one of the several pertinent paragraphs of this opinion, as follows:

"Defendant finally argues that, as the agency contract did not provide that he give notice to plaintiff of a withdrawal of the land from the market, and as the sale by the owner necessarily operated to withdraw the land from the market, the contract terminates on such sale without notice to the agent. We cannot agree to this argument. The law requires that the parties act toward each other in good faith. 9 C. J. 520, sec. 22; *Maddox v. Harding, supra* (91 Neb. 292, 135 N. W. 1019). And good faith would require notice. The landowner could not secretly sell his land, and thereby terminate the agent's right to effect a sale, and, by remaining silent, permit the agent to expend further time and effort in attempting to make a sale, and escape liability

under his contract. To approve such a doctrine would be in effect to say that one man could escape liability by his own neglect or craft, and another be deprived of his rights without fault on his part. As far as the agent's right to compensation under the contract is concerned, the land could not be 'withdrawn from the market' under the terms of the contract, until the agent had notice or knowledge of such withdrawal."

Under the evidence of the plaintiff, if believed by the jury, it was proper for the court to instruct as it did on the matter of notice of intention to cancel the agency agreement.

As to instruction No. 8 as applied to the first cause of action, nothing need be said except that, as has already been pointed out, the correct measure of damage was properly submitted.

The defendants urge that there was an improper submission of the second cause of action and that judgment should have been entered in favor of the defendants.

As has been indicated this cause of action was one in favor of James T. Allan on an agreement for architect's fees entailed in the preparation of plans and specifications for remodeling the building in question to meet the requirements of F. W. Woolworth Company and for supervision during remodeling. The cause of action was assigned to the plaintiff and he sued in his own name.

From the evidence it appears to be conclusive that a contract was entered into with Allan for this service and that all of the service was performed by him except supervision which was prevented by the fact that remodeling never took place. It appears without dispute also that Allan was to receive as compensation 3 per cent. of the contract price of remodeling which contract price was $15,521.

Plaintiff contends that this contract was entered into by him for and on behalf of the defendants and that defendants agreed to pay the expense of this service.

On this issue there is a sharp conflict in the evidence. Plaintiff's position is supported by his own direct and posi-

tive testimony and the testimony of other witnesses in addition to certain documentary evidence. It is sufficient, if believed by a jury, to sustain a verdict in his behalf. Under the rule previously announced herein, the court did not err in submitting the second cause of action to the jury.

On the second cause of action the jury returned a verdict in favor of plaintiff for $450, which was $15.63 less than 3 per cent. of the contract for remodeling called for. Of this verdict the defendants may not properly complain, since the jury accepted the version of the plaintiff and by that version full performance of the contract was prevented by the defendants.

Finding no reversible error, the judgment of the district court is

AFFIRMED.

ROSE and EBERLY, JJ., not participating.

CRAWFORD STATE BANK, APPELLEE, V. L. T. MURPHY ET AL., APPELLEES: CONTINENTAL OIL COMPANY, GARNISHEE, APPELLANT.

7 N. W. (2d) 762

FILED JANUARY 29, 1943. No. 31515.

1. Garnishment. In complying with section 20-1002, Comp. St. 1929, the better practice is to require the fact that affiant is plaintiff, his agent or attorney, to be sworn to as other matters of fact, and not inserted as a mere recital. Where, however, the whole record taken together discloses that the affiant is the plaintiff or agent or attorney of the plaintiff, it is sufficient.
2. ———. There is no requirement in the statute involved (Comp. St. 1929, sec. 20-1010) that the written notice which the officer shall leave with the garnishee shall be issued and signed by the officer.
3. ———. Under our statutes, proceedings in garnishment are in the nature of notice of the attachment to the party in actual possession of the property, and from the time he receives such notice he becomes a trustee in respect to the goods or property of the debtor.

4. ———. Proper affidavit having been filed and a copy of the order of attachment with a written notice having been lawfully issued and served on garnishee, failure to tender garnishee fees excuses garnishee's failure or refusal to appear and answer, but does not dissolve the attachment and discharge garnishee from any and all liability in the premises or deprive the court of jurisdiction and control of all subsequent proceedings, if the garnishee at the time of service had any property of defendant in its possession which the officer "cannot come at."

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

Edwin D. Crites, for appellant.

Porter & Porter and *Charles A. Fisher, contra.*

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

CHAPPELL, J.

In this case questions of law are presented for decision affecting only Crawford State Bank, plaintiff, appellee, and Continental Oil Company, garnishee, appellant. The facts are not disputed. Statutory provisions referred to in this opinion are concededly applicable. Upon consideration thereof, we affirm the judgment of the trial court.

On February 3, 1942, plaintiff filed its petition in the county court of Dawes county seeking to recover $300 and interest upon a promissory note from defendant L. T. Murphy. The latter was in the county when plaintiff's petition was filed but departed therefrom before service could be had upon him, and thereafter has resided in Arizona. On the same date plaintiff filed its affidavit for attachment and garnishment, supported by approved bond. Thereafter plaintiff filed a nonresidence affidavit.

After service on garnishee, its attorney filed a special appearance objecting to jurisdiction, contending, in substance, that the officer did not *leave* with garnishee a copy of the order of attachment with a *written notice* to appear in court and answer, as required by section 20-1010, Comp. St. 1929;

and that garnishee's statutory fees had never been tendered, paid or waived.

The county court sustained the objections, for the reason that no written notice to garnishee was *issued by* and served by the officer upon it, and thereupon excused and discharged garnishee from any and all obligations to answer and liability in the premises; and, there being no property of defendant attached through legal process on garnishee, dismissed plaintiff's case without prejudice at plaintiff's costs.

Upon appeal by plaintiff to the district court, a judgment was therein entered finding garnishee's objections to be without merit; reversing the judgment of the county court, and remanding the case for further proceedings, pleadings, process and final judgment as provided by law. The garnishee appeals therefrom, contending, for the first time in this court, as an additional objection to jurisdiction, that plaintiff's affidavit for attachment and garnishment is fatally defective, the agency of affiant not appearing therein and the fact of agency not being sworn to as other matters of fact. The jurisdictional quality of the affidavit requires adjudication of this contention.

Section 20-1002, Comp. St. 1929, requires the affidavit to be made by the plaintiff, his agent or attorney. In complying therewith the better practice is to require the fact that affiant is plaintiff, his agent or attorney, to be sworn to as other matters of fact, and not inserted in the affidavit as a mere recital. Where, however, the whole record taken together discloses that the affiant is the plaintiff or agent or attorney of the plaintiff, it is sufficient. *Jeary v. American Exchange Bank*, 2 Neb. (Unof.) 657, 89 N. W. 771; *Tessier v. Englehart & Co.*, 18 Neb. 167, 24 N. W. 734.

Plaintiff's petition, its verification, and plaintiff's affidavit clearly disclose affiant's agency, as president and managing executive officer of plaintiff, and dispose of this contention adversely to garnishee.

Service of a written notice is required by section 20-1010, Comp. St. 1929, which reads, in part: "If the officer cannot come at such property, he shall *leave* with such garnishee a

copy of the order of attachment with a written notice that he appear in court, at the return of the order of attachment, and answer * * * ." Here, the officer did leave with garnishee a certified copy of the order of attachment and garnishment, together with written notice and summons therein contained, all issued and signed by the county judge, so commanding garnishee's appearance and answer.

Bouvier defines the word "garnishment" to be, "A warning to any one for his appearance, in a cause in which he is not a party, for the information of the court and explaining a cause." 2 Bouvier's Law Dictionary (Rawle's 3d Rev.) 1334. There is no requirement in the statute involved that the written notice which the officer shall leave with the garnishee shall be issued and signed by the officer. *Moore & Lyons v. Stainton,* 22 Ala. 831. No applicable authorities are cited by the garnishee holding otherwise under similar statutes, and we conclude that the written notice served complied with the statute.

It is conceded that garnishee's fees were never tendered, paid or waived. Section 20-1026, Comp. St. 1929, provides, in part: "But a garnishee shall not be required to appear in this or any other case unless there is tendered to him the same fees as a witness is entitled to in the suit in which the garnishee proceedings are had."

The officer made return herein showing that garnishee did not make any request or demand that attendance fees be paid or advanced to it. This does not comply with the statute requiring that fees must be tendered. See *Chicago, B. & Q. R. Co. v. VanCleave,* 52 Neb. 67, 71 N. W. 971. " 'Tender' is an offer to perform an act which the party offering is bound to perform." 41 Words & Phrases (Perm. ed.) 330.

We have held that a failure to tender garnishee fees is a defense in proceedings by attachment for a contempt (Comp. St. 1929, sec. 20-1028) for garnishee's refusal to appear in court and answer at the time and place named in the written notice. But, there being no defect in the procedure up to that point, such failure was not a matter on

which the jurisdiction of the court to inquire into the contempt depended. *Kelsey v. Klabunde,* 54 Neb. 760, 74 N. W. 1099.

Section 20-1038, Comp. St. 1929, provides: "From the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction and to have control of all subsequent proceedings under this chapter * * * ."

The order of the county court was correct, in so far as it excused garnishee from its obligations to appear and answer, but the judgment of the district court preserved garnishee's rights in that regard when it remanded the case for such further proceedings, pleadings, process and final judgment as provided by law.

Section 20-1017, Comp. St. 1929, provides: "An order of attachment binds the property attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment for all property, moneys, and credits in his hands, or due from him to defendant, from the time he is served with the written notice mentioned in section (20-1010)."

Under our statutes, proceedings in garnishment are in the nature of notice of the attachment to the party in actual possession of the property, and from the time he receives such notice he becomes a trustee in respect to the goods or property of the debtor. It is sufficient if property is deposited with the trustee or that he is indebted to the principal debtor. *Mathews v. Smith & Crittenden,* 13 Neb. 178, 12 N. W. 821.

Proper affidavit having been filed and a copy of the order of attachment with a written notice having been lawfully issued and served on garnishee, failure to tender garnishee fees excuses garnishee's failure or refusal to appear and answer, but does not dissolve the attachment and discharge garnishee from any and all liability in the premises or deprive the court of jurisdiction and control of all subsequent proceedings, if the garnishee at the time of service had any property of defendant in its possession which the officer "cannot come at."

It follows, therefore, that the county court was without authority to discharge the garnishee from any and all liability in the premises and dismiss plaintiff's case, and the judgment of the district court is, accordingly, affirmed.

AFFIRMED.

FERNE OLSEN, APPELLEE, V. ALFRED E. MARSH: MARYLAND CASUALTY COMPANY, APPELLANT.

8 N. W. (2d) 169

FILED FEBRUARY 5, 1943. No. 31486.

1. **Courts.** The county court has original and exclusive jurisdiction of all guardianship matters, including the appointment of a guardian and the final settlement of the accounts of such guardian.
2. **Guardian and Ward.** When a guardian invested his ward's money in land, taking title thereto in his own name, and giving back to himself as guardian a mortgage thereon, he is liable thereon for the full amount of the loss.
3. ———. When a guardian, without the knowledge of the county court, purchased with the ward's money time certificates for one year in a bank which failed, the investment was not a proper investment of the trust funds, and the guardian was liable for the full amount of such loss.
4. ———. In the case of a bond given by a guardian, ordinarily the judgment settling the accounts of such guardian is conclusive on the surety on the bond.
5. ———. The liability of a surety on a guardian's bond, so far as the ward is concerned, is identical with that of his principal.
6. ———. Ordinarily, the only questions open to the surety in a suit on a guardian's bond, after judgment against the guardian, are with reference to the making of the bond, its legal sufficiency, and the extent of its obligation. The amount due from the guardian, when it has been determined in appropriate proceedings, cannot be relitigated by his surety.
7. ———. The surety on a guardian's bond, in the absence of fraud, is concluded by the decree of the county court duly entered on a hearing on an accounting or final settlement, as to the

amount of the principal liability, although the surety is not a party to the accounting.

8. ———. When a guardian's bond has been given for the funds of two wards, and one, upon reaching his majority, has been paid his just share in full by the guardian, but there is a devastavit in the funds of the other ward exceeding one-half of the principal sum of the said bond, the surety upon said bond will be held to account for the amount due from such guardian up to the limit of the bond furnished, and the liability of the surety is not limited to one-half the amount of said bond.

9. ———. When a guardian fails to settle with his ward for the sum he shows is due in his final report, the ward is entitled to interest thereon from the date she became entitled to the fund.

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

Herbert E. Story and *John H. Roper*, for appellant.

John H. Kuns, Kuns & Van Steenberg, Robert Van Pelt, Roland V. Rodman and *R. P. Kepler, contra.*

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

PAINE, J.

This is a law action by a ward against her guardian and the surety on his bond. The action was brought in the district court for Cheyenne county, while the bond was executed for the guardian in the county court for Washington county. A jury was waived. Judgment was entered for plaintiff in the sum of $3,856.65. The motions for new trial filed by the guardian and the surety were both overruled, at which time plaintiff's attorney was granted a fee of $200 as additional costs. An appeal to this court was perfected by the Maryland Casualty Company only.

The assignments of error relied upon by the surety for reversal allege generally that the judgment is not supported by the law or the evidence, and that the amount is excessive.

It is further charged that the district court for Cheyenne county did not have jurisdiction of the subject-matter, and committed error in its rulings in receiving and rejecting

evidence, and that the court erred in holding the plaintiff's cause of action was based upon a final order; the court erred in failing to consider the findings and orders of the county court for Washington county; the court erred in making a determination of fact contrary to the finding of the county court for Washington county; the court erred in holding the proceedings in the Cheyenne county court null and void; and the court erred in overruling defendant's motion for judgment at the close of the evidence.

The bill of exceptions in this case is somewhat unusual, in that it consists, first, of some 97 pages of exhibits, and then, in conclusion, the evidence of one witness, an attorney for appellee.

Exhibits Nos. 1 and 2 are transcripts of the proceedings in the plaintiff's guardianship case in the county court for Washington county, and the same make up 53 pages, and were offered as exhibits by the stipulation of the parties and received by the court.

The same procedure was followed in the introduction of deeds, mortgages, and a receipt signed by the ward. Thereupon, all of the original files of the county court for Cheyenne county in the matter of the guardianship of the same ward in that county were offered by stipulation of the parties and received by the court.

Exhibit No. 9 was the offer of 23 questions and answers from a deposition of Alfred E. Marsh, guardian. It was stipulated that notice to take this deposition was served upon attorney R. P. Kepler, but no notice was served upon the surety, Maryland Casualty Company, and the objection that such evidence was not binding upon that defendant was sustained by the court, but the evidence was received as against the guardian.

Before discussing the law, a summary of the facts will be necessary. The two wards were Ferne Marsh, the plaintiff, born November 25, 1914, who married Gundhardt Olsen December 1, 1934, and her brother, Harvey Marsh, born June 10, 1911. On July 21, 1928, the county judge of Washington county appointed their father, Alfred E. Marsh,

defendant herein, their guardian, and on the same day he filed his oath and bond of $500, with Grant Lothrop as surety. The guardian received $2,000 for each child, and therefore on February 1, 1929, the defendant Maryland Casualty Company executed an additional guardian's bond in the sum of $4,000 in such joint guardianship matter.

Thereafter the two wards inherited $3,533.80 from the McCoy estate, and on April 15, 1930, the guardian furnished an additional new bond in the sum of $5,000 of the National Surety Company, as he then had about $7,500, in which the two wards shared equally.

Harvey Marsh became 21 years of age on June 10, 1932, and his guardian filed a final report on July 6, 1932, and paid Harvey Marsh $3,681.42, and was thereupon released and discharged as guardian for Harvey Marsh. This report shows that he paid to the Maryland Casualty Company premiums of $20 a year upon the bond for four years in the sum of $80 from 1929 to 1932 inclusive.

An order was entered by the county judge July 6, 1932, that the guardian could file a new bond in the sum of $4,000 to cover his liability as guardian for Ferne Marsh. A further order was entered on August 18, 1932, that the National Surety Company bond be reduced to $4,000, and that the bond of the Maryland Casualty Company "be discharged from further liability herein."

On July 23, 1933, the county court for Washington county accepted the final report of the guardian, and also his resignation, the guardian having reported that the ward, as well as the guardian, had removed from Washington county to Cheyenne county, of which county they had both been residents for some four years, and that it would be more convenient to have the guardianship jurisdiction removed to the county court for Cheyenne county, and there was attached to said final report a copy of a petition by the plaintiff to the county court for Cheyenne county, although at that time no such petition was pending in the county court for Cheyenne county. April 1, 1935, was the last date for filing claims against the National Surety Company, which had gone into receivership.

On December 3, 1936, the county court for Washington county entered a judgment *nunc pro tunc,* in which the order entered on July 23, 1933, was modified and changed in its final paragraph to read: "It is therefore ordered, adjudged and decreed by the court that said resignation of Alfred E. Marsh as such guardian in Washington county, Nebraska, be and the same hereby is approved and accepted, and that * * * said Alfred E. Marsh, upon the filing of a receipt from a duly appointed guardian of Ferne W. Marsh for the funds now in the hands of Alfred E. Marsh, the said Alfred E. Marsh be discharged from his trust as such guardian in Washington county, and his bondsmen released from any and all liability herein."

The action in the instant case was begun when the ward, Ferne Olsen, on December 18, 1936, filed a petition in the district court for Cheyenne county against her father and guardian, Alfred E. Marsh, and the Maryland Casualty Company, a corporation, in which she recited all of the pertinent facts about the guardianship proceeding in Washington county, including the filing of a surety bond by the defendant Maryland Casualty Company.

Service was had upon defendant Marsh in Cheyenne county, and upon the Maryland Casualty Company by service upon the director of the department of insurance of the state of Nebraska at Lincoln, Nebraska. On January 15, 1937, the Maryland Casualty Company filed a special appearance, objecting to the jurisdiction of the district court for Cheyenne county, alleging that such district court had no jurisdiction over the administration of guardianships in Washington county, and had no jurisdiction over the subject-matter for the reason that the guardian had been discharged and the surety released, and for the further reason that there had been no finding or judgment against the guardian or his surety in the county court for Washington county.

Thereafter the Maryland Casualty Company filed a demurrer, setting out, among other grounds, that the action is a collateral attack on a judgment of the county court in Washington county, which demurrer was overruled.

The surety company then filed an answer, in which it admits that it is a foreign corporation, authorized to do business in Nebraska, and that an order was entered August 18, 1932, discharging the defendant surety company from all liability for future acts of the guardian; that in accordance with an order of the county court for Washington county the guardian filed in that court certified copies of the petition and of the letters of guardianship issued to him in Cheyenne county, and a certified copy of the inventory of the personal property of said minor then on hand, in the amount of $3,525.77.

To this answer Ferne Olsen filed a reply, in which she alleged that on May 14, 1930, the guardian deposited $3,788.75 in the Liberty State Bank of Sidney, Nebraska, and three certificates of deposit were issued therefor in the name of A. E. Marsh, guardian; that thereafter, at some time between the 14th day of May, 1931, and the 14th day of December, 1931, the guardian converted the proceeds of two of such certificates of deposit to his own use; that the Liberty State Bank of Sidney failed December 14, 1931, and the guardian filed his claim for the sum of $1,838.13; that the guardian knew that the said bank was in failing circumstances when he renewed the said certificates for one year in said bank, which constituted an investment of said funds which was wholly unauthorized by the county court for Washington county.

The reply further alleged that, by reason of such negligent act, the said funds held for the benefit of the ward were lost; that the guardian, having converted the sum of $2,180 to his own use, in an attempt to furnish security executed a mortgage to himself as guardian in the sum of $2,180, to draw 6 per cent. interest, and that such conversion of such funds of the ward constituted a fraud and a violation of the terms and conditions of the bond executed by the Maryland Casualty Company, and that said guardian was never authorized by the county court for Washington county to loan to himself any sums of money whatever, but that such acts of the guardian were a part of his fraudulent scheme to convert and steal the moneys of the plaintiff.

On February 20, 1941, the Maryland Casualty Company filed an amended answer, repeating many of the allegations of its original answer, and charging that the plaintiff is estopped to maintain the action for the reason that she failed and neglected and refused to pursue her legal right against the National Surety Company or its successor.

In the bill of exceptions we find the resignation of the guardian, and attached thereto a final report, under date of June 21, 1933, of his acts and doings up to the date of such report, and this final report shows his total receipts and total expenditures and a balance due to Ferne Marsh, plaintiff, of $3,525.77, and his oath that this report is just and true, and on this final report, setting out the balance on hand belonging to Ferne Marsh, the county judge for Washington county entered a discharge of the guardian and release of the bondsman on July 23, 1933, reciting that the final report of said guardian and his acts and doings are accepted and approved, and later, on November 28, 1936, a *nunc pro tunc* order was issued, reading that the guardian, upon the filing of a receipt from a duly appointed guardian of Ferne W. Marsh for the funds now in his hands, shall be discharged from his trust and the bondsman released.

These matters, as claimed by the surety, were all within the original jurisdiction of the county court for Washington county. Const. art V, sec. 16; Comp. St. 1929, secs. 38-102, 27-503.

The county court for Washington county had original and exclusive jurisdiction over the accounts of the guardian and the settlement thereof. This court finds that this action, based upon such final order exactly as rendered, with no change thereof in any way, was the proper procedure. *Langdon v. Langdon*, 104 Neb. 619, 178 N. W. 178; 10 Neb. Law Bulletin, 407, sec. 81.

This record shows that the guardian did file his final report, he did show the correct amount of money which he should have had on hand, which report, including the amount on hand, was approved by the county court, and on this final report he was discharged, being a final order and

closing the case in the county court for Washington county. The only thing remaining for the guardian to do was to file a receipt showing that he had paid over the sum of $3,525.77.

It appears from the evidence that this report of the guardian, showing that he had on hand said sum of money in cash belonging to his ward, was false and fraudulent, for at that time he had invested a portion of said money in a bank which had failed, and the remaining portion of said money in a piece of property, the title to which had been taken in his own name, all in violation of law.

"Where a guardian ostensibly invested money by a loan to herself, giving notes and mortgages, the loan was not an investment of the trust fund, and the guardian was liable for the full amount." *Hutson v. Jenson,* 85 N. W. 689 (110 Wis. 26).

"In the case of bonds given by administrators, executors and guardians, while there is to some extent the same lack of uniformity in the decisions as in other cases, we find a more pronounced tendency to hold that the judgment or order settling the accounts or fixing the liability of the principal is conclusive on his sureties as to every matter adjudicated by it." 1 Freeman, Judgments (5th ed.) 1017, sec. 462.

The bond of $4,000 given by the defendant surety in this case was in force from February 1, 1929, for the four years during which premiums of $20 a year were paid on it.

These wrongful investments of the guardian, causing the devastavit to this ward's estate, were made during those years. The order of the county court specifically released and discharged the defendant surety "from any and all future liability therein." It cannot be held that it discharged the surety from prior wrongful acts.

"The liability of a surety on a guardian's bond, so far as the ward is concerned, is identical with that of his principal; and after proof of the receipt by the guardian of the ward's money and failure to account for it, the guardian has not faithfully discharged the duty imposed by his

obligation until he has clearly shown how it has been disposed of. Neither can the surety in the bond be permitted to say, 'You cannot prove the date when my principal converted your money, and therefore you cannot recover on any of the bonds.' " *Boyd v. Withers*, 103 Ky. 698, 46 S. W. 13.

"Ordinarily, the only questions open to the sureties in a suit on such a bond, after judgment against their principal, are in reference to the making of the bond, its legal sufficiency, and the extent of its obligation. The amount due from an administrator or executor, when it has been determined in appropriate proceedings, cannot be relitigated by his sureties." 1 Freeman, Judgments (5th ed.) 1017, sec. 462.

"It has been held in a long line of decisions of this court that sureties on a guardian's bond, in the absence of fraud, are concluded by the decree of the county court, duly entered on a hearing on an accounting or final settlement, as to the amount of the principal liability, although the sureties are not parties to the accounting. *Southern Surety Co. v. Burney*, 34 Okla. 552, 126 Pac. 748 (43 L. R. A. n. s. 308)." *Southern Surety Co. v. Williams*, 105 Okla. 44, 231 Pac. 293.

The surety in the instant case gave a bond for $4,000. The guardian was to render an account within one year, and finally to pay the amount due to his ward. The guardian failed to file these required annual reports, which the surety, in protecting its own interests, should have demanded the guardian be ordered to file.

The defendant surety insists that, as the bond of $4,000 was given for the property of two wards, and as a full settlement with the other ward was made by the guardian, no recovery can be had in the instant case in any event exceeding $2,000, or one-half the amount of the bond. In support thereof, we are cited to 28 C. J. 1297, reading as follows: "Where a single bond has been given for two or more wards, the amount of the recovery in the aggregate, exclusive of interest, cannot exceed the penalty in the bond; and each

ward is entitled only to recovery equal to his proportional interest in the bond."

True, if the estate of several wards is protected by a single bond, no one ward should be allowed to recover in full to the loss of the others, but only to the fair share thereof. However, there is but a single ward remaining in the case at bar, and in such situation the general condition of the bond is to guarantee that each guardian will account for the funds in his hands. In other words, the surety on a guardian's bond is bound by whatever binds the guardian up to the limit of the bond it has furnished. See 25 Am. Jur. 114, sec. 188.

The appellant also insists that the plaintiff cannot recover interest until after a demand was made upon the surety, where the surety was not a party to the action.

Appellant cites us to the opinion on rehearing in the case of *Kilby v. Burnham,* 65 N. Dak. 169, 176, 256 N. W. 522, 525, in which the court said: "The liability of defendant is founded upon the fact that he made the investment of the funds of the estate, and without authority; and the conclusion, therefore, is that he should not have made the investment. In determining the extent of the damages sustained by the estate, it is necessary to ascertain what would have been the status of the estate if he had not made the investment. If the investment had not been made, the funds would not have earned any interest, in which circumstance the defendant would not be required to account for an item of that character. It logically follows, therefore, that defendant cannot be liable for interest unless founded upon some other basis or reason, and we do not find any other basis or reason in the record."

Appellant contends that the court erred in allowing interest, and cites *Ericsson v. Streitz,* 132 Neb. 692, 273 N. W. 17, in which this court held that, when funds were in possession of the county judge, interest would only be allowed from a demand made or commencement of suit. However, that holding was made under a special statute (Comp. St. 1929, sec. 27-546). In the instant case, the lower court al-

lowed interest from December 1, 1934, the date the ward became of age by reason of her marriage, and from which date she was entitled to these funds. She has taken no cross-appeal. That she was entitled to interest as the court has allowed is without question, but whether or not she would have been entitled to interest prior thereto is not before this court, for the reason that the ward took no cross-appeal. "In a suit on an official bond, the surety is liable for interest from the date of the breach on the amount then recoverable." *City of Scottsbluff v. Southern Surety Co.*, 124 Neb. 260, 246 N. W. 346.

In conclusion, this case is founded upon the fact that the guardian made investments of a kind that he was not permitted by law to make. The bond of defendant surety was in full force and effect, with premiums fully paid during the time the devastavit occurred. The guardian was liable under the law, and therefore the bonding company was also liable. The county court for Washington county had jurisdiction until the guardian complied with that court's final order to file a receipt for the amount that court found to be due by the approval of his final account.

A full discussion of an abortive attempt to open a guardianship in another county before closing the first one is found in the case of *Dorr v. Davis*, 76 Me. 301, holding: "Such minor cannot acquire a residence in another county from that in which the guardian was appointed that will oust the judge of probate, who appointed such guardian, of jurisdiction over the minor and his estate, and the appointment of a new guardian by the judge of probate in another county, while the first guardianship continues, is void."

In the instant case, the district court for Cheyenne county could not go back of the amount found to be due by the county court in Washington county, but accepted that amount, and credited payments made thereon by the guardian; in other words, found the facts to be that the guardian did not have on hand the amount he had shown in his final report to the county court for Washington county. See *Chaplin v. National Surety Corporation*, 134 Me. 496, 185 Atl. 516.

We have examined all the assignments of error, but find no prejudicial error in the record. The judgment of the trial court is hereby affirmed, with an additional allowance of $200 to plaintiff's attorney for services in this court, to be taxed as part of the costs.

AFFIRMED.

ROSE and EBERLY, JJ., not participating.

FRANK L. ROBINSON, APPELLEE, V. DAWSON COUNTY IRRIGATION COMPANY ET AL., APPELLANTS.
8 N. W. (2d) 179

FILED FEBRUARY 5, 1943. No. 31444.

1. **Waters.** An irrigation company may properly maintain an action to establish and protect its water rights by enjoining the unlawful diversion of its irrigation water supply, and such a suit may be brought without joining its stockholders or water users as parties.
2. ———. In a suit against a junior appropriator for damages for unlawfully diverting the irrigation waters of a down-stream senior appropriator, it is a complete defense to such suit to establish that the available water passing the junior appropriator's headgate would not, if not diverted or interrupted, reach the headgate of the senior appropriator in a usable quantity.
3. **Judgment.** A final judgment by a court of competent jurisdiction on the merits of the case is a bar to a future suit between the same parties or their privies upon the same cause of action,
4. **Waters.** Where evidence of damage to growing crops resulting from the unlawful conversion of storage water is so commingled with evidence of alleged damage resulting from the taking of the natural flow of the stream to which defendant was entitled that the one cannot be separated from the other and the damage caused by each cannot be ascertained, the judgment cannot be said to be supported by the evidence.

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

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

Dryden, Dryden & Jensen, contra.

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

CARTER, J.

This suit was instituted against the Dawson County Irrigation Company and the Elmcreek Ditch Company to obtain injunctional relief and to recover a judgment for damages in the sum of $6,026. Plaintiff waived his alleged right to an injunction against both defendants and the case then proceeded as one for damages before a jury. The jury returned a verdict for $3,125 and judgment was entered against the defendants for this amount. Defendants appeal.

Plaintiff filed his petition on January 31, 1941, alleging that he was the owner of 340 acres of land in Buffalo county lying within the Kearney Mutual Irrigation Company, hereinafter referred to as the "irrigation company." By virtue of his lands lying within the irrigation district, plaintiff entered into a contract with the Central Power Company with reference to the delivery and use of irrigation waters from the Central Power Company canal, said Central Power Company being the owner of an appropriation of the waters of the Platte river with a priority date of September 10, 1882. It is further alleged that on December 26, 1935, the irrigation company entered into a contract with the Platte Valley Public Power and Irrigation District whereby the latter was to deliver certain storage water for irrigation purposes to the irrigation company for the use of plaintiff and others similarly situated. The petition then alleges that the Dawson County Irrigation Company procured a restraining order restraining the officers of the state having supervision of the distribution of the natural flow of the waters of the Platte river in accordance with priority rights and of certain storage waters being carried in the river channel pursuant to the irrigation district's contract with the Platte Valley Public Power and Irrigation District, from interfering with the taking of said water by

the Dawson County Irrigation Company. Thereupon said water was taken by the Dawson County Irrigation Company and the Elmcreek Ditch Company. The petition alleges that the water so taken belonged to the plaintiff and other irrigators similarly situated within the irrigation district and that such taking was tortious and wrongful. Plaintiff claims damages for injuries to his growing crops resulting from the failure to get that water to which he was entitled that was wrongfully taken by the defendant irrigation companies.

The plaintiff having waived his claim to injunctive relief, the only question for our determination is the correctness of the judgment in the amount of $3,125 for damages alleged to have resulted from the unlawful taking of plaintiff's water during July and August, 1940.

The record shows that the Central Power Company is the legal holder and owner of an appropriation of the waters of the Platte river for 140 second-feet for power purposes and 22 second-feet for irrigation purposes with a priority date of September 10, 1882. The defendants also have appropriations of water in the Platte river for irrigation purposes junior to the rights of the Central Power Company. Plaintiff's right to irrigation water from the natural flow of the Platte river stems from the appropriation held by the Central Power Company.

The record further discloses that on July 4, 1940, the department of roads and irrigation officially notified the Dawson County Irrigation Company that it was then entitled to no part of the natural flow of the Platte river and forbade any diversions from the river other than 125 second-feet of storage water to which it was entitled. Thereupon the Dawson County Irrigation Company filed its petition in the district court for Dawson county, praying for an injunction against A. C. Tilley, Robert H. Willis and A. H. Hamilton, setting forth their capacities as officers of the department of roads and irrigation, and other defendants, in which it was alleged that the Dawson County Irrigation Company had an appropriation from the natural flow of the river;

that there was no appropriator of natural flow on the river below its headgate having an appropriation senior to it in point of time except the Central Power Company; that the headgate of the Central Power Company was approximately 35 miles below the headgate of the Dawson County Irrigation Company; that the bed of the river was approximately a mile wide with a dry bed of sand of great depth at the time the petition was filed; that the only reason for ordering the Dawson County Irrigation Company to refrain from taking natural flow waters from the river was to further an attempt to deliver water at the headgate of the Central Power Company, an appropriator senior to it in point of time; that any quantity of water less than 1,000 second-feet flowing in the river at the headgate of the Dawson County Irrigation Company will not reach the headgate of the Central Power Company in usable quantities, but will sink away and be lost in the sand bed of the river and by evaporation, and will be of no beneficial use to any person; that at the time of filing the petition there were but 100 second-feet of water at the headgate of the Dawson County Irrigation Company, that it would be utterly impossible for any of the flow of the river to reach the headgate of the Central Power Company and to deprive the Dawson County Irrigation Company of the water would be to waste said water and cause the same to be of no beneficial use to any one.

On July 5, 1940, a restraining order was issued enjoining the officials of the department of roads and irrigation from in any manner interfering with the headgates of the Dawson County Irrigation Company and from interfering with the diversion of waters flowing in the Platte river into the canal of said defendant irrigation company.

On July 23, 1940, a petition in intervention was filed by the Central Power Company, Walter Sheen, Frank Robinson, O. L. Erickson, A. C. Wittera and H. W. Kendall, in which the rights of the Central Power Company in the natural flow of the river are set forth and the further allegation that interveners, other than the Central Power Com-

pany, are owners of land which is irrigable and is being irrigated from waters contained in the appropriation of the Central Power Company and are beneficial owners of that part of the water right of the Central Power Company which was granted for irrigation purposes. The petition in intervention denies generally the allegations of the petition, alleges the ownership of their lands subject to irrigation, the nature of the crops growing thereon, and the immediate necessity for irrigation water to be used in maturing the crop. The good faith of the Dawson County Irrigation Company is challenged and the results of the action taken by it are alleged to wrongfully deprive the interveners of their prior rights and to subject them to irreparable damage. Interveners asked that the prayer of the petition be denied, that the restraining order and temporary injunction be dissolved, and for such other relief as may be just and equitable. The defendant officers of the department of roads and irrigation filed their answers alleging the correctness of their closing order of July 4, 1940, and praying for a denial of the relief sought by the Dawson County Irrigation Company. On March 10, 1941, the Dawson County Irrigation Company, as its separate answer to the petition in intervention and as reply to the answer of the officers of the department of roads and irrigation, filed its general denial.

On March 10, 1941, the case was tried and a decree generally in favor of the Dawson County Irrigation Company and against the defendants and interveners was entered, in which the following pertinent findings were made: That on July 5, 1940, there was no available water in the Platte river that could be delivered at the Central Power Company's headgate, and that no water could be so delivered prior to July 10, 1940. That on July 11, 12, 13, 14 and 15, 1940, as a result of a heavy rain, the Central Power Company received the full amount of its appropriation from the natural flow of the river. That after July 15, 1940, no water could be delivered to the headgate of the Central Power Company in usable quantities for the reasons stated

in the petition of the Dawson County Irrigation Company. The injunction was thereupon made permanent as against the officers of the department of roads and irrigation and the petition in intervention dismissed. This decree was never modified or appealed from and remains in all respects final.

From this statement of the issues and of the matters adjudicated in the foregoing case, it is apparent that the rights of the Dawson County Irrigation Company and the Central Power Company to the natural flow of the river were conclusively settled. It having been decided that the Central Power Company had no rights in the water as against the Dawson County Irrigation Company, and the decree having become final, the doctrine of *res adjudicata* is applicable and the Central Power Company, and those in privity with it, are estopped from asserting any rights to the natural flow of the river during the period covered by the decree in the former case.

The former case was decided under the following applicable principles of irrigation law:

"An action lies to establish and protect the company's water rights or enjoin the unlawful diversion of its supply of water, and such a suit may be brought by the company without joining its stockholders or consumers as parties." 67 C. J. 1386. See, also, *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 23 Colo. 233, 48 Pac. 532; *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566, 20 Pac. 588.

"A ditch company may maintain an action to protect the rights of the consumers of water through its ditch, and it is not necessary to join such consumers with the ditch company as parties plaintiff in an action for that purpose." *Town of Sterling v. Pawnee Ditch Extension Co.*, 42 Colo. 421, 431, 94 Pac. 339. See, also, 5 Bancroft, Code Pleading, 4465, sec. 2431; *Farmers Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 45 Pac. 444.

"A senior appropriator is entitled to water as against an upstream junior appropriator as long as water in usable quantities can be delivered to him." *State v. Cochran*, 138 Neb. 163, 292 N. W. 239.

"Junior appropriators may use available water within the limits of their appropriation so long as the rights of senior appropriators are not injured or damaged." *State v. Cochran, supra.*

"Where all the available water passing a certain point on the stream would not, if not diverted or interrupted, reach a senior appropriator downstream, junior appropriators may lawfully divert water within the limits of their appropriations, and such diversions are not in law out of priority diversions." *State v. Cochran, supra.*

In the light of these principles, the Dawson county district court determined the diversion of irrigation waters by Dawson County Irrigation Company, between the 1st day of July, 1940, and the last day of August of that year, on the merits, and adjudged the same to be lawful; that the Dawson County Irrigation Company was entitled to the water it thus received. This is the legal effect of its judgment entered. It had jurisdiction of the parties litigant, of the causes of action, and of the subject-matter to which they related.

In 34 C. J. 750, it is stated: "A judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies, upon the same cause of action, in the same or another court, so long as it remains unreversed and not in any way vacated or annulled." See, also, *Allaire, Woodward & Co. v. Perfection Remedy Co.*, 100 Neb. 726, 161 N. W. 250; *Slimmer v. Hoffman*, 100 Neb. 330, 160 N. W. 103; *Trainor v. Maverick Loan & Trust Co.*, 92 Neb. 821, 139 N. W. 666; *Triska v. Miller*, 86 Neb. 503, 125 N. W. 1070.

There can be no question that the doctrine of *res adjudicata* would apply as against the Central Power Company. Plaintiff appears in the former suit as an intervener, but he claims he never authorized the use of his name as such and that he had no knowledge that he was designated as an intervener until after the petition in intervention had been filed. The attorney purporting to represent plaintiff testified that he counseled with a group of farmers owning land

irrigated by the natural flow of the river by virtue of the Central Power Company's appropriation and assumed that plaintiff was to be joined as an intervener. Whether or not the attorney was specifically employed to represent plaintiff presents a question of fact upon which the evidence is somewhat conflicting. In view of the fact that the record shows that plaintiff caused a dismissal to be prepared and forwarded to the clerk of the district court for filing upon the discovery of his inclusion as an intervener, and before the former case was tried, and which was not filed at the direction of the district judge for some unaccountable reason not disclosed by the record, coupled with the fact that plaintiff made no appearance at the trial of the case or otherwise, except as herein shown, we are of the opinion that the doctrine of *res adjudicata* does not apply to him because of his inclusion as an intervener in the petition in intervention. But as to any right he may have had in the natural flow of the river, we think plaintiff is estopped by the former judgment for the reason that he is in privity with the Central Power Company as to the natural flow water to which he is entitled by virtue of his obtaining his appropriative right through that of the Central Power Company, a party to the former suit. This conclusion rests on the fact that plaintiff is in privity with the Central Power Company as to any right he may have had to the natural flow of the river and not upon the fact that his name appears as an intervener in the former suit.

The judgment in the former case appears to have made no distinction between the natural flow and storage waters then flowing in the river. The instructions given by the court specifically inform the jury that, if they find that the defendants wrongfully converted the natural flow of the river and, as a result thereof, the Kearney Mutual Irrigation Company did not receive its 22 second-feet of such water at the time it would have arrived at the headgate of its ditch, they were to find for the plaintiff in the amount in which the use of such water by the defendants contributed to plaintiff's damage. This is a manifest error in view

of the fact that it had been previously adjudicated that the Dawson County Irrigation Company was entitled to the natural flow in the river at the time and that the Central Power Company, with whom plaintiff is in privity had no rights thereto. On the other hand, the Central Power Company had no interest in the contract of the Kearney Mutual Irrigation Company with the Platte Valley Public Power and Irrigation District for storage water and its participation in the former suit could in no way estop the plaintiff from maintaining the present action based on the wrongful conversion of storage waters belonging to plaintiff then being delivered for the beneficial use of the plaintiff, and others similarly situated.

It is urged, however, that the action for damages is incidental only to the equitable suit for an injunction and that the verdict of the jury is therefore advisory only to the trial judge. If this be true, it is contended that errors in the instructions do not constitute prejudicial error, as it will be assumed that such matters will be taken into consideration by the trial judge before a final judgment is entered. These contentions require an examination of the nature of the action and the procedure followed in obtaining the judgment from which this appeal was taken.

The suit was commenced to obtain an injunction and to recover a judgment for damages resulting from the wrongful conversion of waters to which plaintiff was entitled, the prayer of the petition being as follows: "Wherefore plaintiff prays for an order of this court restraining and enjoining the defendants herein and each of them from appropriating or converting to their own use any water from the Platte river and its tributaries under the rights of the Central Power Company, either as natural flow water, or storage water from the Sutherland Dam, that further the defendants and each of them be enjoined and restrained from interfering with the rights of the plaintiff to said water in every particular until the water appropriation belonging to the Central Power Company, or its successors, and the rights incident thereto to plaintiff have been satisfied.

That further upon hearing the court find that plaintiff is entitled to recover the sum of $6,026 from the defendants and for such other and further relief as is just and equitable in the premises."

We think the case is one in which a court of equity could properly take jurisdiction, and jurisdiction once having been taken, the case will be retained for the adjudication of all issues. No objection was made to the court's calling of a jury. The mere fact that the trial court failed to grant an injunction does not deprive such court from hearing the prayer for damages for the injuries suffered. The verdict of the jury must, therefore, be treated as advisory in character and the presumption follows that any errors in the submission of the case to the jury were considered by the trial court before judgment was entered. Prejudicial error in the instructions to a jury called in an advisory capacity cannot be successfully asserted. We hold therefore that reversible error in the instructions in the present case could not be successfully assigned in view of the fact that the verdict of the jury was advisory only.

We are of the opinion, however, that the judgment of the court is not sustained by the evidence. The evidence adduced at the trial makes no distinction between natural flow and storage waters. Defendants are liable only for the conversion of the storage water, if they are liable at all. The damages sustained by the conversion of storage water cannot be separated in the evidence produced at the trial. We are therefore unable to say that the judgment of $3,125 is sustained by the evidence in the record.

Other assignments of error will not be discussed in view of the conclusion we have reached. We think that the case must be reversed and the cause remanded for a new trial on the question of the wrongful conversion of the storage water in which plaintiff had a beneficial use and the resulting damages, if any, sustained by the plaintiff.

REVERSED.

EBERLY, J., not participating.

VERNON HOFFMAN, APPELLANT, V. STATE OF NEBRASKA: BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLEE.

8 N. W. (2d) 200

FILED FEBRUARY 5, 1943, No. 31571.

Workmen's Compensation. In perfecting an appeal in a case arising under the workmen's compensation law, a cost bond, or a cash deposit in lieu thereof, is required as provided by section 20-1914, Comp. St. Supp. 1941, and a failure to comply with such statute requires a dismissal of the appeal.

APPEAL from the district court for Lancaster county: JEFFERSON H. BROADY, JUDGE. *Motion to dismiss appeal sustained.*

Kenneth S. Wherry and *G. E. Price,* for appellant.

Cline, Williams & Wright, contra.

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

CARTER, J.

This is an action commenced for the recovery of benefits under the workmen's compensation law. The trial court held for the defendant and plaintiff appeals. The issue here presented arises on a motion to dismiss the appeal for failure of plaintiff to file a cost bond in accordance with section 20-1914, Comp. St. Supp. 1941.

The workmen's compensation law, section 48-174, Comp. St. Supp. 1941, provides in part as follows: "Any appeal from the judgment of the district court shall be prosecuted in accordance with the general laws of the state regulating appeals in action at law except that such appeal shall be perfected within thirty days from the entry of judgment by the district court * * *." The general law of the state regulating appeals in action at law is section 20-1914, Comp. St. Supp. 1941, which states in part: "In appeal or error proceedings in any case taken from the district court to the supreme court the appellant or appellants shall, within three months next after the rendition of the judgment or decree

or the making of the final order, sought to be reversed, vacated or modified, or within three months from the overruling of a motion for a new trial in said cause, file in the district court a bond or undertaking in the sum of seventy-five dollars to be approved by the clerk of the district court, conditioned that the appellant shall pay all costs adjudged against him in the supreme court; or, in lieu thereof, shall make a cash deposit with said clerk of at least seventy-five dollars for the same purpose: Provided, that if a supersedeas bond is executed no bond for costs shall be required." No bond or cash deposit was given as required by this statute.

It is contended by plaintiff that the provisions of section 48-175, Comp. St. Supp. 1941, relieves an appellant in a workmen's compensation case from the necessity of furnishing a cost bond or cash deposit as required by the general statute on the subject. Section 48-175 provides as follows: "No filing fees shall be charged by the clerk of any court for any service required by this Act." That this statute is effective to relieve parties from the payment of filing fees in cases brought under the workmen's compensation law has been previously determined. *Scott v. Dohrse,* 130 Neb. 847, 266 N. W. 709. But it does not have the effect of relieving such parties from the payment of all costs, nor does it relieve appellants in such cases from the requirements of section 20-1914, Comp. St. Supp. 1941, regarding the providing of a cost bond or cash deposit on appeal. All costs other than filing fees are taxable in a compensation case and a bond or cash deposit is necessary on appeal to insure their payment.

Plaintiff urges that section 48-174, Comp. St. Supp. 1941, was adopted subsequent to section 20-1914, Comp. St. Supp. 1941, and consequently that it can have no application. We do not think there is any merit in this argument. Section 20-1914 was strictly a procedural statute before and after its amendment in 1941 and consequently would be applicable as amended. But assuming that the former statute, section 20-1914, Comp. St. 1929, applied, plaintiff's conten-

tion would lack merit under the decisions of this court interpreting that statute. *Greb v. Hansen,* 123 Neb. 426, 243 N. W. 278; *Heinisch v. Travelers Mutual Casualty Co.,* 135 Neb. 13, 280 N. W. 234.

We conclude that an appellant in a suit seeking benefits under the workmen's compensation law is required, in perfecting an appeal to this court, to file a cost bond, or make a cash deposit in lieu thereof, within the time prescribed by section 20-1914, Comp. St. Supp. 1941. It appearing that no such bond or deposit was filed within the prescribed 30-day period or within any additional period fixed by this court for good cause shown, the motion of the defendant is well taken and the appeal is dismissed.

APPEAL DISMISSED.

ROSE and EBERLY, JJ., not participating.

WALTER T. BANKS, APPELLEE, V. METROPOLITAN LIFE INSURANCE COMPANY, APPELLANT.
8 N. W. (2d) 185

FILED FEBRUARY 17, 1943. No. 31463.

1. **Death.** A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him.
2. ———. Where a person has been away from his home for a period of seven years, his absence is unexplained and nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him, proof of diligent search and inquiry is not required in order to establish the presumption of death.
3. ———. Whether a presumption of death arises from seven years' continued absence from one's usual place of residence depends upon the facts and circumstances of each case.
4. ———. Where there is an unexplained disappearance of a person, there is a presumption that life continues for the first seven years, after which a presumption of death arises.
5. ———. The presumptions of life or death are in the nature

of conclusions of ultimate fact which the law makes when a jury find that certain elemental facts exist.

6. ———. The presumptions of life or death are rebuttable.
7. ———. The burden of overcoming the presumption of life or death rests upon the one asserting a contrary conclusion to be true.
8. **Trial.** The trial court should instruct the jury of these presumptions in order that the litigant may not be denied the benefit of the conclusion to which he is entitled.
9. **Affidavits.** Generally, an affidavit is not admissible to establish facts material to the issue being tried.

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

Beghtol, Foe & Rankin, for appellant.

Claude S. Wilson, Roy F. Gilkeson and *Hymen Rosenberg, contra.*

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

SIMMONS, C. J.

This is a suit to recover upon a life insurance contract issued upon the life of Josephine P. Banks, and payable to her father, Walter T. Banks. Josephine P. Banks, an adopted daughter, then about 19 years of age, disappeared in May, 1932, and has not been heard from since that time. Plaintiff sued on the policy in November, 1940, alleging generally that after eight years of unexplained absence he believed the insured was dead. Defendant answered, alleging that the circumstances surrounding the absence of the insured from the home of her foster parents were such as to negative any legal presumption of death, and that they establish that she voluntarily left her foster parents because of a desire to live separate from them, and that she is alive at the present time. The case was tried to a jury, resulting in a verdict for the plaintiff. Defendant appeals. We affirm the judgment of the trial court.

The original plaintiff in this action was Walter T. Banks. He died after the action was tried and appeal lodged in this

court. The action was revived in the name of Beulah Banks. For clarity here we will consider Walter T. Banks as plaintiff.

On April 10, 1916, plaintiff and his wife adopted a baby who was given the name Josephine. The Banks had no other children. Banks was afflicted with tuberculosis, and moved around a bit and for some time was separated from his family, they remaining in Lincoln while he was in a sanitarium in Colorado. About 1924 he secured employment in Denver, and the family went there to live, and Josephine attended public school. In 1930 when she was in high school her grades were below average. She was having some difficulty with her parents. This appears to have been based upon restraints because of work at home and a desire to go out with boy friends in the evening.

In October, 1930, her parents filed a complaint in the juvenile court charging that she was a delinquent child, in that she "is beyond their control, is truant from school, and is unwilling for them to meet her friends." She was found to be a "delinquent" child, placed on probation and ordered to report once a week. Nothing further is shown as to that proceeding. About that time her parents say she was absent from school one day, but they located her and brought her home that night. Friends testify that the parents told them she had run away, and they had secured her return to the home. About that time Josephine told others that she was not happy at home. In January, 1931, while still in school, she told a friend of her parents that she had run away, had been brought back and "when I go again I am going to make a get-away." Her school record shows that she was absent from school nine times the last semester, but she was not listed as "truant." She quit school on January 26, 1931, apparently with her parents' approval. From that time the record shows that she was at home with her parents, assisting them in earning a living and happy in her home life. The father lost his job about that time because of a reduction in force. He thereafter operated a hotel, appears to have failed in that business, and in late spring 1932

answered an advertisement for a family to cook at a mine in the mountains. By that means they became acquainted with one Rollo. In late April or early May, Rollo, another man, Mr. and Mrs. Banks and Josephine went to the mining camp. Some days later Mr. Rollo came to the camp, asked Mrs. Banks and then Josephine to go to his home in Denver and work as a maid for a few days. Josephine left with Mr. Rollo, saying to her mother, "Goodbye, I will see you next Saturday." The day is fixed as May 23, 1932. She remained at the Rollo home until the following Friday, when she left and did not return. She left clothing and a few personal belongings at the Rollo home. She was wearing an old dress at the time. Later that day she was seen on a street car sitting with a "nice young man," and wearing a new dress. She visited with a friend and told her, "I am going home tomorrow." She was at this time about 19 years old, well developed, attractive and in good health.

The Rollos reported her disappearance to the police, and a notice was run in the police department bulletin on June 1. Rollo then went to the mining camp and reported her disappearance to the parents. Shortly thereafter the plaintiff went to Denver, sought Josephine among his and her friends, and the police broadcast for her on the radio. Still later the parents continued the search in Denver. On September 2, 1932, the plaintiff reported her disappearance to the defendant's Denver office, and asked for assistance in searching for her, and received no practical help. About that time plaintiff moved to Lincoln, where Josephine's grandmother and other relatives lived, and where Josephine had been and was acquainted. The evidence is that Josephine was very fond of the grandmother. Plaintiff made a somewhat exhaustive search for his daughter, limited by his means, physical condition and abilities. Among other things he inquired of the dead letter office for mail that might have been sent to the post office near the mine. From the time she disappeared in May, 1932, she has not been seen nor heard from by any of her relatives or friends, and searches have been fruitless.

The court has long followed the rule, last stated in *Batth v. Metropolitan Life Ins. Co.*, 137 Neb. 676, 290 N. W. 902: "A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him." The legislature has recognized the force of this rule in section 30-1901, Comp. St. Supp. 1941, providing: "Any persons who have not been heard from for a period of seven years will be presumed to be dead and the estate of such persons shall be administered in the following manner."

Defendant does not question this rule, but questions its application to the facts here shown.

The defendant's first contention is that the evidence was not sufficient to sustain the verdict. This is based upon the fact that Josephine was an adopted child, had had trouble with her foster parents regarding her boy friends, had indicated a desire to get out from under their control, had said she would do so, and, they argue, did so voluntarily the day before she was to return to her home. Defendant insists that this evidence indicates a desire to escape from the control of her foster parents. This argument loses its potency in the light of the evidence that for the last sixteen months of her life at home the record shows she had no difficulty with her parents, had at least one young man friend with the parents' approval, assisted them in their effort to earn a living and was happy at it.

Here we have a girl, in early womanhood, living happily at home, helping her foster parents. She disappears after having told a friend that she was going home "tomorrow." She left her clothes and personal belongings behind. Had she been going out to face the world alone under the economic conditions existing in 1932 she would, we think, naturally have taken her personal belongings with her. The reason advanced by defendant to explain her absence is based on a childish statement made that the next time she left home she would make a get-away, and that she had been

unhappy. There is nothing in the record indicating that the adolescent attitude toward her parents while she was in high school carried over into the maturing months that followed. The evidence rather clearly establishes that it did not. These events are too remote in time, unconnected as they are with any subsequent events over a period of sixteen months. But assuming that that was her motive, and she left home because of it, that reason does not account for her continued absence. She had had no difficulty with her friends, and there is no reason apparent why she would not communicate with them or her grandmother. Likewise the control of her parents over her would have expired in two years, by her reaching majority. Continued silence or absence after that time would have been unnecessary, and, it seems to us, unnatural.

As a part of its contention regarding the sufficiency of the evidence, defendant argues that the parents made a dilatory and not exhaustive search at the time of Josephine's disappearance. It is easy in retrospect for the trained minds in defendant's employ to suggest that inquiries at the marriage bureau, morgue, etc., should have been made. The parents inquired of the boy friend who had been attentive to her. She had and did not keep a "date" with a young man the night of the day she disappeared. The record is not one that would indicate a marriage at that particular time. Neither does it indicate that the parents at that time considered death as a probability, but rather that they hoped to find her alive. In this connection it should be noted that in *McLaughlin v. Sovereign Camp, W. O. W.*, 97 Neb. 71, 149 N. W. 112, and *Rosencrans v. Modern Woodmen of America*, 97 Neb. 568, 150 N. W. 630, we cited with approval the rule that it "does not require proof of diligent search and inquiry in order to establish the presumption of death when a person has absented himself from his home or place of residence for seven years." Not to be ignored is the evidence that the plaintiff in September, 1932, sought the assistance of defendant, and received neither suggestion nor aid. Under the circumstances the search here is held to have been sufficient.

It is also contended that the plaintiff did not make full disclosures in the declaration of disappearance, executed in June, 1939, seven years after the event. Some of the information was not as exhaustive as that later given at the trial when the plaintiff and his wife had had occasion to refresh their memories. Defendant's investigators took months to check on this case, and it appears did not contact many of plaintiff's personal and business associates, about whom they later testified.

There are inconsistencies, as defendant complains, in the testimony of plaintiff and his wife, going largely to the dates of events in 1932. This is not an unusual situation where parties who have kept no records testify several years after the event. There is, however, no particular dispute as to the ultimate facts.

Defendant requested the court to submit a special interrogatory ending with this question, "Is the absence of Josephine from the home of her foster parents, and the failure of Josephine to communicate with them an unexplained absence?" The trial court refused to submit the special interrogatory. The defendant, conceding that the giving of such an instruction is discretionary, contends the refusal was error, citing *Kelley v. Meyer Fruit Co.*, 98 Neb. 503, 153 N. W. 554, holding that, where it appears that there is but one question of fact upon which there is substantial conflict in the evidence, the court may submit such question of fact to the jury and upon their verdict thereon should render such judgment as the law requires. In its argument defendant states that "The only question was as to why she (Josephine) left home and stayed away. Was her absence explained or not?"

Defendant also submitted a second requested interrogatory ending with this question, "Did Josephine intentionally remain away from the home of her foster parents and fail to communicate with them?" This requested instruction was also refused.

It appears that defendant considered that there were at least two controverted questions in the case when it was tried.

No reason is advanced as to the basis of the contended error and none appears to us.

Fink v. Prudential Ins. Co., 162 Or. 37, 90 Pac. (2d) 762. is relied upon by defendant. The facts may be clearly distinguished. There as to one policy, death had to be proved to have occurred early in the seven-year period. There the insured was shown by the plaintiff to have left home by design. The preponderant facts pointed to desertion and the desire to escape family burdens and not to death, or in other words the absence was explained. There also the beneficiary failed to follow direct clues that might have disclosed the whereabouts of the insured. The case is valuable for a discussion of the law, but we do not consider the factual situation of sufficient parallel to be controlling. It may be pointed out that the Oregon court (page 71) refused to follow the rule as to search and inquiry which this court stated in *McLaughlin v. Sovereign Camp, W. O. W., supra.*

Likewise in *Petition of Talbot*, 250 Mass. 517, 146 N. E. 1, the facts pointed to the intention of Talbot to cut all ties that bound him to family, business and friends, and start anew in another place. His absence was likewise explained. That situation does not exist here.

We have held, "that whether seven years' continued absence from one's usual place of residence will raise the presumption of death must depend largely upon the circumstances and conditions of each particular case." *McLaughlin v. Sovereign Camp, W. O. W., supra.*

It should also be noted that in the case of *Batth v. Metropolitan Life Ins. Co., supra,* evidence was received which indicated, if believed, that the insured voluntarily disappeared with a determination to remain away. The same is true of *Fredrikson v. Massachusetts Mutual Life Ins. Co.*, 126 Neb. 240, 252 N. W. 802. In both of these cases a finding of death, based on the presumption, was affirmed.

We conclude that the evidence is sufficient to sustain the verdict.

The trial court instructed the jury:

"You are further instructed that the presumption of life

continues for seven years, under ordinary circumstances, after the unexplained disappearance of a person from whom no tidings return to friends or acquaintances, and then the presumption of death arises. This presumption, however, may be overthrown by evidence of facts and circumstances surrounding such disappearance which tend to affect the inference of continued life or early death, and in arriving at a verdict in this case you are to consider all of the facts and circumstances in evidence, the possible motives, if any, of the missing person to absent and conceal herself, or the want of such motives, her possible motives for returning to her family, her attachment to the members of her family and her friends, her character, habits, condition, prosperity, and the extent of the unavailing search that has been made for her.

"Accordingly, if you find by a preponderance of the evidence that the insured, Josephine P. Banks, left her home and has been continuously absent therefrom for a period of seven years prior to the 28th day of November, 1940, without any intelligence of her whereabouts being received from or concerning her during that time by her family or friends who, were she living, would naturally hear from her, then such a continued absence together with such lack of intelligence concerning her, would, if unexplained, raise the presumption of her death, and in that event if the presumption has not been overthrown by evidence in the case your verdict should be for the plaintiff."

The defendant contends that the presumption of death is rebuttable, that when the defendant offers some substantial evidence to the contrary that the presumption disappears, that the presumption is not evidence, has no probative value and should not be weighed by the jury, and that the court erred in giving the above instruction.

By a prior instruction the court placed the burden of proof upon the plaintiff to establish the death of Josephine.

It is to be remembered here that the pleadings admit that the premiums were paid on this policy down to the date the action was brought, and the evidence indicates that they

were paid to the date of trial, so that plaintiff was not required to prove death on any particular date, either during the seven-year period or prior to the bringing of the action; that the plaintiff did not bring his action until more than eight years after his daughter's disappearance, and that defendant by its answer affirmatively alleged that the facts show that the daughter "was alive" when the answer was filed. The instruction given in the instant case was found to be not "prejudicial" to the defendant in *Rosencrans v. Modern Woodmen of America,* 97 Neb. 568, 150 N. W. 630.

We have followed the rule that where there is an unexplained disappearance of a person there is a presumption that life continues for the first seven years, after which a presumption of death arises. These presumptions in the first instance work to the advantage of the one asserting life to exist, in the second to the advantage of the one who asserts that death has occurred. *Rosencrans v. Modern Woodmen of America, supra; Fredrikson v. Massachusetts Mutual Life Ins. Co., supra; Munson v. New England Mutual Life Ins. Co.,* 126 Neb. 775, 254 N. W. 496; *Wells v. Equitable Life Assurance Society,* 130 Neb. 722, 266 N. W. 597; *Batth v. Metropolitan Life Ins. Co., supra.*

These presumptions of life or death are in the nature of conclusions of ultimate fact which the law makes when a jury find that certain elemental facts exist. They are rebuttable. The burden of overcoming the presumption rests upon the one asserting a contrary conclusion to be true. To fail to instruct the jury of these presumptions would be to deny to the litigant the benefit of the conclusion to which he is entitled. The trial court did not err in the instruction given.

The next question involves the allowance of an attorney's fee. Our statute is as follows: "In all cases where the beneficiary, or other person entitled thereto, brings an action at law upon any policy of life, accident, liability, sickness, guaranty, fidelity or other insurance of a similar nature, or upon any certificate issued by a fraternal beneficiary association, against any company, person or associa-

tion doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs, and if such cause is appealed the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings." Comp. St. 1929, sec. 44-346.

Plaintiff in his petition prayed for judgment "and costs of suit, including a reasonable attorney's fee to be fixed by the court and taxed as costs." Defendant made no mention of attorney's fees in its answer. No reference to the matter was made during the trial of the case. After the verdict of the jury was rendered plaintiff filed a motion for the allowance of an attorney's fee. To this defendant objected for the reason that the contract of insurance was governed by the laws of Colorado, and that there is no law in that state providing for the payment of attorney's fee, and the Nebraska statute does not apply. At the hearing on the motion for an attorney's fee, it was stipulated that the application for the policy was made in Denver, the policy delivered in Denver, and that plaintiff was living in Denver at the time, and that Josephine disappeared in Denver. To support its objection defendant offered and the court received, over objection of the plaintiff, the affidavit of its attorney that he had made due search and was unable to find any law of the state of Colorado permitting the allowance of an attorney's fee in an action of this kind. This affidavit was included in the bill of exceptions. The court allowed an attorney's fee and ordered the same taxed as costs.

Defendant, relying upon *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 45 S. Ct. 129, 69 L. Ed. 342, contends that the allowance of an attorney's fee was error. The situation here does not permit of the application of the rule in the *Aetna* case.

In the absence of proof to the contrary, the laws of another state are presumed to be the same as the laws of

Nebraska. This rule applies both to statutes and law established by judicial decision. *Stark v. Olsen,* 44 Neb. 646, 63 N. W. 37; *Franks v. Horrigan,* 120 Neb. 1, 231 N. W. 27; *National Fidelity Life Ins. Co. v. Gordon,* 130 Neb. 130, 264 N. W. 155.

Plaintiff is entitled to the benefit of this presumption, unless the defendant has met it by proof to the contrary.

Defendant offered only the affidavit of its attorney to support its objection. Section 20-1291, Comp. St. 1929, provides a method for the proof of the statutes of a foreign state and section 20-1293, Comp. St. 1929, provides a method for the proof of the "unwritten law" of a foreign state, by "parol evidence" or the "reports" of adjudicated cases. Neither method was followed by the defendant in this proceeding.

Section 20-1244, Comp. St. 1929, provides that an affidavit "may be used * * * upon a motion." This provision clearly relates to preliminary, collateral and interlocutory matters. The general rule is that affidavits are not admissible to establish facts material to the issue. 2 C. J. 373; 2 C. J. S. 984, sec. 28; 1 Am. Jur. 955, sec. 30. The terms and interpretations of the laws of a foreign state are questions of fact. *United Bank & Trust Co. v. McCullough,* 115 Neb. 327, 212 N. W. 762. Assuming, but not deciding, that the motion for an attorney's fee and the objection presented the issue of the Colorado law, it must follow that upon that controverted issue the defendant failed to offer competent proof of the fact of the Colorado law, and the presumption that the law of Colorado is the same as that of Nebraska permitted plaintiff to recover an attorney's fee in the court below. Plaintiff is likewise entitled to an attorney's fee in this court, which is hereby allowed in the sum of $150 to be taxed as costs.

The judgment of the district court is affirmed.

AFFIRMED.

Rose and Eberly, JJ., not participating.

PETER KIEWIT SONS' COMPANY, APPELLEE, V. NATIONAL CASUALTY COMPANY, APPELLANT.

8 N. W. (2d) 192

FILED FEBRUARY 17, 1943. No. 31481.

1. **Highways.** A bond, such as the one in suit, is a contract made for the benefit of the parties furnishing labor and materials in performance of the principal contract, and such persons have a right to sue thereon in their own names.
2. ———. Where a construction contractor contracts with the department of roads and irrigation to construct a highway according to plans and specifications and furnishes bond therefor, and subsequently, due to disagreement with the department, said contractor, with the consent of the department, contracts to employ another contractor to have exclusive supervision and control over the job to complete it, and to furnish, in so doing, such equipment as may be needed and transportation of the same to and from the job, the contractor so employed may, after the work is completed, maintain suit against the surety, the contract being made for the benefit of a class to which he belongs, and recover for such items as labor and materials purchased under an agreement of hire or lease, in that all that is purchased is consumed in aid of the contract and constitutes labor and materials, within the meaning of section 52-118, Comp. St. 1929, and the bond given in conformity with such statute.
3. ———. Bonds given under section 52-118, Comp. St. 1929, are to be liberally construed to effectuate their purpose. The spirit and intent of the statute is to obligate a surety company to pay for material which is actually used in performing the contract. The statute is in its nature remedial.

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

Swarr, May & Royce and *James M. Paxson,* for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

MESSMORE, J.

The plaintiff, construction contractors, brought this action against the National Casualty Company, surety on a bond, the conditions of which are hereafter set forth, for certain obligations incurred by the contractor, Roadmix Construction Company, in the performance of a road construction contract made by and between the Roadmix Company and the state of Nebraska. The claims of the plaintiff against the surety involved in the action are for obligations owed by the Roadmix company to plaintiff, consisting of rental charges for contractor's equipment supplied by plaintiff, and used in carrying on the work of the contract; cost of transportation of the plaintiff's rented equipment to and from the job; a fee for supervisory services rendered by plaintiff in the performance of the job pursuant to contract between plaintiff and the Roadmix company. Jury waived, case tried to the court. The court found in favor of the plaintiff and awarded judgment for $6,311.69 and interest. Motion for a new trial overruled. The defendant appeals.

To eliminate confusion, the plaintiff will be hereinafter referred to as Kiewit, the National Casualty Company as surety, and the Roadmix Construction Company as Roadmix.

On June 11, 1938, the contract between Roadmix and the department of roads and irrigation was entered into. It provided in part as follows:

"Party of the second part (Roadmix) further agrees to pay all just claims for material, supplies, tools, machinery and labor, and all other just claims filed against him or any of his subcontractors in carrying out the provisions of this contract and further agrees that the contractor's bond shall be held to cover all such claims." Roadmix "further agrees to perform the work under the direct supervision of the Department of Roads and Irrigation, subject to inspection at all times by the Secretary of Agriculture of the United States, or his authorized agents, and in accordance with the laws of the State of Nebraska." The consideration

was $40,964.09. Roadmix "agrees to construct in accordance with the plans and specifications," etc., "being items numbered 23 and 24 of Group 11 and 25, 26, 27, 28, and 29 of Group 14, Federal Aid Secondary Project No. FAS-38-A (1), in Cherry county, Nebraska. * * *

"That it is mutually understood and agreed by parties hereto that the general and detailed plans, the Standard Specifications for Highway Construction" and the contractor's bond are a part of the contract.

The bond provided in part:

"Now therefore, if said Roadmix Construction Corporation as principal shall in all respects fulfil this said contract according to the terms and the tenor thereof, and shall faithfully discharge the duties and obligations therein assumed, then the above obligation is to be void * * * ; otherwise to be and remain in full force and virtue in law.

"It is expressly understood and agreed that this bond is given to secure and does secure not only the faithful performance by the principal herein named of said contract for the construction work as specified in said contract and in strict accordance with the terms of said contract and the plans and specifications made a part thereof; but that it is given to secure and does secure also the payment by the said bounden Roadmix Construction Corporation of all just claims for material, lubricants, oil and gasoline used or consumed in the construction of the work, and for the payment of all laborers and mechanics for all labor performed in the work either by any subcontractor or otherwise in conformity with the provisions of Section 52-118 of the 1929 Compiled Statutes of Nebraska, and if such payments be made then this obligation shall be null and void."

Section 52-118, Comp. St. 1929, is in part as follows: That public boards empowered by law to enter into a contract for the erecting, furnishing or repairing of a public improvement, and any officer so empowered by law to enter into such a contract, "to which the general provisions of the mechanics' lien laws do not apply, and where the mechanics and laborers have no lien to secure the payment of

their wages and materialmen who furnish material for said work have no lien to secure payment for material furnished in said work, to take from the person, persons, firm or corporation to whom the contract is awarded a bond * * * conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used in the erecting, furnishing, or repairing of the building or in performing the contract."

The record discloses that difficulty arose with reference to the manner in which the terms of the contract were being performed by Roadmix, and it was to be terminated by the state. The president of Roadmix knew Kiewit was familiar with the job, and his grading outfit was on the job, and Kiewit was asked to intercede with the highway department and work out something that would permit Roadmix to retain control and finish the job. A contract was entered into by and between Roadmix and Kiewit, in part, as follows:

Roadmix "agrees to and hereby does employ Peter Kiewit Sons' Co. to supervise all work in the further performance of the contract * * * between" Roadmix and the department of roads.

"It is agreed that" Kiewit "shall have the exclusive and complete control of all work in the further performance of the contract, without interference by Roadmix." Roadmix "agrees to do, as directed by" Kiewit "any and all things necessary to the performance of the work under said contract in accordance with the purposes and terms of this Agreement." The contract also provided for diligent prosecution of the work by Kiewit, and Roadmix "agrees further to furnish and provide any and all funds necessary for the completed performance of said contract and this Agreement over and above the estimates paid on same."

"It is agreed that the wages at $65 per week of the Superintendent provided by" Kiewit "and all foremen's wages, shall be included and considered as a part of the cost of work and paid by" Roadmix. Roadmix "further agrees to pay for the gas and oil necessary in the operation of the

Superintendent's car." Kiewit "is to furnish all other necessary supervision without expense to Roadmix Construction Company."

"It is agreed further that any equipment furnished by" Kiewit "for use in the performance of the work, shall be paid for monthly at a fair rental value agreed upon before the equipment is moved on to the job. It is agreed further that Roadmix Construction Company should pay for the transportation of all equipment furnished by" Kiewit "to and from the job."

The contract had an addenda, signed by the parties, listing the work done prior to September 1, 1938, in a total amount of $10,786.77. Acting under and pursuant to the terms of the contract with Roadmix, Kiewit took over the job and supervision thereof. If there is liability on the part of the surety, then the evidence and accounting with reference thereto may be considered.

The defendant claims that by the terms of the bond it is a statutory bond, written in conformity with section 52-118, Comp. St. 1929, and defendant's position is best reflected by the following cases:

Iddings Co. v. Lincoln Construction Co., 104 Neb. 124, 175 N. W. 643, is cited. The part thereof to which defendant directs our attention is contained in the opinon, reading: "The bond sued upon was given in conformity with section 3840, Rev. St. 1913. It follows that the parties to this litigation executed and delivered a statutory bond; that the bond must be interpreted and construed in connection with the provisions of this statute; that this statute gives to the bond a certain legal effect that is as much a part of the bond as though its terms were incorporated therein." The court further said: "The statute in this class of cases is the guide fixing the liability of the surety company, and we are constrained to follow it. The legislature intended to fix and did establish the liability in a situation like the instant case." Further language in this opinion is pertinent:

"In this connection here we have bonds given under this statute, and they should be liberally construed to effectuate

their purpose. Release of sureties, through mere technicalities, is not to be encouraged. * * * It is the spirit and intent of section 3840, *supra* (now section 52-118, Comp. St. 1929), to obligate a surety company to pay for material which is 'actually used in the erecting, furnishing, or repairing of the building or in performing the contract.' To permit anything else would be to deny the statute an opportunity to function as per the intent and purpose of the legislature. *United States v. Massachusetts Bonding & Ins. Co.*, 198 Fed. 924." The court added: "Section 3840, Rev. St. 1913, is in its nature remedial, and must be liberally construed."

In *American Surety Co. v. School District*, 117 Neb. 6, 219 N. W. 583, cited by defendant, in the opinion at page 20, we find the following language:

" 'The prevailing doctrine is that where the conditions of a statutory bond are separable and part are authorized by statute and part not authorized or even prohibited, and the statute does not expressly, or by necessary implication, declare it void as a whole, the conditions not authorized or prohibited may be rejected as surplusage, and the residue sustained as a good statutory bond *pro tanto*, the rule being the same as that applied to common-law bonds partly good and partly bad.' 4 R. C. L. 54, sec. 14.

" 'It has been frequently held that, in the absence of a prescribed statutory form, and of a declaration that bonds not in accordance therewith shall be void, if a bond be taken under a statute, with a condition in part prescribed by statute, and in part not so prescribed, yet, if it be clearly divisible, a recovery may be had upon it for a breach of the part prescribed by statute. The superadded part may be rejected as surplusage.' *Board of Education v. Grant*, 107 Mich. 151."

Defendant's contention is that in Nebraska provisions of a statutory bond that are not authorized by statute are rejected as surplusage and of no effect. Therefore, if the plaintiff is to recover, it must be by reason of the statutory bond furnished the state by defendant company, and plain-

tiff must prove its claim is for labor performed by laborers or mechanics or for material actually used in performing the contract.

In 1889 the legislature passed an act entitled "An Act to secure the payment of mechanics' and laborers' wages on all public buildings where the provisions of the general mechanics' lien laws do not apply." Laws 1889, ch. 28. In 1913 the act was amended by the insertion therein of certain provisions to secure payment of materialmen who furnished material for the construction of public buildings. Laws 1913, ch. 170. The act as amended became section 3840, Rev. St. 1913, and is now section 52-118, Comp. St. 1929. It was not until 1913 that the legislature of this state included materialmen within the protection of the bond provided for in this statute, "conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used in the erecting, furnishing, or repairing of the building or in performing the contract." Laws 1913, ch. 170; Rev. St. 1913, sec. 3840.

In *Nye-Schneider-Fowler Co. v. Roeser,* 103 Neb. 614, 173 N. W. 605, this court said: "Before our statute (Rev. St. 1913, sec. 3840) was enacted in 1889 (Laws 1889, ch. 28), the laborer or materialman who furnished labor or material for the erection of a public building had no protection except the responsibility of the contractor, and such bond as the contractor and the public officials might see fit to provide. * * * Then the statute was enacted requiring absolutely that one who contracted to build a public building which would not be subject to mechanics' liens must give bond to pay laborers and materialmen." See *Fremont Foundry & Machine Co. v. Saunders County,* 136 Neb. 101, 285 N. W. 115.

A further review of the Nebraska cases will be helpful in solving this proposition.

In *Sample & Son v. Hale,* 34 Neb. 220, 51 N. W. 837, on December 10, 1887, the board of public lands and buildings awarded to one John Layne a contract for the erection of

the industrial home at Milford, Nebraska. The contract provided, in part, that Layne "agrees to furnish all materials and labor necessary for the construction * * * further agrees to pay off and settle in full, with the parties entitled thereto, all accounts and claims that may become due by reason of laborers' and mechanics' wages, or for materials furnished or services rendered, so that each and all persons may receive his or their just dues in that behalf." The defendants in error, as sureties for Layne, with him gave a bond to the state. Among its provisions appears the following: "Now if John Layne shall faithfully keep and perform each and every one of the stipulations and agreements contained in the contract, and at times and in the manner therein specified, then this obligation to be void, otherwise to be and remain in full force and effect in law." The plaintiff furnished material for Layne and brought this action on the bond. The court held that the provision in the contract was not in excess of the powers of the state, and "the sureties on the contractor's bond for the faithful performance of the contract will be liable for debts arising under the above provision." The statute in force mentioned only laborers and made no reference to the protection of materialmen. The court said: "The rule is well established in this court that if one makes a promise to another for the benefit of a third person such third person may maintain an action upon such promise;" citing *Shamp v. Meyer,* 20 Neb. 223, 29 N. W. 379. See, also, *Lyman v. City of Lincoln,* 38 Neb. 794, 57 N. W. 531; *Korsmeyer Plumbing & Heating Co. v. McClay,* 43 Neb. 649, 62 N. W. 50; *Kaufmann v. Cooper,* 46 Neb. 644, 65 N. W. 796; all of like effect.

In the case of *Rohman v. Gaiser,* 53 Neb. 474, 73 N. W. 923, the defendant in error brought an action to recover for material furnished the contractor. The contractor agreed to settle and pay in full for all work and labor performed, and to settle for and pay all materialmen for all material actually furnished in the erection of the building. The bond provided that the contractor "shall well and truly

keep and perform each and every covenant, stipulation, and agreement contained in said contract and according to the plans and specifications on file * * * shall pay in full for all work done and labor performed, and shall pay all laborers' and mechanics' wages, and shall settle in full and pay for all material actually furnished in the construction, erecting, and completing said chapel," etc., then the contract was to be void. The contention of the plaintiff in error is that the clause in the bond requiring the contractor to settle in full was inserted without statutory authority therefor, and hence did not create a valid obligation. The court said: "This precise question was before this court in the case of *Sample v. Hale,* 34 Neb. 220, where it was held that such a provision was valid," and that the doctrine was subsequently approved in *Korsmeyer Plumbing & Heating Co. v. McClay, supra.* The court also said: "It is a proposition firmly established in the jurisprudence of this state that one not a party to a contract may maintain an action thereon, when such contract is made for his benefit or the benefit of a class to which he belongs." Citing *Cooper v. Foss,* 15 Neb. 515, 19 N. W. 506; *Shamp v. Meyer, supra; Doll v. Crume,* 41 Neb. 655, 59 N. W. 806; *Barnett v. Pratt,* 37 Neb. 349, 55 N. W. 1050.

The foregoing cases involve bonds given to a public body to secure the performance of public contracts entered into prior to the taking effect of the act of 1913, now section 52-118, Comp. St. 1929. The contention of the defendant is that in all of these cases the doctrine of enforcement of the provision of the bond beyond that part requiring payment of laborers would limit it to the material and materialmen, and would not cover the items as contended for by the plaintiff in the instant case. The principal case subsequent to 1913, when the provision of the statute (now section 52-118, Comp. St. 1929) went into effect, is *West v. Detroit Fidelity & Surety Co.,* 118 Neb. 544, 225 N. W. 673, an action against the surety of the subcontractor to recover for labor and material furnished in the construction of a public highway. There were several causes of ac-

tion. The bond provided: "If said Interstate Construction Company as principal, shall in all respects fulfil its said contract according to the terms and tenor thereof, and shall faithfully discharge the duties and obligations therein assumed, and shall pay for all labor, equipment, gasoline, oils, materials and supplies used or employed on said contract, then the above obligation is to be void and of no effect; otherwise, to be and remain in full force and virtue of law." In the above case contracts for the hauling of gravel were made with the owners of automobile trucks at a certain price per yard per mile. Arrangements were made by the contractor with certain garagemen and mechanics to make repairs to trucks upon orders of the contractor to whom they were to be charged. The contractor deducted the cost of repairs from the amount due for hauling. This court held "that the labor and materials used in making such repairs were 'supplies used or employed on said contract,' within the meaning of those terms, and chargeable to the surety." Likewise, gasoline and oil furnished drivers for their own trucks and charged against their contracts under the arrangement were held to be "supplies" and a proper charge against the surety; and groceries delivered upon order of the contractor to the foreman, whose wife carried on a cook shack on the job where employees could obtain their meals, the groceries being deducted by the contractor to whom they were charged from the foreman's wages, where it did not appear that any other workmen on the job patronized the cook shack, were held to be proper charges against the surety. The repairs and supplies, as above stated, were not mentioned in the bond in any way and only generally in the contract as supplies.

In this connection, it is defendant's contention that the "faithful performance" provision is for the security of the state against defaults of the contractor, has nothing to do with claims of third parties, and is as distinct as if contained in a separate instrument, citing Annotation, 118 A. L. R. 75, as follows: "A public contractor's bond to the

public body, conditioned merely for the faithful performance of the contract, is not for the benefit of laborers, materialmen, or subcontractors, and they cannot recover thereon;" that in *West v. Detroit Fidelity & Surety Co., supra,* the case arises out of a public work, but the bond was not given to the public body and was not, therefore, a statutory bond; further, that it was much broader than the bond in question and covered "all labor, equipment, gasoline, oils, materials and supplies used or employed on said contract;" that the charges were, in reality, a part of the labor or wages of the drivers of the trucks.

With reference to the defendant's contention that the "faithful performance" provision is for security of the state against default of the contractors has nothing to do with claims of third parties and is distinct and separate therefrom, the Nebraska cases cited are not in accord and agreement with such statement. However, even if true, we believe that the claims of the items furnished by the plaintiff in the instant case are covered by what the defendant chooses to call the second condition of the bond,—that the bond is given to secure and does secure also the payment by said bounden Roadmix of all just claims for material, lubricants, oil and gasoline, used or consumed in the construction of the work and for the payment of all laborers and mechanics for all labor performed in the work, either by subcontractors or otherwise, in conformity with the provisions of section 52-118, Comp. St. 1929, and that part of said section 52-118 pertinent to the bond is: "conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used * * * in performing the contract."

The Nebraska case of *Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co.*, 98 Neb. 27, 151 N. W. 942, is cited as authority for the foregoing statement. In that case the court held the bond in question "must be construed to cover all labor and materials involved in the work specified in the contract; that is, that enter into the structure or are con-

sumed in and about the work, but not for tools and appliances which are the property of the contractors and may be used from time to time in other works and upon other contracts, and which are not consumed in the work or which do not go as a part of the building or improvement and necessarily enter therein. The use of an engine for hoisting materials, the repairs on such engine, and oil and fuel used in operating the same are not guaranteed by the surety."

The given distinction between the latter case and *West v. Detroit Fidelity & Surety Co., supra,* is that the bond in the *Nye-Schneider-Fowler* case was only for the payment of laborers and did not cover supplies used or employed on said contract. This court has never passed specifically on whether equipment rental should be recoverable as "materials" under a construction contract bond. In *West v. Detroit Fidelity & Surety Co., supra,* this language is used (p. 555): "The bond does not require that the supplies enter into and become a part of the construction, as is generally the case in mechanics' liens, but only that they be used or employed on said contract." This statement discloses the trend of this court in interpreting the second condition of a bond, a trifle more broad but very similar to the one in the case at bar. The following cases are in explanation of a condition in such a bond as the second condition in the bond here under discussion:

In *Nicks v. Baird & Co.,* 165 Tenn. 89, 52 S. W. (2d) 147, the complainant was the owner of a steam boiler, which he rented to Baird & Company for use in the execution of a contract to construct a state highway bridge. It was used to generate power to force water through hollow piles, and this equipment was necessary to operate the water pump, Baird's equipment being inadequate. The court held (52 S. W. (2d) 147): "Surety of state highway contractor held liable for rental * * * under statutory bond for payment of labor and 'materials.'" The condition of the bond was that the contractor "shall well and truly pay every person furnishing material or performing labor in and

about the construction of said roadway, all and every sum or sums of money due him, them or any of them, for all such labor and materials for which the contractor is liable." The statute cited required that the contractor execute a bond, conditioned to secure "the payment for all materials purchased and for all labor employed in the contemplated work." The complainant contended that the boiler was material used in the construction of the bridge. The court held that it was, even though complainant's boiler was not a part of the regular equipment of the contractor, but was engaged for a particular and special use. In the instant case the equipment was regular equipment for a contractor employed in such work.

In the case of *Nicks v. Baird & Co., supra,* the statute in question was under Acts 1917, ch. 74, as reflected in the case of *Southern Construction Co. v. Halliburton,* 149 Tenn. 319, 258 S. W. 409, wherein it was said: "Under the act of 1917, the general contractor and his surety are bound for all materials purchased and labor employed in the work." Section 52-118, Comp. St. 1929, reads: "conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used * * * in performing the contract." The Tennessee statute eliminates the part materials actually used in performing the contract, which accounts for the statement in *Nicks v. Baird & Co., supra.* It is not necessary in Tennessee that materials to be lienable must be incorporated into the structure or public work for which the principal contract was executed. And it is true that the holding goes further in explanation of the subject-matter than the foregoing conclusion; but the Tennessee statute provides that the surety is bound for all material purchased and labor employed in the work, so that the effect of both statutes, in that labor and material must be consumed in the work, is similar.

In the case of *Pittsburg Coal Co. v. Southern Asphalt & Construction Co.,* 138 Tenn. 154, 196 S. W. 490, as set forth in *Nicks v. Baird & Co., supra,* coal used for generating

steam in complainant's boiler was material used in the performance of the bridge contract, within the application of the statute and bond. If pumps, operated by manpower rather than steam, had been used, the wages of the men so employed would have been covered by the bond. The boiler was material, by the use of which energy in the coal was released and directed as a substitute for labor of men, and contributed to the execution of the contract in the same relative degree as did the coal fed into its fire-box. "Compensation of the owner who supplied it is therefore within the principle given effect by the legislature, in its enactment of the statute requiring the execution of bond for the protection of furnishers of labor and material." The court in the *Pittsburg Coal Co.* case said: "The statute under consideration was passed for the protection of laborers and furnishers of material on public works, and the inquiry should not be limited to the method by which the contract is performed."

As said in the *Nicks* case: "The essential requirement that materials be consumed in the execution of the principal contract, in order that their cost be secured by a lien on the building constructed, or by the contractor's bond for a public works project, is supported by two obvious reasons. If the material furnished is not consumable in the use, it is furnished on the general credit of the contractor and not merely in aid of the performance of the particular contract. And if on the completion of the building or project the material, still possessing value, remains the property of the contractor, liability for its cost should be and is his liability alone. * * * But neither of these reasons is present when all that is purchased is the use of material in the execution of a particular contract, under an agreement of hire or lease. In such case all that is purchased is consumed in the use, in aid of the contract."

In *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 37 S. Ct. 614, a contractor for the construction of the naval training station in Chicago executed a bond under a federal statute which required that the bond include the

obligation to "promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work." This obligation is no different from the language of our statute (Comp. St. 1929, sec. 52-118), "conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used * * * in performing the contract." The bond in the instant case does secure the payment of "all just claims for material, lubricants, oil and gasoline used or consumed in the construction of the work, and for the payment of all laborers and mechanics for all labor performed in the work either by any subcontractor or otherwise in conformity with the provisions of section 52-118," Comp. St. 1929. In the above case a claim for rental of cars, track and equipment used at the station was sustained by the supreme court of the United States as a claim for material supplied. The court said: "The equipment was used in the prosecution of the work. * * * The expense of loading and freight were properly included with the fixed rental as recoverable under the bond."

In *Multnomah County v. United States Fidelity & Guaranty Co.*, 87 Or. 198, 170 Pac. 525, Annotation, 44 A. L. R. 383, it appears that, by the terms of a contract for the improvement of a highway, a construction company agreed to pay promptly for all labor or material supplied for the prosecution of the work, and gave a bond to that effect. It was held that the rental of a caterpillar engine was within the bond as being covered by the language of the contract and bond, although it was admitted that, according to the strict legal definition of the term, "labor and material," the use of the engine would not be embraced in such term.

It is true, as stated in Annotation, 44 A. L. R. 381, "there is considerable conflict as to whether the contractor's bond covers a claim for the rental of equipment used in the prosecution of the work, the decision depending not only on the terms of the various statutes, but on the courts' interpretation thereof."

Many other cases adhering to the principle of the fore-

going cases might be cited, and there are numerous cases to the contrary that support defendant's position that the items, such as sued for by plaintiff, are not included within the concept of the statute or the bond as "materials" furnished and consumed under the obligations of the contract.

Again, considering the bond in the case before us, it recites that it is given to secure and does secure also payment by the said bounden Roadmix "of all just claims for material, lubricants, oil and gasoline used or consumed in the construction of the work."

The equipment furnished by plaintiff was not a part of the regular equipment of Roadmix, but a part of regular equipment ordinarily used by a contractor engaged in road construction. The use of this equipment, so rented and transported to and from the job as occasion required, under the supervision of plaintiff's engineer, contributed directly to the construction of the highway. The value of that use (and that is what rental is) is within the protection of, contemplated and intended by the statute and the bond and one not too remotely connected with the principal work. The rule adhered to in some jurisdictions, that the materials to be lienable must be incorporated into the structure or public work for which the contract was executed under the circumstances here existent, is too narrow, under a liberal interpretation of the statute, as required. In fact, the machinery or equipment, placed on the job by plaintiff and rented by Roadmix, transported to and from the job as required, constituted material actually used in the construction and repair of the highway.

We conclude that the items sued for by plaintiff are recoverable under the statute and bond. Such items so furnished constitute labor and material purchased under an agreement of hire or lease, in that all that is purchased is consumed in aid of the contract, within the meaning of the second condition of the bond and of section 52-118, Comp. St. 1929, "conditioned for the payment of all laborers and mechanics for labor that shall be performed and for the payment for material which is actually used * * * in performing the contract."

The record reflects certain charges for transportation of equipment to and from the job, the rental for use of equipment, and other items, and certain credits to which Roadmix claims to be entitled. Most of the evidence deals with these items and explanation thereof, and with the reasonableness or unreasonableness of the charges made. The trial court allowed recovery for the amount the plaintiff prayed. The plaintiff specifically states that, although legally entitled to seek and recover judgment from the defendant for the amount so proved, the plaintiff did not desire at the time suit was filed, and does not now seek, recovery for any more than the balance due on its general account with Roadmix. The proof of the plaintiff went to the amount of some $7,351.56, and allowing the defendant all credits to which it would be reasonably entitled, the amount would, in no event, be reduced below the amount recovered by the plaintiff.

Giving due consideration to the foregoing, it is unnecessary to further pursue the accounting reflected in the record.

AFFIRMED.

Rose and Eberly, JJ., not participating.

MORRIS ROBERTS, APPELLEE, V. THEODORE CARLSON, APPELLANT.

8 N. W. (2d) 175

FILED FEBRUARY 17, 1943. No. 31507.

1. **Trial.** A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence.
2. **Negligence.** If contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to

prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except in so far as the same may appear in evidence adduced for the plaintiff.

3. **Automobiles: TRIAL.** Upon approaching a highway intersection, it is the duty of the driver of an automobile to look to the right and left for approaching vehicles; whether or not he did his full duty in that regard may, in some cases, be a question of law, where undisputed evidence of physical facts and circumstances control, but otherwise it is ordinarily one of fact for the jury upon consideration of all the evidence.
4. ———. Where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right of way, and he may ordinarily proceed to cross, having a legal right to assume that his right of way will be respected by the other driver, but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right of way.
5. **Trial.** In determining whether there is error in the giving of a sentence in an instruction, it must be considered in connection with the instruction of which it is a part and all other instructions given by the court. The true meaning of instructions is to be determined not from a separate phrase or paragraph, but by considering all that is said on each subject or branch of the case.
6. ———. In common language the words "testimony" and "evidence" are used synonymously and interchangeably. The use of the word "testimony" instead of "evidence" in an instruction, where both oral evidence and physical facts and circumstances are defensively interposed, does not constitute reversible error where it is clear and obvious from all the court's instructions that it was intended that such physical facts and circumstances should also be considered by the jury.

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

Mothersead & Wright, for appellant.

Morrow & Miller and *Frank P. Johnson, contra.*

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

CHAPPELL, J.

Plaintiff and defendant, each driving his own car, had an accident at the center of graveled intersecting country roads. Plaintiff approached the intersection from the right and defendant from the left. A jury's verdict awarded plaintiff $1,200 damages. Defendant appeals, impressing upon this court by able brief and argument that plaintiff was guilty of contributory negligence more than slight as a matter of law, requiring the trial court to sustain his motions to direct a verdict for defendant, and that the trial court erred in its refusal of certain requested instructions and the giving of others, more particularly instruction No. 21. A careful study of the entire record and applicable rules of law requires an affirmance of the judgment.

Defendant's motions, made at the close of plaintiff's case and renewed at the conclusion of all the evidence, to instruct the jury to return a verdict in his favor were each respectively overruled. To determine whether this was erroneous we examine the evidence, bearing in mind these well-known and oft-established rules: A motion for a directed verdict must for the purpose of decision thereon be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor, and to have the benefit of every inference that can reasonably be deduced from the evidence. *Parks v. Metz*, 140 Neb. 235, 299 N. W. 643. Also, if contributory negligence is relied upon by defendant as an affirmative defense, the burden is upon him to prove it by a preponderance of the evidence pertinent to that issue contained in the whole record, except in so far as the same may appear in evidence adduced for the plaintiff. *Vertrees v. Gage County*, 81 Neb. 213, 115 N. W. 863; *Schrage v. Miller*, 123 Neb. 266, 242 N. W. 649.

The evidence discloses that on February 15, 1941, between 2 and 3 o'clock p. m., plaintiff, traveling west on the right side of a graveled country road at 35 miles an hour,

looked to the left when he passed a high beet dump and scale house on the south side of the road 325 feet east of another intersecting graveled country road. Plaintiff failed to see any car coming from the south, although he continued to look to the left while he drove 100 feet. He then looked to the right until his vision cleared the intersection from the north for cars having the right of way over him, where the view was obstructed by trees, farm buildings, and a board windbreak abutting on the northeast corner. He then looked to the left again and, when approximately 40 feet from the intersection or 80 feet from the center thereof, he first saw defendant driving 40 miles an hour toward him from the south, at a point 15 feet south of the railroad track, the north rail of which was 72 feet from the center of the intersection. A standard gauge railroad is 4 feet 8½ inches wide. Webster's New International Dictionary (2d ed.) On this assumption defendant was then approximately 91 feet 8½ inches distant from the center of the intersection.

Plaintiff instantly applied his brakes and skidded in the loose gravel to a point where the left front fender and headlight of his car and the right front fender and headlight of defendant's car collided at the center of the intersection. Thereafter plaintiff's car traveled to the north and west 47 feet 6 inches, and defendant's car traveled to the north and west 54 feet 10 inches. The state patrolman saw and measured the skid marks of plaintiff's car in the loose gravel, caused by putting on his brakes. They extended 38 feet up to the point of collision. He found no skid marks, showing that defendant had applied his brakes. We find no evidence in the record that defendant made any effort to avoid the accident.

The cars were badly damaged and both plaintiff and defendant were injured. There is some evidence that defendant had no recollection of facts concerning the accident and that he did not testify for that reason. However, on the day that plaintiff left the hospital, in the presence of plaintiff and his wife, defendant told plaintiff, "he (defendant)

was just looking the other way and that he just never at any time had seen me (plaintiff) and he thought he was just looking the other way." There is no direct admission in the evidence adduced for plaintiff or direct evidence adduced for defendant denying that plaintiff looked at the times, places, and in the manner claimed by him. Defendant's reliance upon *Haffke v. Missouri P. R. Corporation,* 110 Neb. 125, 193 N. W. 257, and *Nelson v. Plautz,* 130 Neb. 641, 265 N. W. 885, can be of little assistance to him under the circumstances. Considering the two cases we scan a difference from the case at bar. The plaintiffs in these cases *never looked again.*

It is admitted that plaintiff's view of the intersection from the north, where cars would have the right of way over him, was obstructed as claimed by him. It is also admitted that the high beet dump and scale house, 325 feet east of the intersection, which before the trial had been removed, obstructed his view to the south at that point. Further, it is admitted that the railroad tracks, running a little to the southeast but almost parallel with the east and west road, and approximately 40 feet south of it at the intersection, had an elevation above the road which partially obstructed a view of cars coming from the south.

We will not recite other evidence in detail lest this opinion be unduly prolonged. However, it is clear from admitted facts, the testimony of witnesses, pictures, and other evidence appearing in the record, that there is a conflict in the evidence on the question of whether or not trees, weeds along the roads, and the railroad grade with weeds along its higher crest, obstructed plaintiff's view of cars coming from the south in some places along the north and south road when he first looked to the left.

This evidence answers defendant's contention that it was plaintiff's duty to look for cars approaching on the highway from the south and his duty to see what was *in plain sight.* In *Vandervert v. Robey,* 118 Neb. 395, 225 N. W. 36, and *Bergendahl v. Rabeler,* 133 Neb. 699, 276 N. W. 673, cases relied on by defendant, we gave approval to the rule, with

this qualification applicable here, "unless some reasonable excuse for not seeing is shown."

Under the evidence the physical facts and circumstances appearing are not decisive of the case as claimed by defendant, for the reasons set forth in *Jones v. Union P. R. Co.*, 141 Neb. 112, 2 N. W. (2d) 624.

Upon approaching a highway intersection, it is the duty of the driver of an automobile to look to the right and left for approaching vehicles; whether or not he did his full duty in that regard may, in some cases, be a question of law where undisputed evidence or physical facts and circumstances control, but otherwise it is ordinarily one of fact for the jury upon consideration of all the evidence. *Thrapp v. Meyers*, 114 Neb. 689, 209 N. W. 238.

The rule is that, where two motorists approach an intersection at or about the same time, the driver approaching from the right has the right of way, and he may ordinarily proceed to cross, having a legal right to assume that his right of way will be respected by the other driver (*Bergdahl v. Rabeler, supra*), but if the situation is such as to indicate to the mind of an ordinarily careful and prudent person in his position that to proceed would probably result in a collision, then he should exercise ordinary care to prevent an accident, even to the extent of waiving his right of way. These rules were clearly established by this court in *Thrapp v. Meyers, supra*, and we have later given them approval in other cases. In this case, their substance appears in the trial court's instructions to the jury.

We call attention to the fact that at defendant's insistence the jury went to view the premises, and at defendant's request, made a part of the record, their cars were driven back to a certain place so that they could make observations as to the visibility of the two roads. After taking into consideration the result of their observations at the *locus in quo*, together with the other evidence, as they had a legal right to do (*Carter v. Parsons*, 136 Neb. 515, 286 N. W. 696), the jury settled the questions involved by returning a verdict for plaintiff and against defendant.

The case at bar is certainly one where there is no yardstick with which to measure or scales with which to weigh plaintiff's alleged negligence as a matter of law. Only when the standard is clear should it be determined by the court.

We have carefully examined the entire record and conclude that the questions of negligence and contributory negligence were questions for the consideration of the jury, and the jury's findings are conclusive upon such questions, provided the case was otherwise properly submitted for their consideration.

Referring to the giving or refusal of instructions, defendant complains of the last sentence in instruction No. 21 given by the trial court. It reads: "Yet you have no right to reject the testimony of any of the witnesses without good reason, and you should not do so until you find it irreconcilable with other *testimony* which you may find to be true." Defendant asserts that the word "testimony" is used instead of "evidence;" that plaintiff testified about the factual details of the accident, while defendant, an elderly man, injured in the accident, was at the time of trial unable to recall and testify to any of them. Defendant contends that plaintiff was thereby given a prejudicial advantage because testimony is evidence given by living witnesses orally, and evidence, the broader term, would have included both that which is given by witnesses orally and the physical facts and circumstances which often speak more effectually than witnesses.

Evidence would have been the better word, but in common language the words "testimony" and "evidence" are used synonymously and interchangeably. 15 Words & Phrases (Perm. ed.) 405. We have held that, where from an inspection of the entire record it is obvious that the word "testimony" was used with reference to the "evidence," they may be accorded such extended significance. *Woolworth v. Parker*, 57 Neb. 417, 77 N. W. 1090; *Columbia Nat. Bank v. German Nat. Bank*, 56 Neb. 803, 77 N. W. 346.

The use of the word "testimony" instead of "evidence" in an instruction, where both oral evidence and physical facts and circumstances are defensively interposed, does not constitute reversible error where it is clear and obvious from all the court's instructions that it was intended that such physical facts and circumstances should also be considered by the jury. 15 Words & Phrases (Perm. ed.) 404, 405; *State v. Winney*, 21 N. Dak. 72, 128 N. W. 680; *Jones v. City of Seattle*, 51 Wash. 245, 98 Pac. 743; *Zipus v. United Railways & Electric Co.*, 135 Md. 297, 108 Atl. 884; *Fitzgerald v. Benner*, 120 Ill. App. 447, affirmed in 219 Ill. 485, 76 N. E. 709; *Jones v. Gregory*, 48 Ill. App. 228.

In determining whether there is error in the giving of a sentence in an instruction, it must be considered in connection with the instruction of which it is a part and all other instructions given by the court. The true meaning of instructions is to be determined not from a separate phrase or paragraph, but by considering all that is said on each subject or branch of the case. *Lincoln Traction Co. v. Brookover*, 77 Neb. 221, 111 N. W. 357; *Schrage v. Miller*, 123 Neb. 266, 242 N. W. 649.

By doing this in the case at bar we find the court instructing the jury that in determining the issues they should take into consideration the evidence, the circumstances surrounding the accident involved, and the entire situation and circumstances as existed at the time, including the obstructions to view, if any, and rate of speed of the motor vehicles involved. Therefore, the jury could not have been misled by the instruction, and the giving of it was not prejudicially erroneous.

We have also examined the entire record and authorities relied upon by defendant in support of his assignments of error concerning the giving or the refusal of other instructions, and decide that there were no errors therein prejudicial to defendant. Those refused were substantially given in other forms or rightly refused. Instructions given by the court properly submitted the issues of negligence and contributory negligence to the jury for their consid-

eration. We conclude that the verdict is amply supported by the evidence in the record, and that the judgment should be, and it is hereby, affirmed.

AFFIRMED.

NELL G. LANGDON ET AL., APPELLEES, V. LOUP RIVER PUBLIC POWER DISTRICT, APPELLANT.

8 N. W. (2d) 201

FILED FEBRUARY 22, 1943. No. 31477.

1. **Appeal.** In a case where a verdict is dependent upon a preponderance of the evidence the court should instruct thereon, but a party who fails timely to call attention to such failure and to request instruction thereon may not afterwards be allowed to subject the parties to the cost and vexation of a new trial.
2. **Trial.** Where fear is a proper element to be considered in the fixing of damages in a condemnation, it is reversible error for the court to refuse to instruct the jury properly on that subject.
3. **Courts:** EMINENT DOMAIN. It has not been error to permit evidence of an award of appraisers in condemnation to be submitted to the jury on appeal to the district court from such award.
4. ———: ———. Henceforth it shall not be proper to permit evidence of an award of appraisers in condemnation to be submitted to the jury on appeal to the district court from such award.
5. ———: ———. The proper and approved practice shall be, for the purpose of preserving the right of the landowner to interest, for the court, after verdict, to compute and add the interest to the judgment in those cases where the verdict exceeds the award of the appraisers.
6. **Evidence.** In condemnation where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land, that they were made at or about the time of the taking by condemnation and that the land so sold was substantially similar in location and quality to that condemned.

7. ———. Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of land condemned.

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

William P. Kelley and *August Wagner,* for appellant.

Crofoot, Fraser, Connolly & Stryker, contra.

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

YEAGER, J.

This is an action of Loup River Public Power District, appellant, to condemn and acquire by eminent domain an easement for an electric power transmission line across 50 acres of land in Douglas county, Nebraska, the property of Nell G. Langdon and J. Frederick Langdon, appellees. The appellees have been designated by the parties as plaintiffs and the appellant as defendant, and for convenience in discussion these designations will be adhered to herein.

In 1939 the defendant entered upon the lands of plaintiffs and constructed its transmission line, which action was held by this court an illegal entry. Thereafter in July, 1941, the defendant instituted condemnation proceedings which were heard and which resulted in an award in favor of plaintiffs for $3,500 with interest at the rate of 6 per cent. per annum from May 1, 1939. The defendant appealed from the award and on a trial in the district court a verdict was returned by a jury in favor of the plaintiffs for $3,875 plus interest. Judgment was entered on the verdict. Motion for new trial was filed and overruled. From this judgment the defendant has appealed.

The only issue before the trial court was the damage sustained by plaintiffs as a result of the taking of land and construction of the transmission line.

The defendant urges that the verdict is excessive and that many errors were committed during the trial, which

consisted of erroneous admission and rejection of evidence, erroneous charge to the jury, failure to properly and sufficiently charge the jury, misconduct of the court, misconduct of counsel and misconduct of the jury.

We first direct our attention to the matter of instructions. It is claimed that instruction No. 1 given by the court is erroneous because it is too general. With it no proper fault may be found. It states the issue and the jury were informed that the measure of damage was the difference between the value of the land immediately before and immediately after construction. Defendant finds no fault with this measure.

Instruction No. 2 given by the court lacks clarity in statement, but we cannot say it is calculated to mislead. Fairly interpreted the instruction informed the jury that they had a right to consider the numerous factors which contributed to a reduction in the value of the land following the construction of the transmission line. In this there was no error.

The principal objection to instruction No. 3 is that it used the word "forced" in stating the power by which the defendant was permitted to acquire this easement. Other terms might well have been employed, but we cannot see that prejudice has flowed from the use of this word.

No instruction was given by the court on preponderance of evidence, and none was requested by the defendant. Of this failure to instruct, the defendant complains. Preponderance of evidence however is defined.

Whether or not in an action of this kind where in the first instance there is properly speaking no plaintiff and no defendant and at least theoretically an independent board of appraisers is selected for the purpose of making an award, with permission of interested parties to offer evidence, but with no party required to assume the substantial affirmative, there should be a requirement of instruction on appeal as to preponderance of evidence, is a matter surrounded with considerable doubt, but assuming the propriety of such an instruction the failure to give it in this

case was not error of which defendant may complain. The rule as laid down by this court is that the trial court in a case dependent upon the preponderance of evidence should instruct the jury thereon, but a party who fails to call attention to a failure so to do and request an instruction thereon may not afterwards be allowed to subject the parties to costs and vexation of another trial. *Chalupa v. Tri-State Land Co.*, 92 Neb. 477, 138 N. W. 603; *Kilpatrick & Co. v. London Guarantee & Accident Co.*, 121 Neb. 354, 237 N. W. 162.

The defendant calls attention to and urges that the court erred in its refusal to give four instructions, numbered 1, 2, 3 and 4, tendered by it. No error is found in the refusal to give No. 2 since the subject-matter was sufficiently covered in the instructions given. Likewise no error is found in the refusal to give No. 3. It is negative and cautionary in character and nothing in the record justified its submission.

As to instructions Nos. 1 and 4 a much more serious problem is presented. The two instructions are of the same general character and if given would have correctly apprised the jury of the character and kind of evidence of fear they had a right to consider in determining the damage to which plaintiffs were entitled.

In the record there is evidence of fear of danger of the kind which may properly affect the value of land over which an electric transmission line extends and of the kind which may not.

The instructions given did not properly cover this subject, therefore we must conclude that the court erred in refusing to give one or both of these instructions or one of similar import.

The rule with reference to fear in such circumstances as these is as follows: "Mere general fears from the presence of a transmission line cannot be made the basis upon which to predicate any depreciation in market value, for ill-defined fear that at some unknown time in the future some misfortune may come to man or beast by reason of

the transmission line cannot enter into the consideration of those who are required to fix the amount of the damages." *Dunlap v. Loup River Public Power District*, 136 Neb. 11, 284 N. W. 742.

This rule was further elucidated in *Wahlgren v. Loup River Public Power District*, 139 Neb. 489, 297 N. W. 833, in the following language: "Fear as such cannot be made the basis upon which to predicate depreciation in market value of land. A fair statement seems to be that the only fear which may be considered as an element in fixing value is that of danger, the present or potential existence of which is grounded in authentic observation and experience, or in scientific investigation, and which fear circumscribes activity or limits freedom of use in the area of the present or potential danger."

This error requires a reversal of the judgment, but in order that further error may be avoided on a new trial of this case it is deemed advisable to discuss some of the remaining assignments.

Attention has been called to the fact that the jury became informed as to the award of the appraisers, and the claim is made that this was error, for the reason that such information was calculated to create bias, passion and prejudice in the minds of the jurors.

While the argument in this connection from the standpoint of reason has merit and is persuasive, yet such practice is upheld by the decisions of this court. In *Chicago, R. I. & P. R. Co. v. Buel*, 56 Neb. 205, 76 N. W. 571, it was stated:

"The first assignment argued in the brief is directed against the ninth or last instruction given by the court on its own motion, which was to the effect that if the jury ascertained that the value of the land taken for right of way purposes and the damages to the remainder of the tract, if any, determined in accordance with the previous instructions, together, exceeded the sum of $800,—the amount awarded by the commissioners,—interest was to be allowed at the rate of seven per cent. per annum on the entire sum

found by the jury to be due the plaintiff below. This instruction is in harmony with many adjudications of this court, and is opposed to none. It is well settled that where, on an appeal for an award of damages for lands taken for right of way, the damages are found to exceed the sum returned by the commissioners, the owner is entitled to interest from the date of the appropriation."

This pronouncement was followed in *Grimm v. Elkhorn Valley Drainage District*, 98 Neb. 260, 152 N. W. 374, and no decision has been found overriding it. The plaintiffs and the trial court cannot properly be criticized or condemned for following the specific pronouncements of this court.

It is, however, the considered opinion of this court that, on a new trial of this case and in future condemnation litigation, evidence of the award of appraisers shall not be admissible as evidence to go to a jury. The proper and approved practice shall be, for the purpose of preserving the right of the landowner to interest, for the court, after verdict, to compute and add the interest to the judgment in those cases where the verdict of the jury exceeds the award of the appraisers.

It also appears that certain jurors learned of the amount of the award during the progress of the trial by reading an article in the World-Herald, a metropolitan newspaper of Omaha, Nebraska.

It follows then, in the light of the right to offer evidence of the appraisers' award, assuming the impropriety of the reading of the amount of the appraisers' award in a newspaper by jurors before a verdict was returned, that this complaint may be dismissed without comment other than that no information was obtained in addition to what had already been properly received.

On rebuttal the plaintiffs were permittted to introduce evidence of statements with regard to warning of danger from electric transmission lines of one E. J. DeBoer. The defendant charges that this was error. It clearly was error. DeBoer was not a witness on the trial and no deposition of

his was used or sought to be used. No foundation was ever laid for the admission of any statement made by DeBoer for any purpose whatsoever.

The last assigned error which will be discussed here is that witnesses for the plaintiffs testifying with regard to damage were permitted to state the price at which other, similar and adjacent lands were sold.

On this question this court has made recent pronouncements. *Rushart v. Department of Roads and Irrigation, ante,* p. 301, 5 N. W. (2d) 884; *Swanson v. Board of Equalization,* ante, p. 506, 6 N. W. (2d) 777. In *Rushart v. Department of Roads and Irrigation, supra,* it was stated: "This court follows the rule that, where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof of the question of value."

Without departing from the strict letter of this rule we think it requires qualifications. The rule as stated however does not and should not exclude testimony in chief as to the sale of other lands where proper and sufficient foundation has been laid to make such testimony of value. It seems that there could be no better evidence of the true market or going value of land than the price paid for other, similar and similarly situated land sold at about the same time when, by evidence, it is shown that the price so paid for the other lands depended upon market or going value rather than other considerations. To demonstrate nonadmissibility under the rule, let us say the other lands were purchased for a specific purpose such as a filling station or some other commercial enterprise not common to the particular location, and for that reason the purchaser was willing to pay much more than market or going value. It is easy to see that in such circumstances price, without foundation, should not be admitted. It would be grossly misleading.

Evidence of price of land sold should be held to be admissible in condemnation proceedings on the subject of damage which price is predicated upon a sufficient foun-

dation to furnish a criterion for market or going value of land condemned. We hold that it is, and any decisions of this court holding or tending to hold to the contrary are expressly overruled.

On this question there is a division of opinion in the various jurisdictions, but the reasoning supporting the position we now take appears more convincing than that supporting the opposite position. A statement contained in *St. Louis, K. & N. W. R. Co. v. Clark,* 121 Mo. 169, 25 S. W. 192, 26 L. R. A. 751, as follows, covers the subject clearly, comprehensively, exhaustively and convincingly: "We think the evidence of sales of similar property to that in question, made in the neighborhood, about the same time, was admissible to aid the jury in determining the damage to which the owner was entitled. The value of property is ascertained largely from such sales, and the opinions of witnesses as to values are largely predicated upon them. It is best, when it can be done, to put the jurors in possession of all the facts from which values are ascertained, and allow them to draw the conclusion therefrom. Witnesses basing their opinions upon recent sales, of like property, are liable to exaggerate or underestimate values; in any consideration they are no more capable of deducing fair conclusions from the known facts than the jury. The object is to ascertain the general market value, and if particular sales are made under exceptional circumstances the fact can be shown, and the jury can determine its probative force. Certainly no more reliable method of determining the fair market values of lands can be reached than that derived from *bona fide* sales of similar lands in the vicinity. The objection that such evidence raises collateral issues, as to the character of the land sold, and the circumstances of such sales, is more than compensated for by its value in aiding the jury to a correct conclusion."

In *Loloff v. Sterling,* 31 Colo. 102, 71 Pac. 1113, it was said: "There are two lines of decisions upon evidence of this character, one spoken of in the books as the Massachusetts doctrine, which is in favor of its admissibility;

the other as the New York doctrine, against it. * * * Without entering into a discussion of the question, we think the decided weight of authority, as well as reason, is in favor of its admissibility. There is force in the objection usually made thereto that it raises collateral issues, and in certain cases may prolong a trial by causing an investigation of similar sales, yet the disadvantages arising therefrom are more than compensated by the benefits which are likely to come to jury from its reception."

Numerous other citations sustaining this view are collected in the annotations in 118 A. L. R. 869 *et seq.* The opposing view is set forth in 118 A. L. R. 905 *et seq.*

This conclusion of course calls for a modification of the rule with reference to cross-examination announced in *Rushart v. Department of Roads and Irrigation, supra.* What the proponent of a witness may go into in chief, the cross-examiner may inquire into on cross-examination on the liberal terms extended to the cross-examiner, but he may not entirely disregard foundational matters, as was true in *Rushart v. Department of Roads and Irrigation, supra.* To have announced in that case the rule here set forth would not have changed the result. In any event that case would have required reversal on account of the prejudicial error found in the form and substance of the questions propounded on cross-examination as is disclosed in that opinion independent of any inquiry regarding the character of the subject-matter here discussed.

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

REVERSED.

Rose and Eberly, JJ., not participating.

FRANK R. FREBURG ET AL., APPELLANTS, V. CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEE.

8 N. W. (2d) 209

FILED FEBRUARY 26, 1943. No. 31538.

Workmen's Compensation. Evidence is examined and *held* that it does not sustain the plaintiffs' contention that they were partial dependents of a deceased son.

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

Anderson, Storms & Anderson, for appellants.

Stiner, Boslaugh & Stiner, contra.

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

SIMMONS, C. J.

This is a workmen's compensation case, brought by the parents of a deceased son, and presents the question as to whether or not the parents were partial dependents of the son so as to entitle them to compensation under the provisions of section 48-122 (2), Comp. St. Supp. 1941, and section 48-124, Comp. St. 1929. The compensation court and the district court held against the plaintiffs. They appeal. We affirm the judgment of the trial court.

It is stipulated that the son Chester was unmarried, 25 years of age, was an employee of the defendant at the time of his death on April 18, 1941, and that death resulted from an accident within the scope of his employment. That he had been employed by defendant from March 22 to May 12, and September 8 to November 21, 1939; and again from March 11 to December 27, 1940; and from January 7 to February 18, and March 20 to April 18, 1941. His total wages in 1939 were $256.18, in 1940, $861.31, and $253.33 in 1941.

For many years prior to 1939 the plaintiffs lived with their four children, two sons and two daughters, on a farm

in Phelps county. The deceased son Chester graduated from high school in 1933. Prior and subsequent to that time he assisted the parents on the farm. Prior to 1939 he worked at various places and contributed liberally of his earnings to his parents. His earnings went for the support and maintenance of the family.

In August of 1939 crops were poor, the father was in debt to the bank, to machinery vendors, on unsecured debts and to the Federal Land Bank on land in Morrill county. He had personal property consisting of farm machinery, live stock, and an automobile. The parents determined to go to California where he, the mother, and the grown daughters thought they could secure employment. They gave a bill of sale of their personal property to the son Chester. He was to try to pay the debts and to send them money for their support if required. Chester owned an automobile at the time. The father's car was left with Chester and Chester's car taken to California. Titles were transferred between them then or shortly thereafter.

The parents, the two daughters and the younger son went to California in August, 1939, and thereafter remained until the death of Chester on April 18, 1941. During that time the father and mother earned $1,100 and the daughters earned $1,700. The record is not clear as to the amount the daughters contributed to the family expenses, but it is established that the family, with one exception to be noted later, were self-supporting during that time, and had funds with which to return to Nebraska at the time of Chester's death.

After the parents went to California, Chester operated the farm, treated the personal property as his own, selling some of it, and borrowing money, giving the property as security. Although the father testified that the transfer of the title of the property was "temporary," the evidence shows that the parents received the property remaining at Chester's death under the inheritance laws of Nebraska.

After the parents removed to California, Chester paid some $1,300 of his father's old obligations. These included

small doctor bills, personal items, personal taxes, deferred payments due on automobiles and machinery, a debt due the bank secured by chattel mortgage on the personal property transferred to him, payments due the Federal Land Bank on the Morrill county land, and a premium on a sister's insurance.

It is not shown that Chester ever accounted to the parents for any moneys received from the sale of the personal property or for the farm operations, nor that he sought an accounting of the amounts which he paid out. All funds were kept in his personal checking account at the bank. The testimony indicates that this was considered to be a "joint account" with the father, but it is established that the father never drew checks upon it or made deposits in it.

The parents testified that Chester gave them $50 when they left for California; however, this money appears to have been from a wheat loan which the parents secured at that time. The parents requested Chester to send, and he did send them on January 17, 1940, a check for $25 which was used for living expenses. This money he borrowed from the banker. He had been employed by the defendant at $75 a month, but was discharged November 21, 1939, and not again reemployed until March 11, 1940. Chester was not employed by defendant when this money was sent to the plaintiffs. This money is not shown to have come "from his wages." Comp. St. Supp. 1941, sec. 48-122 (2). There is evidence that at some time he also sent the father a five dollar bill. No other contributions are shown to have been made by the son to the parents while they were in California.

It is clear that total dependency is not shown. Were the plaintiffs "partially dependent" under the act?

Section 48-122 (2), *supra,* provides: "If at the time of the accident which resulted in his death the deceased employee leaves no persons wholly dependent, but leaves persons partially dependent upon his earnings for support, compensation shall be paid on account of the benefits provided in Subdivision 1 of this section for persons wholly

dependent, in the proportion that the average amount *regularly contributed* by the deceased *from his wages* for a *reasonable time immediately prior to the accident,* to such persons who were partially dependent, bears to the total wages of the deceased during the time." (Emphasis supplied.)

Section 48-124, *supra,* provides (e) "In all other cases, questions of dependency, in whole of (or) in part, shall be determined in accordance with the fact, as the fact may be at the time of the injury; etc.," and (g) "Questions as to who constitute dependents and the extent of their dependency shall be determined as of the date of the accident to the employee." It appears clearly from this record that the deceased made no contributions to the plaintiffs "from his wages," regularly or otherwise, "for a reasonable time immediately prior to the accident."

But plaintiffs contend (1) that the promise to send them money if required, and (2) that the payments made on the parents' indebtedness were contributions, and bring them within the act.

The statute was considered in *Meyer v. Nielsen Chevrolet Co.,* 137 Neb. 6, 287 N. W. 849, wherein we held: "It is the loss of the support, the loss of the financial contributions of the employee, which determines the right of the dependent to compensation—not the mere existence of some legal right to support."

The payments made on the parents' indebtedness do not meet the requirement of the statute. The evidence does not show from what source the funds came that made the payments, although it is apparent that some came from the sale of personal property, some from farm revenue, some from moneys borrowed. Even if we were to assume that the payments on plaintiffs' debts came from wages earned by Chester in working for the defendant, the requirements of the statute would not be satisfied. The contributions from Chester's wages, if any there were, went not to the support of the plaintiffs, but to the retirement of plaintiffs' debts all incurred more than 20 months before Chester's

death. We have held: "It is not money contributed, but money contributed for the partial support of the claimant that must be the basis of any claim of partial dependency. Dependency in fact is not created by contributions made for purposes other than partial support of the alleged dependent." *Pieters v. Drake-Williams-Mount Co., ante,* p. 315, 6 N. W. (2d) 69.

The judgment of the district court is

AFFIRMED.

NETTIE ANDERBERY, APPELLEE, V. HERMAN KATZ, APPELLANT.

8 N. W. (2d) 207

FILED FEBRUARY 26, 1943. No. 31445.

Appeal. Where the sole question on appeal in an automobile damage case is whether the plaintiff was guilty of contributory negligence to such a degree that she cannot recover, the testimony most favorable to her should be accepted as true in determining whether the verdict of the jury should be sustained.

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

Chambers, Holland & Locke, for appellant.

L. R. Doyle and *Paul W. White, contra.*

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

PAINE, J.

This is a suit for personal injuries sustained by plaintiff in a collision between two automobiles. From a judgment entered on the verdict for $1,200, the defendant appeals.

The assignments of error relied upon for a reversal charge, first, that the evidence shows that the plaintiff was guilty of more than slight negligence, which directly contributed to, and was the proximate cause of, the accident;

second, because the evidence is insufficient to sustain the verdict.

An examination discloses that on October 1, 1940, at 7:15 p. m., the plaintiff was driving her 1936 Chevrolet coupé west on K street, in front of the State House, at a speed of 15 to 18 miles an hour; that she slowed down as she approached Fourteenth street to about 10 or 12 miles an hour, and when she had passed the St. Mary's Cathedral she looked to the north and could see no car coming. She then looked to the south and entered the intersection. Her attention was then directed to some pedestrians who were on the crosswalk ahead of her. The front of her car was approaching the crosswalk line when the 1939 Chevrolet sedan of the defendant struck the coupé of the plaintiff violently on the right rear fender, whirling it about and injuring the plaintiff.

The plaintiff testified she did not see the defendant's car at all before it struck her. The defendant was driving south on Fourteenth street, there being no stop sign at that time at the K street intersection. He admitted to the police that he had been driving 25 miles an hour, but testified he did not see plaintiff's car until he was within eight or nine feet of it. The headlights were lighted on both cars.

The defendant testified that, when he went into the intersection, "I did look partly, when I went into the intersection I slowed up. Q. By partly what do you mean? A. I looked to the left. However, the windshield wiper was going at the time and I don't believe my vision was any too good there. Q. When did you decide you looked to the left? Are you positive about that or is that a guess? A. No, I am pretty sure I looked to the left. Q. Didn't you say in your deposition that you doubted whether you looked in either direction before you went in there? * * * A. Well, I was not certain."

As the result of this collision, the plaintiff was taken to her home at 1701 K street, just three blocks from where the accident happened, and her daughter, with whom she lived, took care of her, and the doctor, when called later,

treated her for injuries to her back, neck, hip and arms, in which she suffered severe pain.

As a result of the accident, she cannot do much of the housework which she did before, she cannot comb her hair, she had a stiff neck, her spine was injured so that she has been compelled to wear a sacroiliac belt, without which she cannot walk. She has taken a great many heat treatments, and still bears the effects of the injuries she received.

We are cited to many Nebraska cases which hold that, if the evidence establishes that the plaintiff's negligence is more than slight, it is the duty of the court to direct a verdict, but in the case at bar we believe that the trial court was justified in overruling the motion for a directed verdict made at the close of all the evidence.

Our attention is called to the case of *Klement v. Lindell*, 139 Neb. 540, 298 N. W. 137, in which it is said that the plaintiff by his own negligence failed to see the truck when he was in a position to see it, and continued a negligent course, driving directly in front of the truck, and that his failure to use proper precautions made him guilty of contributory negligence more than slight. Other cases with similar holdings are *Nelson v. Plautz*, 130 Neb. 641, 265 N. W. 885; *Thrapp v. Meyers*, 114 Neb. 689, 209 N. W. 238.

In the case at bar, the plaintiff testified that she looked north on Fourteenth street and saw no car close to her; that she then looked to the south to see if it was safe for her to proceed across the intersection and, finding that it was, she slowly drove through the intersection; that after she had crossed the center line of Fourteenth street her attention was directed to two pedestrians who were about to cross the street from the north side, but they waited for her.

Another intersection case is *Ritter v. Hering*, 135 Neb. 1, 280 N. W. 231, in which Chief Justice Goss said that the plaintiff should have known that he was approaching an arterial highway, on which fast-moving traffic has the right of way, and that he entered such highway without stopping, as required by the stop sign, and this was considered as more than slight negligence on the part of the plaintiff, requiring a reversal of the judgment.

The defendant cites *Bergendahl v. Rabeler*, 133 Neb. 699, 276 N. W. 673, which is another intersection collision. In this opinion Judge Carter says that, for the plaintiff to recover, it must be established that except for the negligence of the defendant the accident would not have occurred, and the record fails to show that the defendant was guilty of any negligence, while on the other hand the driver of the other car had defective brakes and failed to look for cars approaching the intersection, and that the motion for a directed verdict should have been sustained. These cases cited by the defendant are not applicable to the facts in the case at bar.

In the instant case, the defendant was traveling faster than the plaintiff was traveling. The plaintiff's brakes were in good shape, and she not only entered the intersection first but her car was nearly through the intersection at the time it was struck. As a usual thing, when one has reached the center of an intersection, it is then his duty to watch the pedestrians on the crosswalk ahead of him.

This court has very recently held, in effect, that a motorist is guilty of negligence, and liable for resulting damages, where he drives into the center of the intersection of city streets without slackening speed or changing his course and runs violently into the automobile of another motorist who has the right of way and who is free from negligence. *DeBus v. Amen, ante*, p. 109, 5 N. W. (2d) 92.

"Where sole question on appeal was whether motorist who recovered damages sustained in automobile collision was contributorily negligent as matter of law, testimony most favorable to motorist must be accepted as true." *Rathburn v. Riedel*, 289 N. W. 285 (291 Mich. 652).

This case involves a disputed question of fact as to whether plaintiff was guilty of negligence to that degree that she cannot recover. The trial court gave the jury the approved instruction thereon, and the jury passed upon that question. In our opinion, there was no prejudicial error in the record, and the judgment is

AFFIRMED.

Rose and Eberly, JJ., not participating.

ALBERT F. ENGLES ET AL., APPELLANTS, V. DRAINAGE DISTRICT NO. 1 OF RICHARDSON COUNTY ET AL., APPELLEES.
8 N. W. (2d) 166

FILED FEBRUARY 26, 1943. No. 31500.

Drains. A landowner who, with his predecessors in title, has accepted the benefits of a legally organized drainage system for over 30 years, and has paid all preceding assessments of taxes against his property for the construction, maintenance and repair of said drainage system, is estopped to question the validity of an order making an eleventh supplemental assessment which was specifically directed to be made by this court.

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

Lee Kelligar, for appellants.

Archibald J. Weaver and *Joseph C. Reavis, contra.*

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

PAINE, J.

This is an appeal by Albert F. Engles and wife from the judgment of the trial court overruling their objections to a special assessment ordered levied against their lands by Drainage District No. 1 of Richardson county.

The appellants allege that the judgment entered is contrary to the law and the evidence, and also charge that certain rulings on the admission of evidence were erroneous.

Litigation over the affairs of this same district has appeared in this court on several occasions. An opinion was released June 12, 1925, and is entitled *Richardson County v. Drainage District No. 1,* 113 Neb. 662, 204 N. W. 376. The specific thing then in controversy was the fourth supplemental assessment for the improvement of Drainage District No. 1, established under the drainage act, sections 1744-1812, Comp. St. 1922, the county being assessed $2,396.61 for its roads lying within said district. It was held that collection of assessments might be enjoined if proceedings are void, but if not void an adequate remedy exists in

quo warranto or other law action. This decision held that the trial court was right in holding against the county and refusing it an injunction, and affirmed on this point, but also held the decision was wrong in holding that the lands of certain interveners were not subject to the fourth assessment and enjoining the district from attempting to collect it.

The next appearance was in *Mooney v. Drainage District,* 126 Neb. 219, 252 N. W. 910. This opinion was released February 21, 1934. It was an action by Mooney to compel the district to increase the carrying capacity of the large drainage ditch at the outlet. The decree of the district court was affirmed as modified. It held that sections 31-401 *et seq.,* Comp. St. 1929, were constitutional; refused to consider the constitutionality of section 31-456, as it was not necessary to the opinion. In the sixth paragraph of the syllabus it held that the enlargement of the outlet of defendant's drainage system is an improvement and a repair within the terms of section 31-463, Comp. St. 1929, and the district may finance same by an assessment on the basis of the original assessment of the property in the district.

The case of *Mooney v. Drainage District,* 134 Neb. 192, 278 N. W. 368, released March 4, 1938, was a suit in equity to prevent this drainage district from dissolving under an amendment made by the legislature to section 31-463, Comp. St. 1929, as shown by chapter 74, Laws 1935, and this court held: "An amendatory or repealing legislative act may release penalties imposed for the protection or benefit of the state under a former statute, but private property rights acquired under a statute and established by the valid judgment of a court are not subject to legislative invasion by means of a new statute."

The effect of this decision of our court was to restrain the district from dissolving until it had discharged its obligation under the judgment of this court requiring it to increase the capacity of its outlet to 20,000 cubic feet per second.

In conformity with the judgment of this court, the plead-

ings herein show that a transcript of proceedings of the board of supervisors of Drainage District No. 1 of Richardson county, in connection with the levy of the eleventh supplemental assessment, was filed in the office of the clerk of the district court, reciting that at a meeting of said board held on June 30, 1941, a resolution was introduced, ordering and levying upon all of the lands, lots and property in said district sufficient to raise the sum of $54,861.80, which is equivalent to $2 an acre for 100 per cent. benefit lands, and on other lands of a lesser percentage of benefit, the funds to be derived from said assessment to be used for the purpose of enlarging the carrying capacity of the district, in compliance with an order of the supreme court to enlarge the required carrying capacity of the outlet from 11,500 cubic feet per second to 20,000 cubic feet per second, said enlarged carrying capacity of said outlet being made necessary solely by reason of the increased flow of water from the eight drainage districts on the Nemaha river watershed lying above the drainage channels of this drainage district. A copy of the published notice to landowners is set forth in the transcript of proceedings, stating that the board of supervisors of Drainage District No. 1 would meet on August 13, 1941, to hear all objections that might be filed.

On August 13, 1941, Albert F. Engles and Beatrice R. Engles, the appellants herein, filed objections to the eleventh supplemental assessment for the following reasons, which may be condensed as follows: That the proposed assessment and any levy made thereunder are null and void as to the objectors for the reason that at the time of the formation of the district the objectors and landowners had no notice of the alleged benefits assessed and found to be accruing to their lands; that any proposed assessment and levy of special tax are null and void, as said lands will receive no benefit from the proposed improvement; that, by the notice published, said proposed assessment is for the purpose of paying cost of construction for a new outlet at the lower end, the necessity for which is caused by taking on eight other drainage districts to the system of which ob-

jectors' land is a part, all of which was done without the knowledge, consent or acquiescence of objectors; because said proposed construction, and the assessment therefor and subsequent proposed levy, does not benefit any of the land owned by objectors.

Objection is made for the further reason that there has been no maintenance upon the drainage ditch running through the lands owned by objectors for more than two years, but said ditch has been allowed to deteriorate, and has caused a flood hazard, to the damage of the objectors; that said proposed assessment and levy are to be made without taking into consideration what, if any, benefits accrue to the land owned by objectors; that objectors were not parties to any suit, either in the district court for Richardson county or in the supreme court, wherein an order and judgment were entered forcing objectors to contribute any sum of money to enlarge the opening of the outlet and enlarge the same at the lower end of said drainage district for the benefit of the eight other drainage districts which emptied into the system so formed by Drainage District No. 1. Objectors ask that their land be released from the assessment and levy of any proposed tax for the construction of any ditch or improvement within said district.

On November 13, 1941, a petition to intervene was filed by James P. Mooney, for himself and all others similarly situated, in which he alleged that he was the owner of a large body of real estate in the lower Nemaha valley, all of which real estate is in Drainage District No. 1, and which real estate, along with other real estate similarly situated, was the subject-matter of numerous lawsuits in the district court for Richardson county and in the supreme court; that in case No. 30049, *Mooney v. Drainage District*, 134 Neb. 192, 278 N. W. 368, the supreme court held: "Landowners *held* to have acquired vested property rights by payment of legal assessments on their lands by a public drainage district for drainage proving to be ineffective because the district failed to comply with the valid judgment of a court ordering it to enlarge the outlet to the drainage system."

Intervener alleges that the purpose of the objectors is to get around the decision of the supreme court requiring said district to improve the outlet as aforesaid, and should objectors prevail in said cause the vested rights of the intervener and all others similarly situated would be destroyed and they would suffer irreparable harm and injury.

Intervener further alleges that he has paid drainage taxes to said drainage district for over 30 years, and that said drainage district has been in operation since its organization and has never been dissolved, and that said objectors are now estopped from any objection to the assessments in order to carry out the order and commands of the supreme court.

The trial court, after a hearing, granted leave to petitioner to intervene. A jury was waived by all parties, and trial had.

After the submission of briefs and oral arguments, the trial court found generally in favor of Drainage District and Mooney, the intervener, and that the eleventh supplemental assessment of the drainage district was duly and properly assessed; appellants were estopped from questioning the validity of the action of the drainage board in finding and assessing the total benefit to accrue from the construction of the drain and work of said district, and that the action of the board of supervisors of Drainage District No. 1 in overruling the objections of appellants to the eleventh supplemental assessment of said district should be affirmed.

The appellants insist that any proposed special assessment and levy against the land of the appellants are null and void for the reason that their lands will receive no benefit from the proposed improvement, although an objection was sustained by the court after the answer was given and no motion to strike was made. Further, that under the notice published the assessment and levy will be void.

Albert F. Engles, appellant, testified that the land he owns is located two miles east of Dawson, and is about 24 miles from the improved outlet which is to be constructed

with the funds raised from this assessment; that he bought this land between 1916 and 1920, and that he knew when he acquired it that it was under this drainage district. The evidence discloses that he and his predecessors in interest have paid all of the assessments levied against his land prior to this eleventh assessment without objection.

The records of this drainage district are all public records, and before appellant Engles purchased his land in 1916 an examination of these records would have disclosed that his land had been assessed at $40 an acre as total benefits. In March, 1909, landowners acknowledged receipt of notice of pendency of supplemental assessment, and that a hearing would be had on all objections May 1, 1909, as shown by the many exhibits in the bill of exceptions. No objections were then made by the former owners of the lands now owned by appellants.

This actual written notice and service on the predecessors in title of the appellants' lands shows on its face the amount of total benefits assessed against this land, and is a legal and sufficient notice. It is now too late, after 33 years, for the appellants to make complaint, when all preceding assessments upon these lands have been paid without question.

Having accepted the benefits of this drainage ditch all these years, the appellants are now estopped to question an order fixing the total benefits, inasmuch as the sum total, including the present eleventh special assessment, does not exceed the total benefits adjudicated years ago. See *Baker v. Logan*, 98 Neb. 795, 154 N. W. 535; 19 Am. Jur. 682, sec. 64.

We have given full consideration to all the contentions of the appellants, and see no merit in any of them. Therefore, considering all of the prior decisions in relation to this district, and the positive instructions given by this court to this district on February 21, 1934, "to enlarge the outlet of its drainage system between bridge 64 to the Missouri river to a minimum carrying capacity of 20,000 cubic feet per second" (*Mooney v. Drainage District*, 126 Neb.

219, 252 N. W. 910), we are of the opinion that the trial court was right, and its judgment is hereby

AFFIRMED.

Rose and Eberly, JJ., not participating.

CRETIE WIIEST, APPELLANT, V. HORACE C. POUNDS ET AL., APPELLEES.

8 N. W. (2d) 211

FILED FEBRUARY 26, 1943. No. 31475.

1. **Specific Performance.** Courts of equity will not always enforce specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court will be governed, to a great extent, by the facts and merits of each case.
2. ———. Evidence examined and *held* sufficient to sustain a decree denying specific performance.

APPEAL from the district court for Keith county: ISAAC J. NISLEY, JUDGE. *Affirmed in part and reversed in part.*

Hoagland, Carr & Hoagland, for appellant.

Halligan, McIntosh & Feltz and *Beatty, Maupin, Murphy & Derry, contra.*

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

MESSMORE, J.

This is an equity action, in which the plaintiff seeks to have the court decree her to be the owner of an undivided one-third interest in and to three quarter-sections of land, and the defendant to be decreed trustee for the plaintiff for her interest in the land, and to render an accounting of the rents and profits collected by him, and of the money paid out for taxes and instalments due on a Federal Land Bank loan. The action arises from the following facts:

Caroline I. Pounds, the mother of 11 children, two of whom are the plaintiff and defendant, died intestate No-

vember 27, 1934, owning certain real estate. Each child was entitled to one-eleventh interest therein. Lloyd, a son, instituted partition proceedings. The petition filed February 8, 1937, alleged that the plaintiff had heretofore sold, assigned and transferred her interest to the defendant Mary A. Walker and had no further interest in the real estate. The judgment in partition, entered April 5, 1937, decreed an undivided one-eleventh interest to Irving Wiiest, plaintiff's husband, Mary A. Walker having transferred plaintiff's interest to him.

The first sale was held May 11, 1937, and all of the property was bid in by the defendant for $6,600. On May 14, 1937, several of the heirs entered into an agreement that they did not want to accept such amounts; consented to the purchase of the property by the defendant as trustee for the benefit of all persons interested, and agreed to sign a receipt for their distributive shares. The sale was set aside August 24, 1937. October 26, 1937, a second sale was held. There were no bidders. The court ordered that the real estate be readvertised and sold. The third sale was held April 11, 1939. Defendant purchased all the property, including town property, for $5,600. July 12, 1939, the court opened the sale, received bids in open court, and the three quarter-sections involved were sold to the defendant for $5,000. Sale was confirmed. The plaintiff and her sister, Mary A. (Addie) Walker, were desirous of retaining their respective shares in the land, and it was generally understood orally that the heirs would be contacted to ascertain who, if any, wanted to retain their interests. It developed that the plaintiff, Addie Walker and the defendant were the only ones.

While much discussion appears in the record as to whether the defendant bid in the land for the two sisters and himself, or just to protect his own interest, a written agreement, containing all of the oral agreement, was entered into August 5, 1939. It provided in substance as follows: That certain lands belonging to the estate (as aforesaid) were sold at referee's sale and purchased in the name of

the defendant, "who has made application to the Federal Land Bank for a loan for a sufficient amount to satisfy the remaining persons interested in said property, and whereas the persons above named desire to retain an equal interest in said land, * * * it is hereby agreed that * * * (defendant) retain title to said land in his name, that he secure a loan from the Federal Land Bank; that the said parties each pay to the First National Bank, Ogallala, to apply on the temporary loan made by (to) them, the amount of their distributive shares in said partition suit, * * * $513.48, *and such additional amount as may be necessary to pay their proportionate share after said loan is secured from the Federal Land Bank, and thereafter that * * * (defendant) agrees to convey to * * * (plaintiff) an undivided one-third interest in said land subject to said loan.*" (Italics supplied.) Then mention is made that the sisters would execute a power of attorney, authorizing defendant to have charge of the land, collect rentals, pay taxes and instalments, as they become due, to the Federal Land Bank. It was further agreed "that the parties hereto will not sell or dispose of their respective interests in said land except to the other parties," and that the agreement "shall not be subject to record." The agreement was signed by defendant, plaintiff and Mary A. Walker.

On July 20, 1939, after confirmation of the sale, the sisters being unable to raise money, the defendant arranged with the First National Bank of Ogallala for a temporary loan, and in addition sold some 2,300 bushels of wheat for 50 to 55 cents a bushel, which, if held, would have been worth 63 cents a bushel on a government loan, or, if held until May of the following year, 95 cents a bushel. To consummate the transaction, the defendant was forced to raise the money himself, and paid the referee $5,000 on July 26, 1939. The title to the three quarter-sections of land was then in defendant's name. The plaintiff contends that the distributive shares of the three from the partition proceedings, plus a 200-dollar item owing by a brother, made the difference between the 3,300-dollar loan of the First Na-

tional Bank and the $5,000 to be paid the referee. August 5 the written agreement, hereinbefore set out, was entered into.

On August 6, 1939, defendant received an offer of $2,700 for one of the three quarter-sections, which would leave a half-section for the three interested heirs, upon which the federal loan would be unnecessary. He approached Addie Walker on the proposition, and at the same time requested $300 for his work and sacrifice when raising the money to complete the transaction. Addie declined to pay the extra amount, and a check was written out for her distributive share, which she accepted but did not cash until later. She made a statement of the expense as given her by the defendant, which included a new abstract, bringing the abstract down to date, inspection thereof for the loan from the First National Bank of Ogallala, the application for the Federal Land Bank loan, the interest on defendant's money, and miscellaneous costs. Another exhibit, prepared by defendant, discloses items of expense of like nature, but of a larger amount. This expense does not show the full amount for which each of the interested heirs would be obligated to pay $300.18, unless, as testified by the defendant, they agreed to reimburse him for his time and the sacrifice that he had made in order to complete the deal for them. This is denied, Addie Walker contending the contract did not provide for such items. The defendant was unable to discuss with plaintiff the sale of the quarter-section, due to a death in the family.

With reference to the item of $300.18, the defendant testified that the plaintiff was not willing to pay him anything. To the question: "What did you tell her?" he answered: "I told her that I had to sell my wheat, cleaned my place, having to take every dime I had to live on, in order to buy that land, * * * I asked her three hundred, it was no set price, we hadn't come to any conclusion." He testified that the 1st of August he talked to his sisters about the expenses incurred in connection with the loan and asked if they wanted to go in and if they wanted to pay

him for his time and expenses. "Q. And what was said? A. I told them, if I could get paid for it, they would certainly go in, and they said, sure." No figures were stated. The sisters were to make the settlement when the Federal Land Bank mortgage came back. The quarter-section was not sold.

On December 13, 1939, the defendant wrote his sister, Addie Walker, asking her what she intended to do, pay her share of the money for expenses, or cash the check which she held, stating that he had received the Federal Land Bank loan, which was $3,000 net to him, and that he was ready for settlement; that he had not changed his mind with reference to the expenses; that they were the same as when she talked with him; that she had to do one thing or the other by December 23, 1939, cash the check, make the settlement, or call the agreement off. He likewise wrote the plaintiff that he wanted the matter settled by December 23, 1939. The three heirs were to meet at an attorney's office, but on the appointed day the sisters did not appear. The plaintiff's husband was present, made no reference to the contract, but questioned the defendant about the distributive share, evidencing the plaintiff's interest being paid into court to satisfy a judgment obtained by one Goodall against the plaintiff on May 2, 1932, wherein the defendant had been garnished, to which he answered October 30, 1939, that he was indebted to the plaintiff in the sum of $513.48. He was ordered by the court to pay such amount into court. Finally, Addie Walker cashed the check for her distributive share and withdrew from the transaction.

In connection with the garnishment, the record discloses that Goodall obtained a judgment against the plaintiff May 2, 1932, for $453.70. On March 7, 1935, a præcipe was filed with the *ex officio* clerk of the district court to issue an execution on this judgment. The record does not show a levy or return of the execution. On September 29, 1939, another execution was issued and returned unsatisfied, resulting in the garnishment proceeding referred to

previously. The plaintiff denied any notice of such proceeding. Summons against the garnishee was left at the usual place of residence of the plaintiff, as shown by the return, dated September 29, 1939. Garnishee answer day was October 30, 1939. A letter (exhibit 6) to the judgment creditor, which the plaintiff said she was not sure she wrote, but purported to have been signed by her, dated "10-2-39," mailed October 2, 1939, speaks of the judgment creditor holding a judgment against the Pounds estate, so that the federal loan would not go through, and contains a statement with reference to certain merchandise purchased by her from the judgment creditor. The attorney's requirements on the Federal Land Bank loan designate that the judgment of Goodall against the plaintiff should be released.

A stipulation shows that the only record since the partition proceedings with reference to the title is a deed to the defendant, as described in the partition proceedings, and a mortgage to the Federal Land Bank. The only conveyance is the record of the deed made by the referee to the defendant for a consideration of $5,000 July 26, 1939, recorded July 27, 1939, and a mortgage from defendant and wife to the First National Bank of Ogallala, dated July 26, 1939, recorded July 27, 1939, for a consideration of $3,300, which was released and canceled of record December 15, 1939, and a mortgage from the defendant to Federal Land Bank, dated September 12, 1939, recorded October 27, 1939, which was canceled and released June 18, 1941. All mortgages, at the time of trial, were paid and canceled.

On January 17, 1940, the plaintiff wrote defendant that her sister, Mrs. Walker, had sold her share, and under the terms of the agreement, that the plaintiff was entitled to a half interest in the land, and that she wished to take $1,500 "and get out;" that the rest of the heirs need not know about it unless the defendant told them; she never would. She made some reference to the personal relationship between her family and the defendant and informed him that he was "getting off cheap at $1,500. * * * I need the money.

I want to buy an apartment house in Denver so I can be with my kids." She also stated that in the alternative she would still continue with the deal.

During the progress of the trial, plaintiff asked leave to amend her petition to offer to pay to defendant, in the accounting, any sum that the court may find to be due from the plaintiff to the defendant on account of contracts and issues made in this case. Leave was granted. The contract, contrary to its terms, was filed of record on February 20, 1940, by plaintiff with the register of deeds of the county. The defendant's cross-petition prayed for an order canceling the record of the agreement, and for an order quieting title in and to the real estate in him, as against all claims of the plaintiff, her husband, Mary A. Walker and her husband. The court dismissed plaintiff's petition and cause of action, and the cross-petition of the defendant. Plaintiff appealed.

Plaintiff contends that the trial court erred in finding there was insufficient evidence to sustain the allegations of her petition; that the written contract was to the effect that, if plaintiff did not object to confirmation and paid her distributive share, in the partition proceedings, on the purchase price, a resulting trust was created. Several cases are cited that hold: "Generally, where the purchase-money of land is paid by one person and the conveyance is taken in the name of another, the party taking the title is presumed to hold the estate in trust for him who pays the purchase price." *Bailey v. Dobbins*, 67 Neb. 548, 93 N. W. 687. That is to say that the plaintiff having paid her distributive share in the partition proceedings,—the $513.48, —the same constitutes purchase-money to apply on an undivided one-third interest in the three quarter-sections of land here involved. The title being taken in the name of the defendant, under the circumstances a resulting trust arises.

The plaintiff also cites the following authority with reference to specific performance, *Bennett v. Moon*, 110 Neb. 692, 194 N. W. 802, wherein this court said (p. 695): "The

rule of law seems to be well settled that courts of equity will take cognizance of actions requiring the specific performance of agreements concerning real property, and that the rule applies as well to leases as to deeds. This power of courts of equity is regarded as discretionary, yet it is limited to fixed and established equitable principles, and, unless exercised within these limitations, it has been adjudged to be arbitrary and capricious. It is generally held by the best judicial authorities that, under a proper state of facts, the right to the remedy of specific performance is perfect, and the court cannot, in any sense, exercise its discretion to deny relief. * * * The formula as to judicial discretion, therefore, is habitually used by the courts simply to indicate that the cases before the court are governed, not by legal rules, but by some well-established equitable principles."

In applying the foregoing decisions to the instant case, plaintiff contends she and her sister relaxed their efforts to have the real estate sold at a higher price by not bidding thereon, under an arrangement with the defendant, thereby avoiding competition, and such was sufficient consideration. In this connection the evidence is in conflict as to whether the defendant was bidding for the benefit of the sisters or to protect his own interests. It is established that, if he bid at all for the benefit of his sisters, it was at the time of the last sale of the land in the judge's office. The agreement seemed to be that those who desired to retain an interest in the real estate could do so and become a shareholder therein by paying their proportionate share as set forth in the contract.

The plaintiff further bases the applicability of the foregoing holdings, and contends that the evidence shows the defendant considered the plaintiff as a part owner of the realty on December 13, 1939, when he sent her the letter informing her that the Federal Land Bank loan had been received, and to meet him December 23 and settle the matter. It is true the defendant recognized plaintiff's interests as set forth in the contract, notified her to come in

and abide by its terms, which she did not do. The plaintiff further contends the letter of January 17, 1940, sent by plaintiff to the defendant, disclosed that she retained an interest in the real estate and believed she had a greater interest at that time on account of the withdrawal of her sister. Our view of these circumstances, in connection with the authorities which we deem applicable, is hereinafter set forth.

With reference to the contract, it provided that the defendant was to retain title in the land in his name. He was to secure a loan from the Federal Land Bank. The plaintiff was to pay her distributive share in the partition suit, —$513.48,—to apply on a temporary loan made to the defendant, the plaintiff and their sister by the First National Bank of Ogallala. This money was paid to the defendant and used in the purchase of the real estate, either in the manner provided by the contract, or as he saw fit in consummating the transaction. The evidence, as heretofore stated, discloses that he procured the $3,300 by using his own money, selling the wheat to raise it, because it was necessary that the referee be paid. This was done July 26, 1939. The contract further provided that there would be an additional amount to be paid, necessary to consummate the purchase, which amount would be determined after the loan was secured from the Federal Land Bank, and the plaintiff was to pay her proportionate share thereof. The loan was secured, and the defendant requested that settlement be made on December 23, 1939. There was no settlement made. The evidence with respect thereto has been previously stated. The contract provided further that the defendant agrees to convey to the plaintiff an undivided one-third interest, subject to the Federal Land Bank loan, and upon doing so the plaintiff was to execute a power of attorney, authorizing the defendant to have charge of the land, collect rentals, pay taxes and instalments as they became due to the Federal Land Bank. This was not done, presumptively because there had been no conveyance made by the defendant to the plaintiff of the undivided one-third

interest. Then the contract provided that the interested parties should not dispose of their respective interests in the land except to the other parties, and thereupon plaintiff would accept the sum of $513.48, together with such additional amount or amounts as may be contributed or advanced for taxes, interest, loan instalments, etc. The plaintiff infers that the garnishment proceedings interrupted her in performing her part of the contract. The garnishment proceedings, the legality thereof, and whether or not the defendant should have paid the plaintiff's distributive share into court thereunder, while questionable, are not determinative of his case. The amount which was garnisheed was insufficient to take care of the plaintiff's obligation, and, even though the garnishment had not been issued, still plaintiff would have no cause of action for specific performance of the contract or the declaration of a trust, for the reason that she has never complied with the contract by accounting to the defendant for her share of the additional expense, due after the Federal Land Bank loan had been consummated. On December 23, 1939, the date set for settlement, she did not appear. Only her husband appeared and raised the objection, as stated. Nothing further was done with reference to the settlement on that date or thereafter.

On January 17, 1940, plaintiff sent the letter referred to to defendant. There is nothing in plaintiff's conduct that would warrant the belief that she intended to comply with the contract, but, rather, that she had abandoned it. Then she wrote to Goodall's attorney, who had charge of the garnishment proceedings, that she wanted the matter straightened out and the money, paid in by virtue of such proceedings, returned to her "where it belongs." This evidence strongly indicates that she had abandoned the contract.

This action is primarily one for specific performance of a contract. Factual situations in cases of this nature are essentially different. Well-established law governing a situation, such as the evidence and circumstances disclose in the instant case, is stated in *Goodall v. Swartsley,* 108 Neb. 753, 189 N. W. 164, as follows:

" 'Courts of equity will not always enforce a specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court will be governed, to a great extent, by the facts and merits of each case.' *Morgan v. Hardy*, 16 Neb. 427." See, also, *J. H. Melville Lumber Co. v. Welpton Lumber Co.*, 121 Neb. 370, 236 N. W. 438.

In the case of *Tate v. Krentz*, 128 Neb. 68, 257 N. W. 495, this court said:

"It is a salutary rule that specific performance of an unrecorded contract to purchase real estate, the price not having been paid, is not demandable as a matter of right but depends on the circumstances of each particular case and the sound discretion of a court of equity.

"Another rule of equity is that the parties to an unrecorded contract for the sale and purchase of real estate, the price not having been paid, may destroy the written instrument itself or abandon it by parol."

In view of the precepts and the conclusions reached on the facts, plaintiff was not entitled to a decree for specific performance. It follows that the suit in equity was properly dismissed. The defendant is entitled to have the title quieted in him, as prayed for in his cross-petition.

In view of our holding, the accounting is unnecessary. The defendant was a tenant on part of the land in 1939, and his sister, Addie Walker, was the agent for the estate and collected the rents for that year. While reference is made to collection of rents in 1940, the date for settlement on the contract was December 23, 1939, and from and after that date the plaintiff manifested no interest in the contract, the subject-matter thereof, the land, or what was raised on it, and we deem further consideration of the accounting, under the circumstances here presented, unnecessary.

The trial court is directed to enter judgment in accordance with this opinion.

AFFIRMED IN PART AND REVERSED IN PART.

AMELIA FAIRMAN, APPELLANT, V. MERLYN J. COOK, APPELLEE.

8 N. W. (2d) 315

FILED FEBRUARY 26, 1943. No. 31462.

1. **Appeal.** In considering a motion for a directed verdict this court must, for the purpose of a decision thereon, treat it as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the facts in evidence.
2. **Negligence.** Gross negligence, within the meaning of the statute, means negligence in a very high degree, or the absence of even slight care in the performance of duty.
3. **Evidence.** Where it appears that a witness had no reasonable time, means, distance, or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject.
4. **Appeal.** When all of the competent evidence, taken in its most favorable light, is insufficient to sustain a verdict, then the case should not be submitted to a jury.

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

F. E. Williams and *Wright & Wright,* for appellant.

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

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

WENKE, J.

This action was commenced in the district court for Morrill county by Amelia Fairman, mother and next friend of Leta Bentzinger, as plaintiff, and who is appellant in this court, against Merlyn J. Cook, as defendant, and who is appellee in this court, wherein she seeks to recover for Leta Bentzinger damages for personal injuries she sustained in

a car accident which she alleged was due to the gross negligence of the defendant while she was riding in his car. The defendant denies that he was guilty of negligence. At the close of plaintiff's case and after she had rested the motion of the defendant for a directed verdict was sustained. Plaintiff, as appellant, brings the matter here for a determination of the correctness of the ruling of the lower court.

In considering a motion for a directed verdict this court must, for the purpose of a decision thereon, treat it as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the facts in evidence. *Moncrief v. Interstate Transit Lines*, 129 Neb. 168, 261 N. W. 163.

Applying the foregoing rule to the evidence disclosed in the bill of exceptions and admissions in the pleadings, it appears that Leta Bentzinger, who will be referred to herein as appellant and in whose behalf this action is brought, was a fifteen-year-old girl and a student in the tenth grade of the Bridgeport public schools. Among other subjects, she was studying music, and on April 19, 1941, a district music contest was being held at Sidney, Nebraska, in which about 30 of the music students of the Bridgeport public schools, including appellant, were taking part and who were to leave from the schoolhouse in Bridgeport early that morning. The appellant, together with Dorothy Nelson, Katherine Coleman, and Deloris Robertson, were assigned to the car of the appellee who was the principal of the school and who with others had volunteered his car to transport the students to the music contest. These students had been assigned to his car by a notice posted on the bulletin board. Appellee was not teaching music nor was the appellant taking any courses under him.

When they left the schoolhouse that morning about 7:30 a. m., appellee was driving and the appellant with two of the other girls occupied the back seat, appellant being on

the right-hand side. When they left Bridgeport the weather was slightly chilly, a moderate wind was blowing, and there was sleet or mist in the air. A light frost quickly formed over the windows but visibility was good, a windshield wiper was working on the driver's side of the car, and the roadbed was in good condition. The car proceeded toward Sidney, Nebraska, at about 35 miles an hour. After traveling some 10 or 11 miles from Bridgeport, the car hit a snowdrift in the road and thereafter appellee reduced his speed. After they reached the junction of the Bridgeport-Broadwater roads and headed south toward Dalton, the snow kept getting worse and the wind more severe and after they came onto the Dalton flats the storm had materially increased in its severity until it had reached the proportions of a blizzard covering the glass with frost and snow so that the occupants could only see out where the windshield wiper was operating.

That same morning the Schultz car left Morrill, Nebraska, for the purpose of attending the same music contest at Sidney, proceeded through Scottsbluff until they reached the Bridgeport-Broadwater junction and turned south on the Dalton road and continued until at a point near Dalton they came upon a car crosswise in the road with snowdrifts on each side and with a car immediately opposite. At that time they were proceeding about 25 miles an hour and the visibility was between 25 to 40 feet. Mrs. Schultz's daughter, who was driving the car, upon seeing the car some 30 to 40 feet ahead stopped the car without slipping or skidding about one foot from the car that was crosswise in the road. After the car stopped Mrs. Schultz immediately got out and proceeded to go back of her car approximately ten feet and shortly thereafter observed appellee's car approaching through the storm about 25 feet from her at what she estimated was from 20 to 30 miles an hour. The oncoming car skidded sideways about 35 to 40 feet from the Schultz car, then straightened out, and then skidded sideways into the Schultz car breaking the end of the bumper, the light, the pins under the front seat, knocking

in the back of the Schultz car, and pushing it forward into a snowbank, which was about the depth of the running board, for a distance of about six feet. The brakes on the Schultz car were not set. The lower front side of the right door of the appellee's two-door sedan was caved in about six to eight inches shattering the front glass and leaving a part of the bumper from the Schultz car in the car. The appellee's car then straightened out and traveled forward so that when it stopped the car was even with the Schultz car and headed the same direction. In the interim between the Schultz car stopping and the accident, the car crosswise in front of the Schultz car had succeeded in getting out and was not in front of the car at the time of the accident. Appellant herein, although admitting she could not see out and that the speedometer of appellee's car was not working, estimated the speed of the car from 10 to 15 miles an hour and at another time at 25 miles an hour; the appellee's answer admitted it was going 15 to 20 miles an hour. After the accident both cars were driven to Dalton.

Under the pleadings and the evidence it appears that the appellant was, on the day of the accident, riding in the appellee's car as a guest and this action comes under the guest statute, section 39-1129, Comp. St. Supp. 1941. Therefore, in order for the appellant to recover, she must show that the appellee was, by a preponderance of the evidence, guilty of gross negligence in the driving of his car and the pertinent question is whether or not she has produced sufficient evidence that the matter should have been submitted to a jury.

This court said in *Morris v. Erskine,* 124 Neb. 754, 248 N. W. 96: "What amounts to gross negligence in any given case must depend upon the facts and circumstances. What would amount to gross negligence under certain circumstances might, under different circumstances, be even slight negligence. Ordinarily, the question of negligence, whether slight or gross, is one of fact. If the evidence respecting it is in conflict and is such that ordinary minds might draw different conclusions therefrom, then a question of fact is presented for the jury to determine."

"Gross negligence, within the meaning of section 39-1129, Comp. St. Supp. 1935 (1941), means negligence in a very high degree, or the absence of even slight care in the performance of a duty." *Lemon v. Hoffmark,* 132 Neb. 421, 272 N. W. 214.

The appellant cites and relies upon those cases commencing with *Roth v. Blomquist,* 117 Neb. 444, 220 N. W. 572, and including *Most v. Cedar County,* 126 Neb. 54, 252 N. W. 465, wherein the general rule is announced that, "It is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps." And in *Most v. Cedar County, supra,* we added: "And the rule applies to driving in the daytime where vision is shortened by storms or other physical conditions." On principle it would appear that the existence or presence of smoke, snow, fog, mist, blinding headlights or other similar elements which materially impair or wholly destroy visibility are not to be deemed intervening causes but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of a degree of care commensurate with such surrounding circumstances. *Anderson v. Byrd,* 133 Neb. 483, 275 N. W. 825; *Fischer v. Megan,* 138 Neb. 420, 293 N. W. 287. However, these cases are ordinary negligence cases and as we have often said the question as to what amounts to gross negligence in any given case must depend upon the facts and circumstances thereof. Likewise, with reference to section 39-1193 and section 39-11,101, Comp. St. Supp. 1941, setting forth rules of the road in regard to the operation of cars, while any violation thereof would be evidence of negligence, yet the question as to what amounts to gross negligence in any given case must depend upon the facts and circumstances thereof.

Inasmuch as the question of gross negligence depends on the facts of each individual case, let us examine the evidence in this case. From the pleadings and the evidence in this case the principal complaint against the appellee is

one of speed; therefore, let us examine the record on this subject. Taking first the evidence of Mrs. Schultz on this matter, it shows that she was about 10 feet back of her car when she saw appellee's car approach through the storm from about 25 feet away, travel the 25 feet toward her, then pass and travel about 10 feet and hit her car, all of which took just a moment of time during which she was in an excited and frightened condition. This comes clearly under the holding of this court in the case of *Bergendahl v. Rabeler,* 133 Neb. 699, 276 N. W. 673, where we held: "Where it appears that a witness had no reasonable time, means, distance, or opportunity to formulate a basis for an opinion as to the speed of a car, the testimony of such witness is insufficient to sustain a finding of excessive speed in the absence of other evidence on the subject." And in *Knoche v. Pease Grain & Seed Co.*, 134 Neb. 130, 277 N. W. 798: "Where it appears that a witness had no opportunity to formulate a basis for an opinion as to the speed of a motor vehicle, it is error to permit him to give an estimate." While the speed of an automobile is not a matter of exclusive expert knowledge or skill and any one with a knowledge of time and distance is a competent witness to give an estimate, however, such estimate must be based upon a reasonable time and opportunity to formulate a basis therefor which, under the evidence herein, this witness did not have.

What has been said with reference to the testimony of Mrs. Schultz as to the speed of appellee's car is likewise applicable to that of appellant. Her testimony shows that as they drove onto the Dalton flats snow and frost on the glass and the snow blowing outside made it impossible for her to see objects on the side of the road, that the speedometer was not working, that she could not tell the speed of the car, and that she judges the speed of cars as either slow or fast. Yet on cross-examination she testified to a speed of 25 miles an hour and in a deposition to a speed of from 10 to 15 miles an hour. Clearly this witness had neither opportunity nor means to formulate any basis for an

opinion as to the speed of the car and that her answers were either guesses or conjectures is shown by the wide variation in the speeds and is the very thing this rule is intended to prevent; namely, the basing of a verdict on conjectures or speculation.

These being the only two witnesses on speed, let us analyze the remaining evidence under the rule hereinbefore announced for the purpose of determining whether the case should have been submitted to a jury. The evidence discloses that appellee was driving his car toward Dalton and upon approaching the Schultz car he observed it at the first opportunity and was on the lookout, for it appears from the evidence that visibility was from 30 to 40 feet and at from 35 to 40 feet his car skidded the first time and it is a reasonable inference that the skid was from the application of the brakes. He was able to straighten out his car and then it skidded again and hit the Schultz car broadside moving it forward about six feet into a snowdrift that came up to the running board, there being no brakes set on the car. Appellee's car straightened out and continued forward as far as the front of the Schultz car. It would not appear from these facts that the appellee's car hit the other car with any great speed for the road was slippery at the place and the car neither tipped over nor skidded into the ditch, but stayed right side up and went forward a distance of only six feet more than the length of the other car. The appellee's answer admits a speed of 15 to 20 miles an hour, however, this was considerably less than the admitted speed of the Schultz car which was 25 miles an hour, yet it stopped in time to avoid hitting the car ahead, but it neither slid nor skidded. While appellee either knew or should have known of the slippery condition of the highway, yet traveling at a speed slower than another car that was able to stop at the same place within the same distance, but because of slipping he was not able to do so is undoubtedly evidence of negligence, but clearly insufficient to sustain a charge of gross negligence. As a matter of fact, under the law of the guest statute, we are satisfied that it would have

been error to have submitted the question of his gross negligence to a jury, for a verdict based thereon could not have been sustained.

We have not overlooked the principle of law that, where different minds might reasonably draw different conclusions as to the appellee's negligence, the matter should then be submitted to a jury, but as herein stated where the evidence in its most favorable light would not amount to gross negligence then the matter should not be submitted to the jury and we find that the sustaining of the motion for a directed verdict by the lower court was right.

AFFIRMED.

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10. In action to replevin property claimed unlawfully distrained for personal taxes, if there is no evidence of

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11. If judgment in replevin action is not in proper alternative form, a new trial will not be granted, but the judgment will be reversed and cause remanded with directions to render a proper judgment upon the verdict. *Landis Machine Co. v. Omaha Merchants Transfer Co.* 397
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17. While the law requires appellate court, in determining an appeal in equity action involving questions of fact, to reach an independent conclusion without reference to findings of district court, the appellate court will, in determining the weight of the evidence, where there is ir-

reconcilable conflict therein, consider the fact that trial court observed witnesses and their manner of testifying. *Fisher v. Keeler* 728

18. Where the gravamen is negligence, and circumstances are controverted, in that reasonable minds might draw different conclusions, in an analysis of the circumstances, the question is one for the jury and verdict will not be set aside unless clearly wrong. *James v. Krebek* 757
19. The use of the word "testimony" instead of "evidence" in an instruction, where both oral evidence and physical facts and circumstances are defensively interposed, is not prejudicial where it is clear from all the instructions that it was intended that such physical facts should also be considered by the jury. *Roberts v. Carlson* 851
20. In a case where a verdict is dependent upon a preponderance of the evidence the trial court should instruct the jury thereon, but a party who fails to call attention to a failure so to do and to request an instruction thereon may not afterwards be allowed to subject the parties to costs and vexation of another trial. *Langdon v. Loup River Public Power District* 859
21. Where sole question on appeal is whether plaintiff, who recovered for damages sustained in automobile collision, was guilty of contributory negligence to such a degree that she could not recover, testimony most favorable to plaintiff would be accepted as true. *Anderbery v. Katz* 872
22. In considering a motion for directed verdict, the supreme court must treat the motion as an admission of truth of all material and relevant evidence submitted on behalf of the party against whom motion is directed, and the party against whom a motion for directed verdict is made is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. *Fairman v. Cook* 893

Attorney and Client.

1. An attorney at law standing in a fiduciary relationship with an estate of a deceased person or the heirs of the estate may not properly represent interests adverse to his relationship with the estate or the heirs. *Zimmer v. Gudmundsen* 260
2. It is the duty of an attorney at the time of retainer to disclose to the client all circumstances of his relations to the parties, and any interest in or connection with the

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3. It is unprofessional for an attorney to represent conflicting interests, except by express consent of all concerned after a full disclosure of the facts, and an attorney is deemed to represent conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. *Zimmer v. Gudmundsen* 260
4. The obligation of an attorney to represent a client with undivided fidelity, and not to divulge client's secrets or confidences, forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of his client with respect to which confidence has been reposed. *Zimmer v. Gudmundsen* 260
5. An attorney, after receiving a client's confidence, may not enter the service of others whose interests are adverse to such client and those in privity with him, in the same subject-matter to which the confidence relates, or in matters so closely allied thereto as to be, in effect, a part thereof. *Zimmer v. Gudmundsen* 260
6. An attorney owes to his client an undivided allegiance, and after he has been retained by, and received the confidence of, a client, he cannot, without free and intelligent consent of his client, given after full knowledge of all the facts and circumstances, act both for his client and for one whose interest is adverse to or conflicting with that of his client in the same general matter, however slight such interest may be, irrespective of the attorney's intention and motive. *Zimmer v. Gudmundsen* 260
7. Where an attorney at law assumes a confidential relationship, the party to whom he assumes such relationship has the right to believe and rely upon and be governed by the representations and conduct of such attorney. *Zimmer v. Gudmundsen* 260
8. In attorney's action against former client to recover compensation for services performed, evidence established that client had orally directed attorney to perform services involving client's interest in a decedent's estate and that a fair fee for the services was to have been agreed upon at a future time and justified verdict of $1,575. *McCarthy v. Pfost* 667
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Automobiles.

1. A motorist is guilty of actionable negligence and liable for resulting damages where he drives into center of the intersection of city streets without slackening his excessive speed or changing his course and runs violently into another automobile of another motorist who has the right of way and who is free from negligence. *DeBus v. Amen* 109
2. In an action to recover damages for personal injuries in an automobile collision, wherein evidence was conflicting, issues of negligence, contributory negligence and proximate cause were for the jury. *DeBus v. Amen* 109
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4. In action against the owner of a motor truck, which collided with a pedestrian on a crosswalk at the intersection of public streets, to recover damages for personal injuries, evidence *held* sufficient to sustain a verdict in favor of plaintiff on the issues of negligence and proximate cause. *Bancroft v. Kite* 178
5. The family purpose doctrine is not a restatement of the rules of principal and agent or master and servant, but is a development from those principles. *Jennings v. Campbell* 354
6. The family purpose doctrine is based upon public policy and is in the nature of an exception to rule that master or principal is not liable for negligence of servant or agent, unless in driving he is pursuing an employment or agency for the owner. *Jennings v. Campbell* 354
7. The family purpose rule does not require a plaintiff to be able to prove that driver of family purpose automobile had authority of the owner to drive the automobile

at the time and place of the accident. *Jennings v. Campbell* 354

8. Where father forbade son to drive family automobile, but on discovering son had driven to schoolhouse directed him to drive home, and son drove from schoolhouse on a pleasure trip not specifically authorized, during which fatal accident occurred, family purpose doctrine was not rendered inapplicable on ground that automobile was taken surreptitiously or in violation of orders. *Jennings v. Campbell* 354
9. Where testimony that driver of family purpose automobile did not have permission to use it is undisputed by other parol testimony, jury may test credibility of witnesses by their self-interest and weigh that testimony against facts from which permission to drive may be inferred. *Jennings v. Campbell* 354
10. In action for death of pedestrian when he was struck by automobile allegedly going out of control after striking truck wheel in intersecting streets, evidence was sufficient to take case to jury on truck owner's negligence in leaving tractor in the street at night without warning signals, removing a wheel of the same color as the highway from the truck and leaving wheel in the street in line of public travel, and leaving the wheel in the street at night without warning. *Grantham v. Watson Bros. Transportation Co.* 362
11. A guest in automobile is chargeable with contributory negligence for failure to exercise ordinary care to warn driver of approaching danger of which guest has knowledge, unless to a reasonably careful, cautious and prudent person it appears that the warning would be of no avail, or that the driver observed or should have observed the danger as well as the guest. *Fulcher v. Ike* 418
12. A guest in automobile having knowledge of approaching danger is chargeable with contributory negligence for failure to exercise ordinary care to protest to host if there is time and opportunity, unless it reasonably appears that such protest would go unheeded or would be of no avail. *Fulcher v. Ike* 418
13. The general rule making it negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by the lamps on the automobile, should embrace in the exceptions all situations wherein reasonable minds may differ

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15. Certificates of convenience and necessity issued by the Nebraska state railway commission to a common carrier by motor vehicle under the "grandfather" clause of the motor carrier act determine the operations of the carrier prior to the critical dates of the act. *Kassebaum v. Nebraska State Railway Commission* 645

16. In a proceeding to determine whether a common carrier by motor vehicle under the "grandfather" clause of the motor carrier act is operating within terms of his certificate, the state railway commission cannot go behind the certificate and show that the carrier's operations, prior to the critical period, were different from those set out in his certificate. *Kassebaum v. Nebraska State Railway Commission* 645

17. The state railway commission cannot classify common carriers by motor vehicle as regular and irregular route carriers, and cannot establish a formula of elements that determine to which classification a common carrier belongs, nor test the operations of a carrier according to such classification, but such carrier's operations must be tested by terms of his certificate. *Kassebaum v. Nebraska State Railway Commission* 645

18. The state railway commission is granted the power and directed, in issuing certificates, to specify the services that may be rendered by a common carrier by motor vehicles, and either the routes over which the fixed termini, if any, between which and the intermediate and off route points, if any, at which such carrier is authorized to operate, or in case of operations not over specified routes or between fixed termini, the territory within which such carrier is authorized to operate. *Kassebaum v. Nebraska State Railway Commission* 645

19. A certificate defining only the territory within which a common carrier by motor vehicle is authorized to operate is broader in scope than a certificate which is restricted to specified routes over which, the fixed termini between which, and intermediate and off route points at which a carrier is authorized to operate. *Kassebaum v. Nebraska State Railway Commission* 645

20. Where a common carrier by motor vehicle holds a certificate limited only as to territory in which he is to operate his certificate authorizes him to carry all of the authorized commodities tendered him within the authorized territory. *Kassebaum v. Nebraska State Railway Commission* 645
21. Where certificate of convenience and necessity granted to a common carrier by motor vehicle under the "grandfather" clause of the motor carrier act authorized carrier to operate "irregular routes from within a 25-mile radius of Hebron, to and from Omaha and vicinity and Lincoln and vicinity" a requirement of state railway commission that such carrier could not make regular trips was not a reasonable requirement which the commission may attach. *Kassebaum v. Nebraska State Railway Commission* 645
22. If needs of commerce require that freight be moved on certain days of each week by common carrier by motor vehicle, the regulations of the state railway commission should aid and not retard the movement. *Kassebaum v. Nebraska State Railway Commission* 645
23. The term "irregular routes" within certificate of convenience and necessity granted to a common carrier by motor vehicle under the "grandfather" clause of the motor vehicle act to operate over "irregular routes from within a 25-mile radius of Hebron to and from Omaha and vicinity and Lincoln and vicinity" means the carrier may follow those routes from the point of origin of a shipment to destination within territorial limits, which may be adequate, economical and efficient in movement of the commerce which he hauls, and within those limits carrier may follow the route of his choice, repeating trips over the same route if shipment which he hauls justifies it. *Kassebaum v. Nebraska State Railway Commission* 645
24. The term "irregular routes" within certificate of convenience and necessity granted to a common carrier by motor vehicle under the "grandfather" clause of the motor carrier act to operate over "irregular routes from within a 25-mile radius of Hebron to and from Omaha and vicinity and Lincoln and vicinity" does not require that a carrier move his shipments at irregular times but carrier may move his shipment as the needs of commerce require. *Kassebaum v. Nebraska State Railway Commission* 645

25. Where two automobiles approach an intersection from opposing directions at lawful rates of speed at approximately same time, the right of way to which is not otherwise controlled by statute or ordinance, the automomobile to the right has the right of way in the intersection. *Crandall v. Ladd* 736
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27. The negligence of husband, while driving automobile with his wife as a guest, may not be imputable to her, but she may be responsible for the consequences of her own negligence in failing to warn husband of known approaching danger and to protest for her own safety against his recklessness. *Crandall v. Ladd* 736
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29. "Gross negligence," within automobile guest statute, means negligence in a very high degree or the absence of even slight care in the performance of a duty. *James v. Krebek* 757
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30. Automobile guest suing host for personal injuries has burden of proving by preponderance of evidence that host was guilty of gross negligence. *James v. Krebek* 757
31. A motorist approaching a highway intersection must look to the right and left for approaching vehicles, and whether he has done his full duty in that regard may be a question of law where undisputed evidence or physical facts control, but otherwise it is ordinarily one of fact for the jury. *Roberts v. Carlson* 851
32. Where two motorists approach a highway intersection at the same time, the motorist approaching from the right has the right of way and may ordinarily proceed to cross the intersection, but if to an ordinarily prudent person in motorist's position to proceed would result in a collision, motorist should exercise ordinary care to prevent a collision, even to waiving his right of way. *Roberts v. Carlson* 851

33. Automobile driver who skidded into standing automobile in a blizzard, and who was traveling at a speed slower than another automobile that was able to stop at the same place within same distance, was not guilty of gross negligence within the meaning of the guest statute, and trial court properly granted motion for directed verdict. *Fairman v. Cook* 893

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1. Bankruptcy court may authorize a mortgagee to foreclose in a state court a mortgage on real estate of bankrupt mortgagor. *Prebyl v. Prudential Ins. Co* 532
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3. Usually there is sufficient consideration for promissory note if there is any benefit, profit or advantage to the promisor, or any loss, detriment or inconvenience to the promisee. *In re Estate of Tynan* 671
4. Term "execution" as employed in respect to promissory notes means both the signing and delivery of the bill or note, and mere signing is insufficient. *In re Estate of Tynan* 671
5. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. *In re Estate of Tynan* 671
6. "Value" as employed in respect to promissory notes means any consideration sufficient to support a simple contract, and an antecedent or preexisting debt constitutes value and is deemed such whether the instrument is payable on demand or at a future time. *In re Estate of Tynan* 671

Brokers.

1. In action for breach of agency contract to negotiate a lease, measure of recovery by agent is compensation he would have earned had the contract not been breached, and the action may be on contract or in damages for breach. *Calkins v. Yechout* 788
2. A landowner, having entered into an agency agreement with licensed real estate broker for leasing of his premises, could not secretly lease premises himself, and thereby terminate the broker's right to effect a lease, and by remaining silent permit the broker to expend further time and effort in attempting to obtain a lease, and escape liability for commissions under agency agreement. *Calkins v. Yechout* 788

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2. Evidence *held* sufficient to sustain conviction of breaking and entering a filling station with intent to steal. *Walls v. State* 748

Charities.

Where foreign corporations and an unincorporated foreign association took real estate under will and entered into contract with heir at law to dismiss an action to construe the will and pay heir for quitclaim deed and the heir agreed to claim only the bequest and devise given to him under the will, the will having been admitted to probate and decree of distribution to be made in conformity with the will, foreign corporations and unincorporated foreign association became vested with sufficient title to real estate to convey valid title to *bona fide* purchaser, and were not exempt from payment of inheritance tax, nor from acquiring interest in real estate in such manner. *In re Estate of Sautter* 42

Constitutional Law.

1. The habitual criminal law permitting imposition of a heavier sentence upon conviction of a felony upon proof of two prior felony convictions and sentences therefor is not violative of the state and federal Constitutions. *Rains v. State* 284
2. Courts are not to speculate upon reasons that prompted the legislature to indefinitely postpone bill proposing amendment to statute under which ordinance was enact-

ed nor to construe the ordinance in light of proposed amendment to the state law. *Village of Axtell v. Nebraska Hardware Mutual Ins. Co.* 657

3. In the absence of legislative definition, the meaning of doing business as used in an ordinance is a matter for judicial determination to be made primarily upon the particular facts and circumstances of each case. *Village of Axtell v. Nebraska Hardware Mutual Ins. Co.* 657
4. The legislature cannot properly waive the statute of limitations in a case where it has become a bar to the commencement of suit against state, unless constitutional provisions requiring uniformity as to class and prohibiting the granting of special privileges are satisfied. *Bordy v. State* 714
5. The legislature may not create liability on part of state as to a part of a class and waiver of immunity of state from liability must be in form of a statute operating uniformly on all within the class. *Bordy v. State* 714
6. The attempt of legislature to create liability on part of state for fraud by its officers or agents is ineffectual where it appears that such liability is created only for a favored few of a class. *Bordy v. State* 714
7. The provision of the Constitution prohibiting the taking or damaging of private property for public use without just compensation therefor is self-executing and no waiver of the immunity of the state from suit is required to bring action thereunder. *Bordy v. State* 714

Contracts.

1. The general rule is that, in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are, in the eye of the law, one instrument, and will be read and construed together as if they were as much one in form as they are in substance. *Blum v. Poppenhagen* 5
2. Language used in a contract prepared by one of the parties thereto, which is susceptible to more than one construction, should receive such construction as the party preparing it at the time supposed the other party would give to it, or such construction as the other party would be justified in giving to it. *Blum v. Poppenhagen* 5
3. Where correspondence by letter and telegram is the basis of a cause of action, it is the duty of the court to give to the words used in the correspondence their or-

dinary and popularly accepted meaning in the absence of explanation or qualification. *O'Shea v. Smith* 231
4. A valid contract in writing may be made by correspondence, and it is not necessary that there shall be a single paper signed by the parties containing all of the conditions of the contract. *O'Shea v. Smith* 231
5. A written contract is sufficiently made if all of the elements of a valid and binding contract are contained in correspondence passing between the parties. *O'Shea v. Smith* 231
6. Where a contractual relation exists by virtue of a written contract expressed in clear and unambiguous language, the court will not look further to construe it. *Smith v. United States Fidelity & Guaranty Co* 321
7. A preponderance of evidence sufficient to justify reformation of a contract in writing on ground of mutual mistake requires clear, convincing and satisfactory proof and must establish that mutual mistake involved is common to both parties, each laboring under the same misconception. *Smith v. United States Fidelity & Guaranty Co* 321

Corporations.
1. A foreign corporation which complies with the statute becomes a body corporate of the state, and, while such corporation may become a domestic corporation in many respects and treated as such for local purposes, in other respects it retains the character of a foreign corporation and its status within the state is not equivalent to that which it would have had, were it created a separate corporation therein. *In re Estate of Sautter* 42
2. The domestication of a foreign corporation is nothing more than extension to it of the privilege of license as a foreign corporation to do business in the state and its susceptibility to service within the contemplation of statute. *In re Estate of Sautter* 42

Counties.
1. The statutory provisions authorizing the board of county commissioners to pay the premiums on bonds of officers and employees designated therein, which have been approved by the board, are mandatory in character and create a binding obligation against the county. *Douglas County v. Belitz* 376
2. A county commissioner acts quasi judicially in passing upon claims against the county whenever he is required

to determine questions of fact and exercise his best judgment and discretion upon the evidence before him. *Allen v. Miller* 469

3. Members of a county board are not ordinarily liable to individuals for their official acts, unless they wilfully or negligently caused damage. *Allen v. Miller* 469
4. Statutes imposing liability upon members of a county board for acts in connection with their official business are in derogation of the common law and are to be strictly construed. *Allen v. Miller* 469
5. Where township organization has been adopted in a county and the county divided into supervisor districts, and after a state and federal census it appears from a general election that the inhabitants have become unequal in number, the statute providing that the county supervisor districts may be changed after each state and federal census imposes a mandatory duty on the board to redistrict the county into districts and as nearly as possible with regular boundary lines and each district to contain as nearly as possible the same number of inhabitants as any other district. *State, ex rel. Rowe, v. Emanuel* 583
6. The obligation to do justice rests upon all persons, natural or artificial, and if a county obtains money or property of others without authority, the law, independently of statute, will compel restitution or compensation. *City of Grand Island v. Willis* 686
7. Contract between county and auditor whereby auditor agreed to make a thorough and complete investigation and verification of all matters pertaining to records of county officials, as requested by grand jury, or attorney general, and report, was not void on ground that services were required to be performed by law by either state auditor or county comptroller. *Campbell v. Douglas County* 773
8. County was liable for reasonable value of services rendered by auditor under contract between auditor and county whereby auditor agreed to make a thorough and complete investigation and verification of all matters pertaining to records of officials of county as requested by grand jury or attorney general, and make report. *Campbell v. Douglas County* 773

Courts.

1. The county court has exclusive and original jurisdiction to fix, determine and assess inheritance taxes and to pro-

rate the same proportionately to the taxable interests of the heirs at law, legatees, devisees or beneficiaries. *In re Estate of Sautter* 42

2. The jurisdiction of the district court is general, original and appellate in all matters civil and criminal, except as otherwise provided by law. *Fisher v. Keeler* 79
3. A district court acquires jurisdiction of an appeal from an order in a probate proceeding if within 40 days from date of order a transcript thereof and of the proceedings relative to it is filed with the clerk of the district court, and if within 30 days from the date of such order the bond upon appeal, required by statute, has been executed and filed. *In re Estate of Jurgensmeier* 188
4. A county court has exclusive jurisdiction of the probate of wills and the administration of estates. *Zimmer v. Gudmundsen* 260
5. Nebraska courts are without jurisdiction over subject-matter in an action in ejectment when the real estate involved is not a part of the Nebraska domain. *First Nat. Bank v. McFerrin* 617, 627
6. A county court has original and exclusive jurisdiction of all guardianship matters, including appointment of guardian and final settlement of accounts of such guardian. *Olsen v. Marsh* 800
7. It has not been error to permit evidence of an award of appraisers in condemnation to be submitted to the jury on appeal to the district court from such award. *Langdon v. Loup River Public Power District* 859
8. Henceforth it shall not be proper to permit evidence of an award of appraisers in condemnation to be submitted to the jury on appeal to the district court from such award and the proper and approved practice shall be, for the purpose of preserving the right of the landowner to interest, for the court, after verdict, to compute and add the interest to the judgment in those cases where the verdict exceeds the award of the appraisers. *Langdon v. Loup River Public Power District* 859

Criminal Law.

1. Where there was no showing that accused could not properly prepare his defense prior to the time set for trial, denial of continuance of case was not prejudicial error. *Bassinger v. State* 93
2. Photographs of scene of murder, showing body of deceased, are admissible if they tend to throw light on or illustrate any controverted issue. *Bassinger v. State* 93

3. Where an article of clothing was shown to have been worn by accused before and after murder was committed, and expert testified that there were blood spots on the clothing, but on cross-examination admitted he did not know whether the spots were human blood or when the blood got there, admission of the clothing with indications of removal of spots was not prejudicial error. *Bassinger v. State* 93
4. Where evidence established that murder was committed by using a hammer, admission of hammer handle which was found at scene of the crime and was identified as handle from hammer in possession of accused prior to the murder was not error because of the fact that the handle was not found until some time after the crime had been committed. *Bassinger v. State* 93
5. In a criminal case where there is no satisfactory showing that the accused could not have a fair trial in the county where the crime was committed, it was not prejudicial error to deny a change of venue. *Bassinger v. State* 93
6. Under the statute, conviction for murder in the first degree was required to be affirmed where examination of entire cause disclosed that no substantial miscarriage of justice occurred, and that there was no prejudicial error. *Bassinger v. State* 93
7. In order to review alleged errors occurring during the trial of a criminal case, such errors must be pointed out to the trial court in the motion for new trial and a ruling obtained thereon. *Luster v. State* 253
8. Alleged errors not brought to the attention of the trial court in motion for new trial will not be considered on appeal. *Luster v. State* 253
9. Where the evidence in a criminal case is acutely conflicting and from its consideration different minds may reasonably arrive at different conclusions, the weight to be given thereto is a question for the jury. *Luster v. State* 253
10. The supreme court will not interfere with a conviction based on conflicting evidence unless it is insufficient as a matter of law. *Luster v. State* 253
11. A judgment or sentence of a court of record in a criminal case is supported by the usual presumption of validity and regularity, and failure to specify the offense for which defendant was convicted will not make a certified copy of the judgment inadmissible in prosecution where the habitual criminal law is operative. *Rains v. State* 284

12. In absence of evidence to the contrary, it will be presumed that the provisions of statute with reference to the commitment of convicted persons who have been sentenced have been properly performed by the officers charged with so doing. *Rains v. State* 284
13. When an offense is not designated by the statute which creates it, either as a felony or misdemeanor, but its punishment is prescribed, the character of the offense is determined by the maximum punishment which the statute authorizes. *Rains v. State* 284
14. The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the guilt and justifies heavier penalties. *Rains v. State* 284
15. Allowance of amendment to information charging sodomy by changing date of commission of offense to earlier date within limitation period was not error prejudicial to defendant. *Sledge v. State* 350
16. It is not prejudicially erroneous to allow an amendment to an information where there is a variance between the information and the proof as to a matter of description, where it would have been proper to submit the case to a jury without amendment notwithstanding the variance. *Sledge v. State* 350
17. Whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he were the principal offender. *Sledge v. State* 350

Damages.

In an action to recover damages for causing a collision between motor vehicles in an intersection of streets, evidence *held* sufficient to support a verdict for $2,500 in favor of plaintiff. *DeBus v. Amen* 109

Death.

1. In death action, where evidence was sufficient to take plaintiff's case to jury, trial court erred in directing nonsuit for a defendant. *Grantham v. Watson Bros. Transportation Co.* 362
2. Where there is evidence tending to show contributory negligence, such question should be submitted to jury. *Nichols v. Havlat* 534
3. A presumption of death arises from the continued and unexplained absence of a person from his home or place of residence for seven years, where nothing has been heard from or concerning him during that time by those

who, were he living, would naturally hear from him. *Banks v. Metropolitan Life Ins. Co.* 823

4. Where a person has been away from his home for a period of seven years, his absence is unexplained and nothing has been heard from or concerning him during that time by those who, were he living, would naturally hear from him, proof of diligent search and inquiry is not required to establish the presumption of death. *Banks v. Metropolitan Life Ins. Co.* 823
5. Whether a presumption of death arises from seven years' continued absence from one's usual place of residence depends upon the facts and circumstances of each case. *Banks v. Metropolitan Life Ins. Co.* 823
6. Where there is an unexplained disappearance of a person, there is a presumption that life continues for the first seven years, after which a presumption of death arises. *Banks v. Metropolitan Life Ins. Co.* 823
7. The presumptions of life and death are in the nature of conclusions of ultimate fact which the law makes when a jury find that certain elemental facts exist. *Banks v. Metropolitan Life Ins. Co.* 823
8. The presumptions of life or death are rebuttable. *Banks v. Metropolitan Life Ins. Co.* 823
9. The burden of overcoming the presumption of life or death rests upon the one asserting a contrary conclusion to be true. *Banks v. Metropolitan Life Ins. Co.* 823

Descent and Distribution.

1. The administrator in a contest to establish heirship and distribution of an estate of a decedent is not an adverse party with a duty to defend against one claiming to be the common-law wife of the deceased. *Zimmer v. Gudmundsen* 260
2. One assuming the position of heirs in the defense of one claiming to be the common-law wife of the deceased was entitled to recover the proper expense of the litigation, especially where the litigation is beneficial to the interests represented. *Zimmer v. Gudmundsen* 260

Divorce.

1. In the absence of legal collusion, which the court may meet on its own motion, the prevailing spouse may have a decree of divorce in his or her favor vacated and set aside as a matter of right, if application therefor is made within six months after rendition, unless some unconscionable result would be produced thereby. *Dudgeon v Dudgeon* 82

2. Collusion which is proscribed by divorce statute consists of an agreement, express or implied, for the suppression of facts or the simulation or fabrication of evidence material to the issue of existence of lawful grounds for a divorce. *Dudgeon v. Dudgeon* 82
3. Society has an interest in the marital status, its continuance and its dissolution, and divorce is not favored or encouraged, but is discouraged. *Dudgeon v. Dudgeon* 82
4. The trial court has power to set aside a decree of divorce upon application therefor filed within six months after decree is rendered, and a decree does not become final upon the mere passage of such period if application to set aside decree is pending. *Dudgeon v. Dudgeon* 82
5. If an innocent spouse is induced to procure a decree of divorce by fraud or duress, he or she will not be forced to accept a dissolution of the relationship, but may have the decree set aside upon application therefor made before the decree becomes final. *Dudgeon v. Dudgeon* 82
6. Demand for physical examination of a party should be made before commencement of trial. *O'Donnell v. O'Donnell* 706
7. Demand for physical examination of a party which is first made during trial is addressed to sound discretion of trial court, and unless discretion has been abused denial thereof will not constitute reversible error. *O'Donnell v. O'Donnell* 706
8. Statute forbidding physician or surgeon to testify as to confidential matters constituting privileged communications applies to hospital records made by physician or surgeon or under his direction. *O'Donnell v. O'Donnell* 706
9. In fixing amount of alimony, courts will take into consideration the estate of each party when married and respective contributions since marriage as well as duration of marriage, and conduct of each party leading up to divorce. *O'Donnell v. O'Donnell* 706

Drains.

A landowner who, with his predecessors in title, has accepted the benefits of a legally organized drainage system for over 30 years, and has paid all preceding assessments of taxes against his property for the construction, maintenance and repair of said drainage system, is estopped to question the validity of an order making an eleventh supplemental assessment which was specifically directed by the supreme court. *Engles v. Drainage District No. 1* 876

Easements.

An easement by prescription cannot be acquired except by open, notorious, exclusive and adverse user for ten years. *Dawson County Irrigation Co. v. Stuart* 428

Ejectment.

1. In action in ejectment involving land on east side of Missouri river, if it were shown that the land was cut off from territory of Nebraska in 1856 or 1857, Nebraska district court had jurisdiction of the subject-matter of the action. *First Nat. Bank v. McFerrin* 617,627
2. In action in ejectment where there was issue regarding whether lands involved were within state of Nebraska, Nebraska district court had jurisdiction to try that issue. *First Nat. Bank v. McFerrin* 617,627

Embezzlement.

Employees of county clerk are not officers or persons charged by law with the collection and safe-keeping of public money within embezzlement statute applying to officers or other persons charged with collection, receipt, safe-keeping, transfer or disbursement of public money. *State v. Boatman* 589

Eminent Domain.

1. Waters previously appropriated for power purposes may be taken and appropriated for irrigation purposes, upon due and fair compensation therefor, and cannot be appropriated arbitrarily for irrigation purposes without just compensation. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
   Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
2. Where plaintiff alleges that condemnation proceedings and the award therein are null and void, but he elects to ratify said award, such election is a ratification of the condemnation proceedings as regards plaintiff's right to participate in distribution of award. *Olander v. City of Omaha* 340
3. The award of appraisers in proceeding for condemnation of land by department of roads and irrigation for highway purposes may be reviewed in district court. *Hoesly v. Department of Roads and Irrigation* 383
4. The award of appraisers in proceeding for condemnation of land by the department of roads and irrigation

for highway purposes may be reviewed either by appeal or by petition in error. *Hoesly v. Department of Roads and Irrigation* 383

5. Where party having lawful right to enter and take lands by eminent domain for public use by paying just compensation therefor does not enter in conformity to law, but owner waives such feature and treats it as if the law had been followed with only the question of compensation to be settled, the law of compensation under eminent domain applies as if condemnation proceedings were begun and not yet completed, and action for just compensation is not barred except by adverse possession for ten years. *Dawson County Irrigation Co. v. Stuart* 435

Equity.

1. A litigant, asking affirmative equitable relief, will be required to do justice himself with regard to any equity arising out of the subject-matter of the action in his adversary's favor, and the statute of limitations is no bar to imposition of such condition. *Dawson County Irrigation Co. v. Stuart* 428
2. The maxim that "Equity follows the law" in its broad sense means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common or statute law. *Dawson County Irrigation Co. v. Stuart* 428
3. The maxim that "Equity follows the law" is strictly applicable whenever the rights of the parties are clearly defined and established by law, especially when defined or established by constitutional or statutory provisions. *Dawson County Irrigation Co. v. Stuart* 428
4. Where claim for damages for taking of land for irrigation canal and reduction of value of adjacent lands not taken is barred by statute of limitations, the maxim that "Equity follows the law" prevents assertion of such claim by answer in irrigation company's equity suit to quiet title to easement for canal. *Dawson County Irrigation Co. v. Stuart* 428
5. Equity delights to do justice and that not by halves, and when equity once acquires jurisdiction it will retain it so as to afford complete relief. *Hardt v. Orr* 460

Estoppel.

1. Equitable estoppel will be applied where the wisdom and justice of the principle are founded upon equity, morality and justice in accordance with good conscience, honesty and reason. *City of Grand Island v. Willis* 686

2. A county may be estopped by its acts in failing to do justice and equity and estoppel will apply to such county when it is established that the county in its acts and conduct is retaining money to which it is not entitled. *City of Grand Island v. Willis* 686

Evidence.

1. In condemnation proceeding, evidence as to price paid for lands purchased from other property owners is not competent on question of value of land taken, especially where the portions and selling price are designated by counsel to witnesses on cross-examination, and where the record fails to show that such other lands were similar to or used for the same purpose as the land taken. *Rushart v. Department of Roads and Irrigation* 301
2. Mortgage executed by three joint tenants is the best evidence of the liability of a joint tenant thereunder and of the amount to be taken from his part of the proceeds of condemnation award in payment of mortgage debt. *Olander v. City of Omaha* 340
3. A warranty deed conveying property to three persons as joint tenants and not as tenants in common and vesting entire title in the survivor is the best evidence of interest and title of one of the parties mentioned in the deed. *Olander v. City of Omaha* 340
4. In action to recover disability benefits under life policy, parol evidence is admissible to prove that the misstatements in application for policy were inserted by insurer's agent instead of truthful statements of insured who was without knowledge of the discrepancies. *Gillan v. Equitable Life Assurance Society* 497
5. In proceeding in nature of appeal from decision of board of equalization refusing to reduce valuation of farm land for purpose of taxation, evidence of fair price of other farm land in the immediate vicinity was not admissible to prove the fair market value of the taxpayer's land. *Swanson v. Board of Equalization* 506
6. In condemnation where the value of real estate is in issue, evidence of particular sales of other land may not be introduced as independent proof on the question of value, unless foundation is laid indicating that prices paid represented the market or going value of such land, that they were made at or about the time of the taking by condemnation and that the land so sold was substantially similar in location and quality to that condemned. *Langdon v. Loup River Public Power District* 859

7. Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of land condemned. *Langdon v. Loup River Public Power District* 859
8. The testimony of a witness who had no reasonable time, means, distance, or opportunity to formulate a basis for an opinion as to the speed of an automobile was insufficient to sustain a finding of excessive speed in the absence of other evidence. *Fairman v. Cook* 893

Executors and Administrators.
1. Where executor selling realty pursuant to testamentary power purchases the same either directly or indirectly, the sale may be avoided. *In re Estate of Jurgensmeier* 188
2. Where executor selling realty pursuant to testamentary power purchases the same either directly or indirectly, the sale is voidable even though he paid full value for the realty and no actual fraud was intended. *In re Estate of Jurgensmeier* 188
3. The rule making voidable executor's sale of realty to himself is applicable to a sale to his wife. *In re Estate of Jurgensmeier* 188
4. Where executor exercising testamentary power to sell realty sold the same to his wife, evidence established that the executor was not only interested in the purchase of the realty but that he acted in participation with his wife indirectly to purchase the same, and the sale was voidable. *In re Estate of Jurgensmeier* 188
5. Where executor sold realty to his wife, the fact that some of the heirs ratified the executor's sale did not preclude a repudiation by the others. *In re Estate of Jurgensmeier* 188
6. Evidence established that heirs, filing objections to executor's final account because of executor's sale of realty to his wife, had not ratified the sale. *In re Estate of Jurgensmeier* 188
7. Where executor in exercise of testamentary power to sell realty sold same to his wife for a price that was less than its true value, on exceptions to his account in probate court, the executor was chargeable with the difference between such inadequate price and the true value of the realty so sold. *In re Estate of Jurgensmeier* 188

8. At common law, widow's right to allowance did not survive widow's death. *In re Estate of Samson* 556
9. In equity, assets which pass into the hands of an executor are treated as trust funds, and held by him for the benefit of all persons entitled thereto. *State, ex rel. Nebraska State Bar Ass'n, v. Merten* 780
10. The district court is one of general jurisdiction and its powers are ample in cases of fraud by executors to compel the proper application of trust funds committed to their care. *State, ex rel. Nebraska State Bar Ass'n, v. Merten* 780

False Imprisonment.
1. One who charges that he has been falsely imprisoned must show by evidence that he was falsely imprisoned by the person or persons charged, or adduce evidence from which it may be reasonably inferred that he was so imprisoned. *Jonson v. Heller* 380
2. Evidence of participation by store owner and one in charge of store, in false imprisonment of an employee of the store by police department in connection with an investigation of an alleged theft of merchandise, was insufficient for the jury. *Jonson v. Heller* 380

Fraud.
1. The question of fraudulent intent is one of fact and not of law. *Luikart v. Bosse* 157
2. Defrauded party must prove that his adversary made false representation of material facts with intent that it should be acted on, and that it was acted on by defrauded party to his damage, and that defrauded party was ignorant of its falsity and believed it to be true. *Welch v. Reeves* 171
3. The measure of damages for fraud inducing execution of a contract is generally the difference between the article or thing purchased if it had been as represented and its actual value. *Welch v. Reeves* 171
4. Fraud in its generic sense, especially as word is used in courts of equity, comprises all acts, omissions and concealments involving a breach of legal or equitable duty and resulting in damage to another. *Fisher v. Keeler* 728

Fraudulent Conveyances.
1. Under statute relating to conveyances to defraud creditors, such a conveyance is good as between the parties and void only as to such creditors as attack it. *Filley v. Mancuso* 106

2. In judgment creditor's proceedings in equity in nature of a creditor's bill against debtor, his brother-in-law, and debtor's wife to vacate conveyances from the debtor to the brother-in-law and from the latter to wife, evidence *held* insufficient to sustain defendants' burden of proving *bona fides* of conveyances by a preponderance of evidence. *Luikart v. Bosse* 157
3. A conveyance is a fraudulent conveyance when its object or effect is to defraud another, or the intent with which it is made is to avoid some duty or debt due by or incumbent upon the party making transfer. *Luikart v. Bosse* 157
4. A conveyance from a husband to his wife is presumptively fraudulent as to an existing creditor, and in litigation between the creditor and grantee on that issue, the burden is on the latter to establish the good faith of the transaction by a preponderance of the evidence. *Luikart v. Bosse* 157
5. Where testimony relied upon to show good faith with respect to a conveyance from a husband to his wife is given by interested relatives, the reasonableness or unreasonableness of their evidence bears considerable weight in arriving at a just conclusion. *Luikart v. Bosse* 157
6. Court of equity will not aid a fraudulent grantor to recover from grantee property or its proceeds transferred in fraud of creditors. *Fisher v. Keeler* 728
7. Object of rule that equity will not aid a fraudulent grantor to recover property or proceeds transferred in fraud of creditors is not to protect the fraudulent grantee, but to protect society and its purpose cannot be achieved without allowing the grantee to retain his ill-gotten gains. *Fisher v. Keeler* 728
8. If plaintiff can make out his case without disclosing alleged fraud, defendant will not be allowed to show, as a reason why plaintiff should not recover, the fraud in which defendant himself participated. *Fisher v. Keeler* 728

Garnishment.

1. In making affidavit for garnishment, fact that affiant is plaintiff, his agent or attorney, should be sworn to as other matters of fact and not inserted as a mere recital, but, where the whole record taken together discloses that affiant is plaintiff, or agent or attorney of plaintiff, it is sufficient. *Crawford State Bank v. Murphy* 795

2. It is unnecessary that written notice to garnishee to appear in court be issued and signed by officer leaving notice with garnishee. *Crawford State Bank v. Murphy* 795
3. Proceedings in garnishment are in the nature of notice of attachment to party in actual possession of property, and from time he receives such notice he becomes a trustee in respect to debtor's property. *Crawford State Bank v. Murphy* 795
4. Failure to tender garnishee fees excused garnishee's failure or refusal to appear and answer, but did not discharge garnishee from all liability nor justify dismissal of proceedings, since court retained jurisdiction if garnishee had any property of defendant in its possession which officer could not come at. *Crawford State Bank v. Murphy* 795

Guardian and Ward.

1. The death of a ward necessarily terminates the guardianship, and thereupon all powers and duties of the guardian cease, except the duty, which remains, to make a proper accounting and settlement in the probate court. *Keefe v. Grace* 330
2. A loan by minor's guardian to himself is not proper investment of trust fund, and guardian is liable to ward for full amount borrowed. *Olsen v. Marsh* 800
3. Sureties on guardian's bond are concluded by county court's decree, duly entered after hearing on accounting or final settlement, as to amount of guardian's liability, in absence of fraud, though sureties were not parties in accounting. *Olsen v. Marsh* 800
4. The liability of surety on guardian's bond is identical with that of the guardian, and surety cannot avoid liability for ward's money, not accounted for by guardian, because of ward's inability to prove date on which guardian converted money. *Olsen v. Marsh* 800
5. In action on guardian's bond after judgment against guardian, only questions open to sureties ordinarily are in reference to making of bond, legal sufficiency thereof, and extent of its obligation, and amount due ward from guardian cannot be relitigated by sureties. *Olsen v. Marsh* 800
6. After full settlement by guardian with one of two wards, surety on guardian's bond was liable in full amount of bond for remaining ward's funds not accounted for by guardian. *Olsen v. Marsh* 800

7. The surety on guardian's bond is bound by whatever binds the guardian up to limit of bond furnished. *Olsen v. Marsh* 800
8. In action on guardian's official bond, surety thereon is liable for interest from date of guardian's breach of condition on amount then recoverable. *Olsen v. Marsh* 800

Highways.
1. One injured while momentarily standing in a highway and when not in motion is not *per se* guilty of contributory negligence, and the offending party is not exonerated from all duty and from liability by the fact that the injured party is not in motion. *Grantham v. Watson Bros. Transportation Co* 367
2. One causing an obstruction to be placed in a highway must use ordinary care to prevent injury to others. *Grantham v. Watson Bros. Transportation Co* 367
3. A bond given by highway construction contractor to state to secure payment by contractor of all just claims for material, lubricants, oil and gasoline used or consumed in construction of the work and for payment of all laborers and mechanics for all labor performed, is not limited to default of contractors, but is for the benefit of all those furnishing labor and materials in performance of the contract, and such persons have a right to sue on the bond in their own names. *Peter Kiewit Sons' Co. v. National Casualty Co* 835
4. The statute requiring in case of public improvements a bond conditioned for payment for labor and material actually used in performing contract, was intended to obligate a surety company to pay for material actually used in performing the contract, and is in its nature remedial. *Peter Kiewit Sons' Co. v. National Casualty Co.* 835

Homicide.
1. Where evidence justified jury in finding accused guilty of murder in the first degree, submission of question whether accused was guilty of murder in the second degree was not prejudicial error. *Bassinger v. State* 93
2. Where an information charges that the accused did strike, beat, wound and maim the deceased causing his death, and the state offers evidence showing that the murder was committed by the use of a hammer such as was shown to have been in the possession of the accused a few hours prior to the murder, and that the handle of that hammer was found at the scene of the crime, the

state was not required to prove that the murder was committed with that hammer and that hammer only. *Bassinger v. State* 93

Indians.

The act of congress relating to laying out and opening of roads across certain Indian reservations in Nebraska is an act complete and independent in itself and, on compliance therewith by the state, the taking of restricted lands of Indians is authorized. *Bordy v. State* 714

Indictment and Information.

1. Crimes necessary to be charged and proved to bring a person within the habitual criminal law must not only be felonies, but they must be felonies in which the defendant was sentenced and committed to prison for one year or more. *Rains v. State* 284
2. An information which charges two prior convictions and prison sentences for terms of not less than one year each, and charges a crime which is a felony, meets the requirements of the habitual criminal law. *Rains v. State* 284
3. A variance in the proof from an indictment or information for an offense as to name or description of any person described, or the description of any matter or thing named, is not ground for acquittal, unless the trial court finds that such variance is material to merits of the case or may be prejudicial to defendant. *Sledge v. State* 350
4. Where time is not an ingredient of a crime, a variance between the information and proof is not fatal, if date proved is within statute of limitations. *Sledge v. State* 350

Insurance.

1. Generally, an insurer may waive a provision that a health and accident policy shall not cover any person more than 65 years of age. *Lipe v. World Ins. Co* 22
2. Where an insurance company over a period of years sends premium notices to an insured who is past the inhibited age provided in the policy, and the insurer knew the insured was beyond the inhibited age but continued to treat the contract as of binding force by accepting and retaining the premiums paid, such forfeiture or condition is waived, and the policy should thereafter be construed as to the parties thereto for the period covered by the premiums thus paid and collected as though such condition never existed. *Lipe v. World Ins. Co* 22

3. The provision of an accident and health insurance policy that "the insurance under this policy shall not cover any person under the age of sixteen years nor over the age of sixty-five years" constitutes a condition or limitation for the benefit of the insurer and not the insured, and is subject to waiver by insurer. *Lipe v. World Ins. Co.* 22
4. Under other insurance clause of fire insurance policy, the procurement of additional insurance without the insurer's consent did not render the policy void, but only voidable at the election of the insurer. *Slafter v. New Brunswick Fire Ins. Co.* 209
5. Breach of condition in an insurance policy shall not avoid the policy, nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss. *Slafter v. New Brunswick Fire Ins. Co.* 209
6. An insurance policy is a contract, and where there is no uncertainty as to its meaning and it is legal and not opposed to public policy, it will be enforced as it is made. *Smith v. United States Fidelity & Guaranty Co.* 321
7. Terms used in an insurance policy are to be taken in their plain and popular sense. *Smith v. United States Fidelity & Guaranty Co.* 321
8. In construing a written instrument for purpose of ascertaining intention of parties, resort must be had to the instrument as a whole and, if possible, effect must be given to every part thereof. *Smith v. United States Fidelity & Guaranty Co.* 321
9. Parties to a contract of insurance may contract for any lawful coverage, but insurer has the right to limit its liability and to impose restrictions and conditions upon its contractual obligations not inconsistent with public policy or statute. *Smith v. United States Fidelity & Guaranty Co.* 321
10. Accident resulting in bodily injuries to motorist which occurred after insured had finished installation of a culvert and had removed all equipment from scene of work and state had accepted such work did not occur "during the progress of the work" within the meaning of contractor's public liability policy which imposed on insurer the duty to defend insured against claims for accidents except those which did not occur during the progress of the work, and insurer was under no obligation to reimburse insured for expense of defending claim. *Smith v. United States Fidelity & Guaranty Co.* 321

11. Where insured, in order to obtain reinstatement of industrial life policy, warranted that statements made in application relative to health were true, but questions were not truthfully answered and insurer was induced to reinstate insured at a time when he was afflicted with a fatal disease, insured's recovery under policy was limited to premiums paid. *Wainright v. Washington Nat. Ins. Co.* 372
12. The fact that insurer makes an investigation of its own relative to the insurability of applicant does not absolve applicant from speaking the truth in his application, nor lessen the right of insurer to rely on insured's statements as to his physical condition. *Wainright v. Washington Nat. Ins. Co.* 372
13. Statute providing that breach of warranty or condition in any insurance policy shall not avoid the policy unless such breach shall exist at the time of loss and contribute to the loss has no application to a breach which could only arise after the loss occurred. *Clark v. State Farmers Ins. Co.* 483
14. Statute providing that breach of warranty or condition in any insurance policy shall not avoid the policy unless such breach shall exist at time of loss and contribute to loss relates to question of recoverable loss and not to question of procedure to be followed in collecting for the loss after it has occurred. *Clark v. State Farmers Ins. Co.* 483
15. Statute providing that breach of warranty or condition in any insurance policy shall not avoid policy unless such breach shall exist at time of loss and contribute to loss does not deny an insurer the right to rely on conditions of a policy which insured is required, as a condition of recovery, to perform after loss has occurred. *Clark v. State Farmers Ins. Co.* 483
16. In an action to recover benefits under life insurance policy for permanent total disability, wherein insurer set up defense that insured made false and material statements in application, insurer has burden to prove that statements were untrue, were made knowingly with fraudulent intent to mislead and deceive insurer, that they were material to the risk and that insurer relied on them. *Gillan v. Equitable Life Assurance Society* 497
17. In an action to recover disability benefits under life policy, whether insured was guilty of fraud in procuring policy by making false statements in application, or

whether misstatements in application were inserted by insurer's agent, was a jury question. *Gillan v. Equitable Life Assurance Society* 497

18. In negotiations to procure life policy providing for disability benefits, soliciting agent and examining physician are agents of the insurer and misstatements inserted by them in answers to questions in application, without applicant's knowledge or consent, are not binding on the applicant. *Gillan v. Equitable Life Assurance Society* 497

19. Where insured recovered judgment for disability benefits under life policy, court was authorized by statute to allow the insured a reasonable attorney's fee as an item of cost. *Gillan v. Equitable Life Assurance Society* 497

20. Where the evidence is conflicting as to the amount of damages sustained as the result of a loss covered by a policy of hail and windstorm insurance, it presents a question for the jury. *Parish v. County Fire Ins. Co.* 504

21. Where a fraternal beneficiary society issues a beneficiary certificate insuring against accidental death, the constitution and by-laws of such society constitute a part of the insurance contract. *Young v. Order of United Commercial Travelers* 566

22. Where parties to a beneficiary certificate insuring against accidental death are in different states when the contract is made, the state where the last act was performed necessary to the validity of the contract is the place where the contract was entered into. *Young v. Order of United Commercial Travelers* 566

23. Where accident insurance certificate insuring against accidental death provided that it was in force at 12 o'clock noon on the day it was dated and signed at the fraternal beneficiary society's home office, the law of the state in which the home office was located became a part of the contract, since that state was the place where the last act necessary to validity of contract was performed. *Young v. Order of United Commercial Travelers* 566

24. Where a provision in contract of insurance, valid in the foreign state where the contract was entered into, is a bar to a recovery, such provision is required to be enforced in Nebraska under the full faith and credit clause of the Constitution of the United States, although such provision is void under the law of Nebraska. *Young v. Order of United Commercial Travelers* 566

25. Fact that insurance was written on property situated within village was indicative that corporation writing insurance was doing business in village within ordinance levying tax on fire insurance company so doing business. *Village of Axtell v. Nebraska Hardware Mutual Ins. Co.* 657
26. Fact that corporation writing fire insurance contracts to do further business in village, to wit, adjust losses there, in the event losses occur, was indicative that it was doing business there within meaning of ordinance levying tax on fire insurance company so doing business. *Village of Axtell v. Nebraska Hardware Mutual Ins. Co.* 657
27. Soliciting members and receiving considerable sums of money for assessments constitute doing business in a village. *Village of Axtell v. Nebraska Hardware Mutual Ins. Co.* 657
28. Fact that none of several acts or transactions considered separately may constitute doing business was not conclusive on question of whether fire insurance company was doing business in village within ordinance levying tax on corporation so doing business, but the combined acts and circumstances were to be considered. *Village of Axtell v. Nebraska Hardware Mutual Ins. Co.* 657
29. As used in an ordinance levying tax on fire insurance company doing business within village, doing business implies a fair measure of permanency and continuity of business acts and purposes, in the sense that they may be distinguished from casual, occasional or isolated acts or business transactions. *Village of Axtell v. Nebraska Hardware Mutual Ins. Co.* 657
30. Doing business as used in ordinance levying tax on fire insurance company doing business within village refers to doing of some of the business that is ordinarily and customarily done by the corporation in carrying out purpose for which it was created, as distinguished from acts that are within power of the corporation. *Village of Axtell v. Nebraska Hardware Mutual Ins. Co.* 657
31. Presence of an agent of fire insurance company within village, soliciting business which is later consummated by execution of policies and their delivery to the policyholders within village, a course of action which was continuous over a period of years, was indicative, if not determinative, that corporation was doing business in village. *Village of Axtell v. Nebraska Hardware Mutual Ins. Co.* 657
32. A broader meaning is attributable to the words "doing business" when used in a tax act, from the fact that the

corporation receives the protection of local laws and institutions such as a water system, fire fighting equipment and fire department. *Village of Axtell v. Nebraska Hardware Mutual Ins. Co.* 657

Joint Tenancy.

1. If the purpose to create a joint tenancy is clearly expressed in a deed, the intent of the parties will control, and a joint tenancy with right of survivorship will be created. *Olander v. City of Omaha* 340
2. The right to create title in real estate by joint tenancy, when clearly and definitely expressed in the conveyance, has never been abridged in Nebraska. *Olander v. City of Omaha* 340
3. Where conveyance failed to show that joint tenants in possession of real estate did not improve such real estate or pay cost of improvements thereon, and that one of the joint tenants when residing thereon did not improve such real estate, but that all of such joint tenants have an equal interest, all of such joint tenants have an equal ownership in the improvements on said real estate. *Olander v. City of Omaha* 340
4. The statute providing that a deposit made in the names of two or more persons payable to either or their survivors, or any part thereof, or increase thereof, may be paid to either of such persons or to the survivors, was intended for the protection of the bank and fixes the property rights of the persons named, unless the contrary appears from the terms of the deposit. *McConnell v. McCook Nat. Bank* 451
5. Under statute providing that a deposit made in the names of two or more persons payable to either or their survivors or any part thereof or increase thereof may be paid to either of such persons or to the survivors, when a deposit is made in a bank payable to either of two or more persons, either expressly as joint tenants with right of survivorship or without the qualifying words, upon death of one payee the deposit is payable to the survivors of those named in the deposit. *McConnell v. McCook Nat. Bank* 451
6. Application of statute providing that a deposit made in the names of two or more persons payable to either or their survivors may be paid to either of such persons or to the survivors is not limited to payees of certain relationships, but the legislature has left to the depos-

itor the determination of who shall receive the benefits of the statutes. *McConnell v. McCook Nat. Bank* 451

Judgment.

1. A judgment on the facts in a former suit is a bar to a second action involving the same facts between the same parties and those in privity with them. *In re Estate of Vetter* 167
2. A judgment on facts affecting a party not in interest has no binding force and effect in and upon parties in interest who were not parties to the action in which the judgment was rendered. *In re Estate of Vetter* 167
3. A decree from which no appeal has been taken becomes the law of the case, and is *res adjudicata* as to the same issues raised by answer in nature of a cross-action. *Dawson County Irrigation Co. v. Stuart* 428
4. The district court, having jurisdiction over trust funds in the hands of an executor, has power to enter such decree and judgment as is required in equity and good conscience in case of misapplication or conversion of such funds by an executor. *State, ex rel. Nebraska State Bar Ass'n, v. Merten* 780
5. A final judgment by a court of competent jurisdiction on the merits of the case is a bar to a future suit between the same parties or their privies upon the same cause of action. *Robinson v. Dawson County Irrigation Co.* 811

Judicial Sales.

Where realty has been sold under foreclosure decree to a person not a party plaintiff to the action, the owner may redeem the equity of redemption at any time before confirmation of the sale by payment to the purchaser of the purchase money, together with interest at 12 per cent. from date of sale to date of redemption. *Knox County v. Perry* 678

Jury.

It is not error to overrule a challenge to the array that does not plead facts showing in what way the statute regulating the manner of drawing the jury panel was violated. *Bassinger v. State* 93

Landlord and Tenant.

Where a lessee assigns his whole estate in demised premises, assignee is ordinarily liable to lessor for the whole of the rent reserved in the lease, but where the lessee assigns a lease as security for a loan only, and the whole

estate consequently is not assigned, the assignee is not ordinarily liable for rents reserved in the lease in absence of a binding contractual provision to that effect. *State, ex rel. Johnson, v. Commercial State Bank* 752

Limitation of Actions.

1. The statute of limitations is a bar to recovery of amounts of excess salary received more than ten years prior to commencement of suit. *Neisius v. Henry* 29
2. A payment on a note by principal debtor without the authority or consent of surety does not prevent the running of statute of limitations as to surety. *In re Estate of Soukup* 456
   Rawleigh Co. v. Smith 527
3. A will which does not acknowledge as an existing liability a note executed by testator as surety or make it a charge against his estate does not prevent the statute of limitations from running against the debt. *In re Estate of Soukup* 456
4. The statute of limitations commences to run against surety when his obligation to pay accrues. *Rawleigh Co. v. Smith* 529
5. Partial payments made without authority or consent of surety or joint obligor do not toll statute of limitations as to such surety or joint obligor. *Rawleigh Co. v. Smith* 529
6. A part payment, to toll statute of limitations as to a surety, must have been made by surety in person or for him by his authority, or for him without authority and subsequently ratified by him. *Rawleigh Co. v. Smith* 529
7. A waiver of "all notice of any nature whatsoever" in a suretyship agreement does not operate to supply the surety's consent and authority to the making of partial payments in the future. *Rawleigh Co. v. Smith* 529
8. Knowledge of the making of partial payments by the principal does not of itself affect the liability of the surety, nor operate to toll the statute of limitations as to him. *Rawleigh Co. v. Smith* 529

Mandamus.

1. A public-school teacher who did not comply with the statutory prerequisites for a life certificate until after the legislature amended the law to take from the state superintendent of public instruction the power to issue it was not entitled to a peremptory writ of mandamus commanding the superintendent to issue such certificate. *Hess v. Taylor* 184

2. A peremptory writ of mandamus should be issued only where the legal right to it is clearly shown. *Hess v. Taylor* 184

Master and Servant.

1. For an injury to be compensable under the workmen's compensation law, there must be a causal connection between the employment and the injury. *Richtarik v. Bors* 226
2. Under the provisions of the workmen's compensation act, a workman not engaged in, on, or about the premises where his duties are to be performed, or where his service requires his presence as a part of such service at the time of injury, is not covered by the act. *Richtarik v. Bors* 226
3. An injury to an employee caused by slipping on ice while employee was on way home after work does not arise out of or in the course of employment, whether such employee works regular hours or is subject to call by the employer. *Richtarik v. Bors* 226
4. In a compensation case, claimant has the burden of proof to establish by a preponderance of the evidence that there was an injury to the employee by an accident arising out of and in the course of his employment. *Kaffenberger v. Iverson* 257
5. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment. *Kaffenberger v. Iverson* 257
6. An award of compensation under the workmen's compensation act fixes the rights and liabilities of the parties, and is subject to modification only as authorized by statute. *Ludwickson v. Central States Electric Co.* 308
7. A proceeding for modification of district court's final judgment, awarding compensation for total disability under workmen's compensation act, cannot be used for the purpose of correcting judicial error in original compensation proceeding. *Ludwickson v. Central States Electric Co.* 308
8. The incapacity into which the court may inquire in proceeding to modify award of compensation under workmen's compensation act and use as a basis for modification of an award is that increase or decrease of incapacity which is due solely and only to that violence to the physical structure of employee's body which resulted from his accident, and which increase or decrease has

occurred since the award was rendered. *Ludwickson v. Central States Electric Co.* ... 308

9. In proceeding to modify award of compensation under workmen's compensation act, any increase or decrease of incapacity due to other causes is not within the scope of the authorized inquiry and cannot be used as a basis for modification of the award. *Ludwickson v. Central States Electric Co.* ... 308
10. The workmen's compensation act contemplates that there will ultimately be a partial rehabilitation of employees who have received permanent disability. *Ludwickson v. Central States Electric Co.* ... 308
11. The schedules of compensation set out in the workmen's compensation act provide for automatic reduction of compensation after certain periods of time, and such reductions do not presuppose decrease of incapacity due to the injury, but rather presuppose that within the periods of time named the employee will have adjusted himself to his disability and established a new basis of self-support. *Ludwickson v. Central States Electric Co.* 308
12. An employer and workmen's compensation insurance carrier, receiving benefit of automatic decreases in compensation payable to injured employee because of his partial rehabilitation since award of compensation to him for total permanent disability, are not entitled to further reduction because of employee's success, since the award, in assuring a livelihood to himself during the period in which the act contemplates he should be able to work out that rehabilitation. *Ludwickson v. Central States Electric Co.* ... 308
13. In proceeding to modify judgment awarding compensation under workmen's compensation act for total disability, evidence *held* sufficient to sustain district court's conclusion that there was no decrease in injured employee's incapacity due solely to his injury on which judgment was based. *Ludwickson v. Central States Electric Co.* ... 308
14. Dependency in fact under the workmen's compensation act is not created by contributions made for purposes other than the partial support of the alleged dependent. *Pieters v. Drake-Williams-Mount Co.* ... 315
15. The determination of the fact of partial dependency under the workmen's compensation act must be based first upon contributions made by the employee for the purpose of support of the claimed dependent. *Pieters v. Drake-Williams-Mount Co.* ... 315

16. It is not money contributed, but money contributed for the purpose of support of the claimant that must be the basis of any claim of partial dependency under the workmen's compensation act. *Pieters v. Drake-Williams-Mount Co* 315
17. Proof that there has been a financial injury to the alleged dependent arising from the loss of contributions made by an employee is not sufficient in itself to establish partial dependency under the workmen's compensation act. *Pieters v. Drake-Williams-Mount Co* 315
18. The statute providing that all scaffolds used in the erection, repairing or alteration of any building shall be erected and constructed in a safe, suitable and proper manner, makes an employer an insurer that a place furnished the employee to work on a house or building shall be safe, suitable and proper regardless of the knowledge or negligence of the employer. *Johnson v. Weborg* 516
19. Where carpenter built scaffold for defendant to be used in placing roof on barn, and after scaffold was built plaintiff was employed to assist defendant in the work, and while plaintiff and another were on a ladder which rested on the scaffold, something caused the scaffold to collapse and injure plaintiff, evidence was sufficient to require submission to jury of question of defendant's liability under statute requiring scaffolds to be erected in a safe manner, in absence of any evidence that scaffold was constructed in a safe, suitable and proper manner. *Johnson v. Weborg* 516
20. Allegation in employer's petition on appeal from compensation court that disability of employee was due to employee's failure to allow normal recovery and not to the injury sustained, and that had employee made effort to restore injured member to service his disability would be negligible, constituted a charge of negligence on part of employee within meaning of provisions of workmen's compensation act relating to defense of negligence. *Rexroat v. State* 596
21. Malingering, as applied to workmen's compensation cases, means deception, practiced by a dishonest employee, by feigning, inducing, or prolonging either sickness or injury, for purpose of securing illegal or fraudulent compensation payments. *Rexroat v. State* 596
22. Where employee sustained a compensable injury and during course of treatment employee developed mental condition by which he was convinced that he had a per-

manent disability and by reason of which he believed he was suffering pain and that his physical condition was incurable and employee was given inadequate treatment for such mental condition, employee was not guilty of wilful negligence or malingering and was entitled to continued compensation. *Rexroat v. State* 596

23. Where employer ceased payment of compensation awarded in first action and compensation claimant then brought a second original action for additional compensation in which compensation judge increased award but allowed credit for compensation previously paid, on reversal of judgment of district court reversing award in second action compensation claimant was entitled to award made by compensation judge in second action. *Rexroat v. State* 596

24. The workmen's compensation act does not cover workmen except while engaged in, on or about premises where their duties are being performed, or where their service requires their presence as part of such service at time of injury, and during the hours of service as such workmen. *Baughman v. City of Omaha* 663

25. Where detective reported off duty to police station at end of his shift without any assignment or requirement for subsequent special duty, and was struck and fatally injured when on way home from work, death was not compensable as arising within scope of employment. *Baughman v. City of Omaha* 663

26. Evidence that cabinetmaker and refinisher of furniture while moving a 50-pound spray bench a few feet felt a sharp pain in one eye, that shortly thereafter he lost the sight of that eye by occlusion of the retinal artery due to embolism, and that he had been suffering from arteriosclerosis, was insufficient to show a compensable accidental injury. *Roccaforte v. State Furniture Co* 768

27. In perfecting an appeal in a case arising under the workmen's compensation law, a cost bond, or a cash deposit in lieu thereof, is required as provided by general statute dealing with cost bond or cash deposit on appeal, and a failure to comply with such statute requires a dismissal of the appeal. *Hoffman v. State* 821

28. Evidence *held* to show that employee made no contributions to his parents from his wages for reasonable time immediately before accident resulting in his death, and parents' recovery of compensation therefor on ground that they were partially dependent on decedent is precluded. *Freburg v. Central Nebraska Public Power and Irrigation District* 868

Mortgages.

1. The conveyance to mortgagee of the legal title to lands, even when encumbered for their full value, together with the surrender of rents and other valuable rights, is a sufficient consideration for a contract reserving in the grantors a right of possession of a part of the lands so conveyed. *Blum v. Poppenhagen* 5
2. Where agreement whereby mortgagors reserved the right to retain possession of a portion of mortgaged realty was executed at the same time as deeds conveying mortgaged realty to mortgagee in payment of mortgage, the typewritten words "no exceptions" following the printed words "free from encumbrance" *held* to refer to encumbrances running from the title holder to third parties and did not cover a reservation of possession by the grantors in themselves. *Blum v. Poppenhagen* 5
3. A decree of foreclosure and sale of mortgaged realty which the mortgagors had conveyed to a grantee by deed containing provision that grantee assumed payment of the mortgage to the mortgagee did not adjudicate a relation of joint defendants between the grantee and the mortgagors, nor in any manner purport to affect the real relations of the parties involved to each other or to the cause of action. *Coleman v. Beck* 13
4. Release of deficiency judgment did not discharge one joint debtor either from the obligation of the cause of action or the decree entered thereon. *Coleman v. Beck* 13
5. Where one buys land encumbered by a mortgage, and covenants to pay the mortgage debt, or as part of the consideration assumes the payment thereof, his promise creates a principal obligation which the mortgagee may enforce against him, and, as between themselves, the vendor becomes in effect a surety and the vendee the principal debtor. *Coleman v. Beck* 13
6. Where real estate encumbered by a mortgage is sold and conveyed and there is inserted in the deed a clause which states that grantee assumes and agrees to pay the mortgage debt, and grantee accepts deed with knowledge of such provision, or, as part of consideration for purchase of realty, agrees to assume and to pay mortgage indebtedness, grantee becomes personally liable for payment of the mortgage debt, whether his grantor was so liable or not, and the liability thus created may be enforced by the mortgagee or his assigns. *Coleman v. Beck* 13

7. The statute requiring petition for foreclosure of mortgage to state whether any proceedings had been had at law for recovery of the debt secured thereby and statute providing that if judgment has been obtained at law foreclosure proceedings shall not be had unless execution has been returned unsatisfied are for the protection of the debtor and to prevent the probability of two judgments being rendered against him for the same debt, but the statutes do not release the mortgage security. *Federal Farm Mtg. Corporation v. Adams* 202
8. To entitle a mortgagee, who has taken a judgment at law on debt secured by mortgage, to foreclose mortgage, it is only necessary that the judgment and return showing execution is unsatisfied be set out, and it is not necessary in the petition to state the nonexistence of other proceedings to enforce the judgment. *Federal Farm Mtg. Corporation v. Adams* 202
9. In mortgage foreclosure action against purchaser who acquired title to mortgaged premises without assuming the mortgage indebtedness, evidence established facts entitling plaintiff to foreclosure of mortgage and sustained foreclosure decree, notwithstanding plaintiff had obtained judgment at law on note secured by the mortgage. *Federal Farm Mtg. Corporation v. Adams* 202

Municipal Corporations.

1. General statutory limitations and restrictions upon the powers of a municipality ordinarily apply to proprietary as well as governmental functions. *Neisius v. Henry* 29
2. Under statute providing that no city officer shall be interested in a contract to which city is a party and that any such interest in such contract shall avoid the city's obligation thereon, the obligation of the city on such contract is avoided *ipso facto* and no affirmative action on the part of the city is necessary. *Neisius v. Henry* 29
3. In a suit to recover excess salary received by a public officer, a taxpayer can enforce no greater rights on behalf of a city than the city itself might enforce, and any defense which might be interposed in an action by the city itself is available to the defendant in a suit brought by a taxpayer. *Neisius v. Henry* 29
4. Where a statute prohibits a village officer from having an interest in any contract with the village, such a contract is void and any money paid thereunder may be recovered at suit of the village or a taxpayer suing in village's behalf. *Neisius v. Henry* 29

5. Recovery *quantum meruit* cannot be had against a village on a contract prohibited by statute. *Neisius v. Henry* 29
6. In operating a water-works system, a city acts in its proprietary capacity, and is liable for negligence to the same extent as a private corporation engaged in the same business. *Harms v. City of Beatrice* 219
7. A service line from a water main to the property of a consumer, including a meter box constructed in a public street, is a part of the water-works system of the city which it must construct and maintain in a reasonably safe condition for the protection of the public. *Harms v. City of Beatrice* 219
8. The fact that consumer paid for the labor and materials used in constructing a service line from water main of city operated water-works system to property of consumer, including a meter box constructed in a public street, was not a conclusive factor in determining liability of the city for failure to keep meter box in repair. *Harms v. City of Beatrice* 219
9. A city cannot delegate its duty to maintain its water-works system in a reasonably safe condition and thus escape liability for failure to make repairs. *Harms v. City of Beatrice* 219

Negligence.

1. Want of ordinary care, and not knowledge of danger, is the test of contributory negligence. *Grantham v. Watson Bros. Transportation Co.* 367
2. A person who knowingly exposes himself to danger cannot recover for resulting injuries which he might have avoided by the use of reasonable care. *Grantham v. Watson Bros. Transportation Co.* 367
3. Generally, it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by his lamps. *Fulcher v. Ike* 418
4. The gist of negligence is failure to exercise the care of a reasonable and prudent person under a given set of circumstances. *Fulcher v. Ike* 418
5. The test of negligence is made by submission of the facts, if they are not admitted or if not more than one inference or conclusion may be drawn from the evidence, to a jury to determine whether or not the person charged with negligence failed to exercise the care, caution and

prudence required of a reasonably careful, cautious and prudent person under the given circumstances. *Fulcher v. Ike* 418

6. Negligence is essentially relative and comparative, and what may be deemed ordinary care in one case may, under different surroundings and circumstances, be negligence, since the surrounding facts and circumstances are of controlling importance. *McClelland v. Interstate Transit Lines* 439
7. Where it is or should be apparent to a reasonable and prudent person that to pursue a certain course of conduct is likely to produce results injurious to others, the pursuit of such course of conduct is negligence and it is not necessary that the precise or particular result be foreseen. *McClelland v. Interstate Transit Lines* 439
8. If original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it and the subsequent mischief will be held to be the result of the original negligence. *McClelland v. Interstate Transit Lines* 439
9. Where separate, independent acts of negligence by different persons combine to produce a single injury, each participant is liable for resulting damages, although one of them alone might not have caused the injury. *McClelland v. Interstate Transit Lines* 439
10. A tort-feasor is liable for all consequences which naturally flow from his unlawful or negligent acts, although those results are brought about by the intervening agency of others. *McClelland v. Interstate Transit Lines* 439
11. An essential element of the sudden peril rule is that it cannot be invoked by one who has brought that emergency upon himself by his own wrong, or who has not used due care to avoid it. *McClelland v. Interstate Transit Lines* 439
12. One who has been injured because of another's failure to comply with statute providing that all scaffolds, used in the erection, repairing, or alteration of any building, shall be erected in a safe, suitable and proper manner, has the right to recover under the statute, though the statute does not expressly impose liability. *Johnson v. Weborg* 516
13. A failure to perform a mandatory duty enjoined by statute 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. *Johnson v. Weborg* 516

14. Voluntary intoxication does not relieve one from contributory negligence, or serve to relax the requirement imposed upon a person to exercise due care for his own safety. *Nichols v. Havlat* 534
15. The fact that a person when injured was intoxicated is not of itself sufficient proof of contributory negligence, but is a circumstance to be considered by jury in determining whether intoxication contributed to his injuries. *Nichols v. Havlat* 534
16. When an invitee exceeds limits of an invitation, invitation ceases and liability of property owner is only that of abstaining from acts wilfully injurious. *Malolepszy v. Central Market* 570
17. The burden of proving a cause of action for negligence is not sustained by evidence from which negligence can only be surmised or conjectured. *Bowerman v. Greenberg* 721
18. In action for negligence, the burden is on plaintiff to show that there was a negligent act or omission by defendant and that such act was the proximate cause of plaintiff's injury or a cause which proximately contributed to the injury. *Bowerman v. Greenberg* 721
19. Proprietor of a store is not an insurer against accidents to customers, but he is bound to exercise reasonable care and prudence to keep premises which public is tacitly invited to use safe for that purpose. Bowerman v. Greenberg 721
20. Negligence is not presumed, and the mere happening of an accident does not prove negligence. *Bowerman v. Greenberg* 721
21. Where different minds may reasonably draw diverse conclusions from same facts as to whether they establish negligence or contributory negligence, such issues must be submitted to the jury. *Crandall v. Ladd* 736
22. A party who tenders an issue of negligence has the burden of sustaining the charge by a preponderance of the evidence. *Fanders v. Davison* 745
23. Burden of proof on issue of negligence rests upon the party alleging it, and such burden does not shift during the trial. *Fanders v. Davison* 745
24. The violation of a statutory provision by motorist is not, in and of itself, negligence, but may be taken into con-

sideration, together with all other circumstances in the case, to determine the question of negligence. *James v. Krebek* 757

25. If contributory negligence is relied upon by defendant as an affirmative defense, defendant has burden to prove such negligence by a preponderance of the evidence, except as such negligence may appear in plaintiff's evidence. *Roberts v. Carlson* 851

New Trial.

1. A motion for a new trial on the ground of surprise is properly overruled where a request for continuance for that reason was not made at the trial. *Hardt v. Orr* 460
2. Newly discovered evidence is not a ground for a new trial, where the exercise of due diligence before the trial would have produced it. *Hardt v. Orr* 460

Notice.

Possession of land is notice to the world of the possessor's rights therein, and of all interests of which inquiry of the possessor would elicit knowledge. *Blum v. Poppenhagen* 5

Officers.

1. A public officer is required to perform the duties of his office, however burdensome they may be, for the compensation fixed by law. *Neisius v. Henry* 29
2. If a public officer performs new or additional duties which are germane to his office, whether prescribed by law or otherwise, it must be conclusively presumed that they were performed for the salary fixed by law, or that they were gratuitous. *Neisius v. Henry* 29
3. The duties of a public officer cannot be divided into two separate jobs and additional salary be paid him in excess of that prescribed by statute as a consideration for his filling the new position thus created. *Neisius v. Henry* 29
4. Public policy forbids a public officer from receiving compensation other than the salary prescribed by law. *Neisius v. Henry* 29
5. When additional pay or perquisites are accepted by a public officer for the performance of duties germane to his office, a taxpayer may sue to compel their return to the public treasury. *Neisius v. Henry* 29
6. A public officer who has made a contract for salary, additional to that provided by law, cannot recover *quantum meruit*. *Neisius v. Henry* 29

7. Where a member of a county board is invested with discretion, and required to exercise his judgment in matters brought before him, he is usually given immunity as the result of an erroneous decision, provided the action taken is within the scope of his authority, and without malice or corruption. *Allen v. Miller* 469

Pleading.

1. It is error to exclude competent evidence tending to prove material allegations of a pleading. *Dudgeon v. Dudgeon* 82
2. The forms of pleading in civil actions in courts of record and the rules by which their sufficiency may be determined are those prescribed by the Civil Code. *State, ex rel. Johnson, v. Consumers Public Power District* 114
3. A general demurrer admits the truth of all facts well pleaded as well as intendments and inferences that may reasonably be drawn from the pleaded facts. *O'Shea v. Smith* 231
4. Under the Code, chancery practice is so enlarged that an answer in the nature of a cross-petition may properly seek affirmative relief beyond that which is merely defensive, and such relief sought need not be based on equitable grounds, but matters set up in such answer must be germane to original suit. *Dawson County Irrigation Co. v. Stuart* 428
5. A demurrer to a petition admits all material facts alleged therein. *City of Grand Island v. Willis* 686

Powers.

1. Although the law favors the early vesting of estates and looks with disfavor on the postponement of the vesting of title, yet if an unfavored estate is created and lawful, the court must uphold it. *Massey v. Guaranty Trust Co* 237
2. Powers will be construed in this state according to the principles of the common law. *Massey v. Guaranty Trust Co* 237
3. In construing power, donor's intention is controlling and such intention is to be ascertained from a liberal interpretation and comprehensive view of all the provisions of the instrument. *Massey v. Guaranty Trust Co* 237
4. In construing power, the court will endeavor to place itself in the position of the donor, ascertain his intention and enforce it in all its parts, if it be lawful to do so. *Massey v. Guaranty Trust Co* 237

5. A donee of a power must keep within its terms, and where the donor prescribes the method of its execution, such method must be strictly followed, so far at least as may be necessary to give effect to donor's intent and design. *Massey v. Guaranty Trust Co.* 237
6. Where there is no prohibition or restriction in a power, everything which is legal and within its limits should be supported, but where there is a prohibition, limitation or restriction, such provisions will control and the donee will not be permitted to disregard the same. *Massey v. Guaranty Trust Co.* 237
7. In absence of restriction or prohibition, power to appoint a fee will be held to authorize appointment of any lesser and legal estate. *Massey v. Guaranty Trust Co.* 237
8. In absence of restriction, where the power is unlimited as to eligible appointees, it will be construed as authorizing appointment of a fee or any lesser or qualified legal estate. *Massey v. Guaranty Trust Co.* 237
9. A power being unlimited as to eligible appointees and without restriction as to the character of the estate to be appointed, held to authorize appointment in trust. *Massey v. Guaranty Trust Co.* 237

Principal and Agent.

A party cannot retain the benefits derived from the fraudulent conduct of his agent, without being chargeable with the instrumentalities employed to effect the purpose. *Zimmer v. Gudmundsen* 260

Principal and Surety.

The liability of a surety is measured by, and will not be extended beyond, the strict terms of his contract. *Rawleigh Co. v. Smith* 529

Public Lands.

1. Statutes dealing with school-lands, and their sale or lease, default, forfeiture, redemption, and irrigation taxes and requiring assignments to be recorded with commissioner of public lands and buildings to be valid, were enacted for the protection of the state in enforcing the remedies therein provided, and they create no liabilities other than those contained in the contracts of the parties. *State, ex rel. Johnson, v. Commercial State Bank* 752
2. A person claiming an interest in a school-land lease under an assignment from a lessee is liable on covenant to pay rent only if privity of estate exists between such

person and the lessor. *State, ex rel. Johnson, v. Commercial State Bank* 752

3. Whether an assignment of a lessee's interest in school-lands destroys the privity of estate existing between the lessee and the lessor and creates that relation between the assignee and the lessor depends on the estate demised and the estate assigned being identical. *State, ex rel. Johnson, v. Commercial State Bank* 752
4. Where assignment of a school-land lease is made to secure a loan, such assignee is not liable to the lessor for the rent reserved until he enters into possession. *State, ex rel. Johnson, v. Commercial State Bank* 752
5. An assignment of a school-land lease, absolute in its terms, may be shown by parol evidence to have been given as security for the payment of a loan, and as between the parties, if established, will be so construed by the courts. *State, ex rel. Johnson, v. Commercial State Bank* 752

Public Service Commissions.

On appeal to the supreme court from order of railway commission the only questions to be determined are whether the railway commission acted within the scope of its authority and whether the order complained of is reasonable, and where action of railway commission is not unreasonable or arbitrary and does not exceed its powers or violate a rule of law, the supreme court will not interfere with the commission's findings of fact since they involve administrative and legislative rather than judicial questions. *Thomson v. Nebraska State Railway Commission* 477

Quo Warranto.

1. A proceeding in *quo warranto* is a civil action, as defined by the Civil Code, and is governed by the provisions thereof. *State, ex rel. Johnson, v. Consumers Public Power District* 114
2. Under the terms of the Civil Code, issues of law or of fact in *quo warranto* are required to be joined by the respondent by filing an appropriate demurrer or an appropriate answer to the information filed against him. *State, ex rel. Johnson, v. Consumers Public Power District* 114

Railroads.

1. While income of a railroad station is an element in determining whether an agency shall be discontinued, it is

not in itself controlling but must be considered along with all other elements bearing upon reasonableness under all disclosed conditions. *Thomson v. Nebraska State Railway Commission* 477

2. The ruling of the railway commission or of the supreme court on question of discontinuance of an agency at any given time does not amount to an adjudication for the future, but is only a judgment on the condition presented by the application and relates only to the time and condition presented. *Thomson v. Nebraska State Railway Commission* 477
3. The matter of time necessary to be devoted to performance of duties by an agent of a railroad is important in determining whether railway commission acted arbitrarily in denying application for discontinuance of an agency and substituting caretaker's service. *Thomson v. Nebraska State Railway Commission* 477
4. A common carrier, in addition to being a commercial and transportation enterprise for profit, is a public service facility with duties owing to the domain it traverses, and the necessities, requirements and convenience of tributary areas must be considered and reasonably protected. *Thomson v. Nebraska State Railway Commission* 477

Release.

1. To avoid a written release of damages for personal injuries on ground of mutual mistake of the parties, mistake must relate to a present or past fact or facts material to the contract of settlement, and not to an opinion as to future conditions as to results of present known facts. *LaRosa v. Union P. R. Co.* 290
2. A mistake as to future development of a known injury is one of opinion, and not a mistake of fact. *LaRosa v. Union P. R. Co.* 290
3. In action for injuries sustained by plaintiff when his arm was cut by a circular crosscut saw, evidence was insufficient to avoid a written release of damages on ground of mutual mistake of the parties. *LaRosa v. Union P. R. Co.* 290

Remainders.

Where the remainderman is ascertained, a vested remainder is distinguished by the certainty of the right of future possession or enjoyment, and not the certainty of possession or enjoyment if remainderman lives until de-

termination of the preceding estate. *Goodrich v. Bonham* 489

Replevin.

1. The action of replevin is a law action requiring return to or recovery by a person of goods or chattels wrongfully taken or retained, and the right of immediate possession. *Landis Machine Co. v. Omaha Merchants Transfer Co.* 389
2. Where personal taxes were assessed against conditional buyer in possession, buyer defaulted and surrendered the property, and the sheriff levied on property during process of its removal, by virtue of a distress warrant for taxes, the validity of which is not questioned, judgment dismissing seller's replevin action against sheriff was improper and case was remanded with directions to enter proper judgment denying plaintiff immediate right of possession or return of property, holding that sheriff was entitled to return of property taken, or, in the alternative, for the value thereof, or for the value of sheriff's possession, if property could not be returned. *Landis Machine Co. v. Omaha Merchants Transfer Co.* 389

Revivor.

A cause of action created by statute does not survive unless declared so to do by the statute itself or by provisions for its survival made by some other statute. *In re Estate of Samson* 556

Sodomy.

The statute defining the crime of sodomy contemplates *per os* as well as *per anum* involvement. *Sledge v. State* 350

Specific Performance.

1. A petition which alleged a definite offer of sale of realty by defendant containing certainty as to conditions, and an acceptance of the offer with its conditions before offer was withdrawn, to which was attached the correspondence between the parties allegedly constituting the contract, was sufficient to state a cause of action for specific performance of the contract. *O'Shea v. Smith* 231
2. Applications for specific performance of a contract are addressed to sound legal discretion of the court, and the court will be governed to a great extent by facts of each case. *Wiiest v. Pounds* 882
3. Where defendant had repeatedly requested performance by plaintiff of plaintiff's contract to purchase undivided

interest in real property, and plaintiff had not paid purchase price and by conduct indicated that she had abandoned contract, plaintiff was not entitled to decree for specific performance. *Wiiest v. Pounds* 882

States.

1. It was the intention of congress in formation of state of Nebraska out of territory obtained through Louisiana purchase that the eastern boundary adjacent to state of Iowa should be coincident and coterminous with the middle of the channel of the Missouri river as it existed at the date of the purchase of the territory, except to the extent that it was abridged, if it was abridged, by any rights acquired by the state of Iowa through the enabling act whereby that state was admitted into the union. *First Nat. Bank v. McFerrin* 617, 627
2. Lands cut off from the mainland of a state by avulsion do not change their status, but remain a part of the state from which they were cut off. *First Nat. Bank v. McFerrin* 617, 627
3. The middle of the channel of the Missouri river is the boundary line between the states of Nebraska and Iowa. *First Nat. Bank v. McFerrin* 617, 627
4. A suit against the state for the taking or damaging of private property for public use must be commenced within two years from time the taking or damaging of the property occurred. *Bordy v. State* 714
5. A state is not liable for the fraudulent acts of its officers and agents unless such liability exists by constitutional provision or statute. *Bordy v. State* 714
6. The legislature may properly waive the immunity of the state from suit by adoption of a resolution to that effect. *Bordy v. State* 714

Statutes.

1. The Civil Code as a statute complete in all its parts should be so construed as to make all of its parts harmonize with each other and render them consistent with its general scope and object. *State, ex rel. Johnson, v. Consumers Public Power District* 114
2. That which is implied in a statute is as much a part of it as that which is expressed. *State, ex rel. Johnson, v. Consumers Public Power District* 114
3. Statutes should be so construed as to give effect to the intention of the legislature, and if a statute is plain and unambiguous, there is no room for construction or interpretation. *Federal Farm Mtg. Corporation v. Adams* 202

4. When the legislature reenacts a law, it thereby adopts the judicial construction which has theretofore been placed upon it. *Johnson v. Weborg* 516
5. Special statutory provisions in regard to a particular subject control general provisions. *City of Grand Island v. Willis* 686
6. Where a statute is clear and unambiguous, it should be given effect according to its plain terms. *City of Grand Island v. Willis* 686

Stipulations.

A formal, judicial stipulation by the parties as to facts, so long as it stands, is conclusive between them, and cannot be contradicted by evidence tending to show the facts otherwise. *In re Estate of Sautter* 42

Taxation. SEE CHARITIES.

1. In action to foreclose tax sale certificate, wherein plaintiff purchased land on foreclosure and was required to account for rents on application to redeem, evidence required approval of plaintiff's report in so far as it credited defendants with rent collected each year, less amount paid one defendant, but did not require approval of report in so far as it claimed right to deduct expenses paid by plaintiff on trip made to rent the land. *Coffin v. Maitland* 1
2. Statutes exempting certain legacies from an inheritance tax should be strictly construed, and in order to be exempt a legacy must come within the strict letter of the statutory exemption. *In re Estate of Sautter* 42
3. An appeal properly perfected as provided by statute gives the district court jurisdiction to fix, determine and assess an inheritance tax against the interests of all parties liable thereto and to designate the *pro rata* payment thereof to the counties entitled to receive the same for the benefits for which the tax was created. *In re Estate of Sautter* 42
4. A foreign corporation organized exclusively for charitable purposes, which complies with statute and becomes a body corporate in the state, is not exempt from payment of an inheritance tax, since such foreign corporation by its domestication does not become entitled to the same legal rights, powers and advantages in all respects as a domestic corporation. *In re Estate of Sautter* 42
5. Exemption from payment of inheritance tax applies only to domestic institutions organized and operating as

charitable institutions, and does not apply to unincorporated foreign associations organized and operating for charitable purposes. *In re Estate of Sautter* 42

6. Where foreign charitable corporations and a foreign unincorporated charitable association, devisees under a will, agreed to pay heir at law to dismiss suit to construe will, such amount to be retained from a partial distribution of the assets of the estate and there was no stipulation for decree of distribution of property other than in accordance with the terms of the will, the property passed under the will and the compromise payment was not deductible from the interest of such corporations and associations in computing inheritance taxes. *In re Estate of Sautter* 42

7. The statutes pertaining to listing for taxation all personal property do not take into account qualified or conditional sales of personal property and admit of no reference to legal and equitable or general and specific owners. *Landis Machine Co. v. Omaha Merchants Transfer Co* 389

8. Where a statute requires property to be assessed to the owner, it means the general and beneficial owner, that is, the person whose interest is primarily one of possession and enjoyment in contemplation of an ultimate absolute ownership, and not the person whose interest is primarily in enforcement of a collateral pecuniary claim, and does not contemplate the use and enjoyment of the property as such. *Landis Machine Co. v. Omaha Merchants Transfer Co* 389

9. Personal property in the possession and control of a buyer under a conditional sales contract, who has been invested with all the indicia of ownership, is properly assessed to the buyer. *Landis Machine Co. v. Omaha Merchants Transfer Co* 389

10. The purpose and intent of statute prohibiting use of remedy of replevin to recover property restrained for nonpayment of tax is to provide an adequate legal remedy for the tax debtor and prevent delay in collection of public revenue during vexatious litigation, but the remedy has no application to strangers to the tax whose property has been distrained for taxes of another. *Landis Machine Co. v. Omaha Merchants Transfer Co* 397

11. Under statute providing that taxes assessed on personalty shall be first lien after November 1 next following date on which taxes are levied, a conditional sales con-

tract executed before November 1 is superior to statutory tax liens of prior years but is inferior to tax liens for subsequent years. *Landis Machine Co. v. Omaha Merchants Transfer Co.* 397

12. An erroneous and excessive valuation of realty for taxation purposes may be corrected on appeal by the taxpayer to the district court and likewise to the supreme court. *Swanson v. Board of Equalization* 506

13. The amendatory statute respecting matters to be considered in arriving at actual value of realty for purpose of taxation is unconstitutional as providing method for fixing valuation of realty different from that prescribed for other tangible property, contrary to constitutional requirement that taxes be levied by valuation uniformly on all tangible property. *Swanson v. Board of Equalization* 506

14. Under statute requiring property to be assessed for purpose of taxation at its actual value, farm land must be valued and assessed at its actual cash value, that is, at its value in the market in the ordinary course of trade. *Swanson v. Board of Equalization* 506

15. The statute authorizing board of equalization, at its annual meetings, to correct evident errors of assessment or apparent gross injustice in overvaluation or undervaluation of realty, authorizes action by the board regardless of whether the errors or injustice result from some act of the assessor or from the act of the board itself, and the statute is remedial and intended to reach cases where, because of evident error of assessment or apparent injustice in overvaluation or undervaluation, the taxpayer would bear more or less than his just share of the burden of taxation. *Swanson v. Board of Equalization* 506

16. Where county purchased a tax sale certificate of realty and held it for two years, county's foreclosure proceedings were governed by section 77-2040, Comp. St. 1929. *Knox County v. Perry* 678

17. The procedure to be followed under statutes authorizing county to foreclose tax sale certificate for delinquent taxes which had been purchased by the county and held for two years, and authorizing county to foreclose such certificate immediately after purchase thereof, is that provided for foreclosure of real estate mortgages. *Knox County v. Perry* 678

18. Section 77-2039, Comp. St. Supp. 1937, provides a full, complete, and definite procedure by which a county may

foreclose the lien of certain delinquent taxes. *City of Grand Island v. Willis* 686

19. A county may not go beyond statute authorizing counties as trustees for governmental subdivisions to foreclose liens for delinquent taxes upon realty which has been unsuccessfully offered for sale for taxes for three consecutive years to protect itself or other governmental subdivisions for which it is trustee. *City of Grand Island v. Willis* 686
20. Where sales of realty for delinquent taxes were illegally confirmed to county as trustee for governmental subdivisions which relied upon county and county sold such realty to individual purchasers and refused to make required proportionate distribution of purchase price to governmental subdivisions as their share of the taxes and raised question of its own illegal acts, county was estopped from retaining the money and equity would intervene to require county to make the distribution to the governmental subdivisions. *City of Grand Island v. Willis* 686
21. Under statute authorizing counties to foreclose liens for delinquent taxes upon realty which has been unsuccessfully offered for sale for taxes for three consecutive years, a county is obligated to foreclose tax liens and to account to other governmental subdivisions for their *pro rata* share of the taxes and, acting for such subdivisions as trustee, to institute foreclosure proceedings and to make presentation, on motion, to the court for confirmation of sales under the statute. *City of Grand Island v. Willis* 686
22. Fact that property was assessed in name of one other than owner does not render tax void if the property be in other respects sufficiently described. *Scotts Bluff County v. Frank* 698
23. It will not be assumed that assessor intended to omit any land from assessment. *Scotts Bluff County v. Frank* 698
24. Irregularities, informalities or omissions in describing real property on assessment records and tax lists shall not invalidate the tax or invalidate the tax sale if description is sufficiently definite to enable county treasurer, or other officer, or other person interested to determine what property is meant or intended by the description. *Scotts Bluff County v. Frank* 698

Trial. SEE APPEAL. CRIMINAL LAW.

1. Instructions should be considered together and when, as an entire charge, they properly submit the issues to the

jury, the verdict will not be set aside on appeal for harmless error in one of them. *Bancroft v. Kite* 178

2. Where there is a change of pleading accompanied by a material change of testimony made for the purpose of making a case against another defendant, a court should look beyond the bare allegations of the petition and the testimony given before challenge is made to its credibility. *Gormley v. Peoples Cab* 346
3. Where defendant moves for a directed verdict at close of plaintiff's evidence, such motion must be treated as an admission of the truth of all material and relevant evidence favorable to plaintiff and of all proper inferences to be drawn therefrom, and if the evidence tends to sustain allegations of the petition and the petition states a cause of action, case should be submitted to the jury, but the rule is not applicable where other evidence of plaintiff demonstrates conclusively, or to a degree that minds of reasonable men cannot differ thereon, that such evidence favorable to plaintiff is incapable of belief. *Gormley v. Peoples Cab* 346
4. In a jury case, where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is not disputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the court. *Fulcher v. Ike* 418
5. Harmless imperfections in single instructions are not sufficient grounds for reversal of a judgment, where entire charge to jury fairly states the law applicable to the issues and evidence. *Gillan v. Equitable Life Assurance Society* 497
6. Motion for directed verdict must be treated as admission of all material evidence submitted on behalf of the party against whom the motion is directed, and said party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference reasonably deducible from the facts in evidence. *Malolepszy v. Central Market* 570
   Roberts v. Carlson 851
7. A motion for directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom motion is directed, and said party is entitled to have every controverted fact resolved in his favor and to

have the benefit of every inference that can reasonably be deduced from the facts in evidence. *Bowerman v. Greenberg* 721

8. Where instructions given, in their entirety, adequately state the law, they are sufficient. *Crandall v. Ladd* 736
9. In an action at law, trial court should refuse to direct a verdict on an issue of fact or to sustain a motion for judgment and discharge jury when there is a substantial conflict in the evidence. *Calkins v. Yechout* 788
10. The trial court should instruct the jury on the presumptions of life or death in order that a litigant may not be denied the benefit of the conclusions to which he is entitled. *Banks v. Metropolitan Life Ins. Co.* 823
11. In determining whether giving of a sentence in an instruction is erroneous, it must be considered with the instruction of which it is a part. *Roberts v. Carlson* 851
12. Where fear is a proper element to be considered in the fixing of damages in a condemnation, it is reversible error for the court to refuse to instruct the jury properly on that subject. *Langdon v. Loup River Public Power District* 859
13. In proceeding to condemn an easement for an electric power transmission line where there was in the record evidence of fear of danger of the kind which may properly affect the value of the land over which an electric transmission line extends, and of the kind which may not, and instruction given did not properly cover it, refusal of the trial court to give instruction which would have correctly apprised the jury of the character and kind of evidence of fear they had a right to consider in determining the damages to which landowners were entitled was error. *Langdon v. Loup River Public Power District* 859

Trusts.

1. If an attorney, by statements and representations to his clients as to the condition and quality of their interests in an estate, procures a sale thereof to a third party for whom he is acting at the same time as attorney, for an inadequate price, a court of equity will set aside the transaction and restore the interest in the estate to the clients on repayment of the purchase price with the legal rate of interest, whether the attorney acts on information derived from the client or from any other source, since the attorney is affected with a trust and the matter is grounded on public policy and not necessarily on fraud. *Zimmer v. Gudmundsen* 260

2. In equity action to impress a constructive trust on real estate, on ground that a fiduciary relation existed between plaintiff and defendants and that defendants, using plaintiff's money inequitably, purchased real estate taking title thereto in defendants' names, evidence was insufficient to establish fiduciary relationship or to authorize the court to impress a constructive trust on the real estate. *Standidge v. Creveling* 334
3. A constructive trust is a relationship with respect to property subjecting the person by whom title to property is held to an equitable duty to convey it to another on ground that his acquisition or retention of property is wrongful, and that he would be unjustly enriched if he were permitted to retain the property. *Fisher v. Keeler* 728
4. Where owner of interest in land transfers it *inter vivos* to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, and transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor if the transfer was procured by fraud, duress, undue influence or mistake. *Fisher v. Keeler* 728

Venue.

1. An action against a public officer for any neglect of official duty must be brought in the county where the cause or some part thereof arose. *Platte Valley Irrigation District v. Tilley* 122
Loup River Public Power District v. North Loup River Public Power and Irrigation District 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
2. A suit for an injunction, and the establishment of the relative rights of the parties to the action, against the executive and administrative officers of the state to compel the enforcement of appropriative water rights according to priority by restraining unlawful diversions by junior appropriators is properly brought in the county where the damages occurred. *Platte Valley Irrigation District v. Tilley* 122
Loup River Public Power District v. North Loup River Public Power and Irrigation District 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156

3. Where an unlawful diversion of water takes place in one county and damage occurs as a result thereof in another county, the party injured may commence his action in either of such counties. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
4. Where a court has jurisdiction of the subject-matter of an action and obtains service of summons on a defendant amenable to service in that county, who has a substantial interest in the subject of the suit adverse to plaintiff, a summons may properly issue to a defendant public corporation domiciled in another county. *Platte Valley Irrigation District v. Tilley* 122
Loup River Public Power District v. North Loup River Public Power and Irrigation District 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156

Waiver.

"Waiver" is defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege which, except for such waiver, the party would have enjoyed, the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefit, or such conduct as warrants an inference of the relinquishment of such right, or the intentional doing of an act inconsistent with claiming it. *Lipe v. World Ins. Co.* 22

Waters.

1. A junior appropriator who takes water contrary to the closing orders of the bureau of irrigation, and without regard to priority, may be enjoined at the instance of an injured senior appropriator. *Platte Valley Irrigation District v. Tilley* 122
2. It is the duty of the bureau of irrigation, if its closing orders be not obeyed, to shut and lock the headgate of an offending appropriator of public waters. *Platte Valley Irrigation District v. Tilley* 122
3. The bureau of irrigation may not, without shutting and locking the headgates of offending appropriators, sit by and permit unlawful diversions of water with impunity. *Platte Valley Irrigation District v. Tilley* 122

4. In a suit for general equity relief by senior appropriator against junior appropriators, the court should determine and declare the relative rights of the parties and render a decree making effective the enforcement of the rights thus found to exist. *Platte Valley Irrigation District v. Tilley* 122
5. The granting of an appropriation by the state, which includes the right to construct a diversion dam in the river, carries with it the incidental right to impound unappropriated waters behind the dam to facilitate the diversion of water under its appropriative right. *Platte Valley Irrigation District v. Tilley* 122
6. Where impounded water was captured during the nonirrigation season, or from waters not usable for irrigation purposes during the irrigation season, a senior irrigation appropriator was not entitled to its release for irrigation purposes as a part of the natural flow of the stream. *Platte Valley Irrigation District v. Tilley* 122
7. The rights of an appropriator for power and storage purposes will not be jeopardized by refusal to obey an order of the bureau of irrigation to release water impounded behind its dam, where such order was not in accord with priority rights and was coerced by a void peremptory writ of mandamus. *Platte Valley Irrigation District v. Tilley* 122
8. A senior appropriator of public waters has a prior right over all junior appropriators so long as water can be delivered to senior appropriator's headgate in usable quantities. *Platte Valley Irrigation District v. Tilley* 122
9. The obtaining of irrigation water by procurement of a restraining order enjoining the closing of the headgate of a canal ordered closed by the bureau of irrigation will be treated as a condition and the waters remaining will be administered according to priority. *Platte Valley Irrigation District v. Tilley* 122
10. The securing of restraining orders by filing injunction suits in bad faith is condemned as an intolerable menace to the orderly administration of appropriated waters of the state. *Platte Valley Irrigation District v. Tilley* 122
11. Violations of orders of the bureau of irrigation by other appropriators do not furnish a basis for injunctive relief by a junior appropriator where the effect of such injunction is to deprive a senior appropriator of his prior right to water. *Platte Valley Irrigation District v. Tilley* 122

12. An injunctive order obtained by a junior appropriator against officers charged with administering the appropriated waters of a stream can have no effect against an injunction procured by a senior appropriator in which junior appropriator and administrative officer of state have been made parties to the suit. *Platte Valley Irrigation District v. Tilley* 122
13. An irrigation district is a public as distinguished from a municipal corporation, and is not confined to the strict and narrow limits applied to municipal corporations. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
14. An appropriation of public waters for power purposes together with the necessary dams, ditches and other works used therewith, are appurtenant to the power plant and the real estate upon which it stands. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
15. A wrongful act, which reduces the quantum of water necessary for a senior appropriator's needs within limits of his appropriation, constitutes a damage to his appropriative and other property rights connected with the use thereof. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
16. Limitations imposed on an appropriator of public waters by the state in adjudicating his right and fixing his priority are restrictions upon such appropriator only and may not be treated as a grant to another appropriator. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
17. Each appropriator of public waters must derive his rights from his own grant. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156

18. Under statute an appropriation of public waters may be allowed in an amount less than that applied for, and if the applicant be dissatisfied therewith he must appeal, otherwise the appropriation becomes final. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
19. An appropriation of one acre-foot of water for each acre of land irrigated was final and mandatory on the administrative officers of the state. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
20. The amount of public waters to which an appropriator is entitled is to be measured at the point of diversion from the natural channel of the stream from which the appropriation was made. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
21. The right under the Constitution to divert unappropriated waters to a beneficial use is a constitutional right, and the first in time is the first in right, without reference to the particular use. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
22. Where the waters of any natural stream are insufficient for the use of all desiring to use the same, those using the water for agricultural purposes are entitled to preference over those using the same for manufacturing purposes. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
23. A petition to determine relative rights to waters flowing in a public stream in this state, wherein the facts alleged show that plaintiff appropriated such water and applied the same to a beneficial use prior in time to the alleged diversion by the defendant, states a cause of action entitling plaintiff to an injunction restraining further

wrongful diversions by the defendant. *Loup River Public Power District v. North Loup River Public Power and Irrigation District* 141
Loup River Public Power District v. Middle Loup Public Power and Irrigation District 156
24. A specific call for the thread of a stream fixes the thread as the boundary and in case the stream has two channels the thread of the main channel is the limit. *Hardt v. Orr* 460
25. Where title to an island in a nonnavigable stream is conveyed to a grantee by government patent and the land so conveyed is bounded by the waters of such stream, the grantee's ownership carries with it the bed of the river to the center or thread of each surrounding channel. *Hardt v. Orr* 460
26. The thread or center of a channel as used with respect to grants of land bounded upon rivers must be the line which would give the owners on either side access to the water, whatever its stage might be and particularly at its lowest flow. *Hardt v. Orr* 460
27. Grants of land bounded upon rivers carry with them the exclusive right and title of the grantees to the center or thread of the stream, unless the terms of the grant clearly denote an intention to stop at the bank or margin of the river. *Hardt v. Orr* 460
28. If land involved in ejectment action, from date of acquisition of territory by Louisiana purchase in 1803 to 1846, the date when Iowa was admitted to the Union, was west of middle line of Missouri river, the jurisdiction of Nebraska rightfully attached to it, and if the river subsequently turned its course to west of the land, it remained in the jurisdiction of Nebraska, and ownership of land was not changed. *First Nat. Bank v. McFerrin* 617, 627
29. An action lies to establish and protect an irrigation company's water rights and enjoin the unlawful diversion of its supply of water, and such a suit may be brought by the company without joining its stockholders or consumers as parties. *Robinson v. Dawson County Irrigation Co.* 811
30. In senior appropriator's action to recover for damages to crops by conversion of storage water and the taking of natural flow of irrigation water by junior appropriator, evidence failing to distinguish between damages from taking of the natural flow to which defendant was

entitled and damages from conversion of storage water was insufficient to sustain recovery by plaintiff. *Robinson v. Dawson County Irrigation Co.* 811

31. Where all available water passing a certain point on the stream would not, if not diverted or interrupted, reach a senior appropriator down-stream, junior appropriator may lawfully divert water within the limits of his appropriation, and such diversion is not in law out of priority diversions. *Robinson v. Dawson County Irrigation Co.* 811

Wills.

1. Where grantee received title to property subject to a reserved right of possession in grantors, and grantors remained in possession, wife of grantee, as his devisee, took title subject to the burden of the reservation. *Blum v. Poppenhagen* 5
2. Where a testator has used words of purchase and of limitation synonymously or interchangeably, the words of purchase must control, and the words of limitation construed to be *descriptio personæ*. *Salmons v. Salmons* 66
3. In order that the rule in Shelley's case be applicable, it is necessary that the words in a will shall indicate an intention that the full line of heirs of the ancestor shall take at the time of his death, and by heirs is meant all of his kin who survive him and are capable of inheriting at the time of his death, including descendants and collateral heirs. *Salmons v. Salmons* 66
4. Since by statute a surviving spouse is an heir as to both personalty and realty of a deceased spouse, the description of "heirs" in a will includes a surviving spouse, unless excluded by unambiguous words or by clear implication from the language of the will. *Salmons v. Salmons* 66
5. Where words used in a devise creating an estate in real estate do not include the full line of heirs of the ancestor, the words are words of purchase and not of limitation. *Salmons v. Salmons* 66
6. The rule in Shelley's case is a rule of property in this state. *Salmons v. Salmons* 66
7. Where a testator intending to create a life estate uses words of limitation rather than of purchase, testator's intention must yield to the rule in Shelley's case and the devisee decreed to be owner in fee simple of the devised realty. *Salmons v. Salmons* 66

8. In determining testator's intention, it is the court's duty to examine the will in its entirety, giving consideration to every provision, giving words used their commonly and generally accepted meaning, and to indulge the presumption that the testator understood the meaning of the words used. *Salmons v. Salmons* 66
9. Generally, the purchaser of an heir's interest, if the sale is set aside, may be entitled to reimbursement for expenditures made in good faith to protect the heir's interest or title. *Zimmer v. Gudmundsen* 260
10. Though the purchase of an heir's interest in an estate may be fraudulent and may be set aside for fraud, reimbursement may be allowed for expenditures made in good faith by the purchaser to protect the interest so purchased, if expenditures are beneficial to the heirs. *Zimmer v. Gudmundsen* 260
11. Where transfers by heirs of their interests in deceased's estate to a third person were vacated because the attorney for deceased's estate falsely represented to the heirs the value of the estate, the heirs were entitled to have the purchaser account for the rents and profits, or the value of the use of the lands with interest thereon at the legal rate. *Zimmer v. Gudmundsen* 260
12. If possible without violating well-settled rules of law, effect must be given to every word in a will. *Hulse v. Tanner* 406
13. The words "it is my will" used in a clause of a will are more than mere entreaty or expression of desire, and are words of command expressing an imperative testamentary design. *Hulse v. Tanner* 406
14. Where will in one clause provided for bequest of testator's property to his children and their issue in the manner thereafter set forth, and in subsequent clause prohibited sale of farms for ten years and placed them in charge of executors to use income to preserve the property and to support and educate a daughter until she married or reached the age of 21 years, and also provided for the taking per stirpes by issue of deceased child, and the taking by remaining heirs of share of child who died without issue, will create a ten-year trust and children received an equitable interest in premises subject to destruction unless they lived until termination of trust. *Hulse v. Tanner* 406
15. Where testamentary trust provided for distribution by executors among children of testator of surplus income

remaining after trust purposes had been met and for division of trust *res* at end of trust term, and will provided that upon death of a child without issue, remaining heirs should take his share, child of testator acquired a defeasible estate in trust *res* and trust income, and upon his death his interest terminated and passed to the remaining children. *Hulse v. Tanner* 406

16. Though subsequent provisions in a will will not prevail to cut down an estate in fee simple, they may operate to define the estate devised, and show that what without them would be a fee was intended to be an inferior estate. *Hulse v. Tanner* 406

17. The rules that words of limitation shall be applied to death of first taker without issue during life of testator does not apply where there are indications, however slight, that testator referred to death subsequent to his own demise. *Hulse v. Tanner* 406

18. In construing a will, testator's intent must be determined from the language used in the will and when so ascertained that intent must be given effect, if it is not contrary to law. *Goodrich v. Bonham* 489

19. In construing a will, it is presumed that testator intended to dispose of his entire estate, unless the contrary is apparent from the will itself. *Goodrich v. Bonham* 489

20. Where a will does not show a contrary intention, a remainder will not be held to be contingent if it can reasonably be held to be a vested remainder in view of policy of law to favor the early vesting of estates. *Goodrich v. Bonham* 489

21. Under will disclosing testator's intention to provide for all contingencies, and placing certain realty in trust, the net income to be paid to testator's daughter during her lifetime and that "upon the death of" the daughter title to realty shall vest in fee simple in testator's son, quoted words define the time when the enjoyment of estate in remainder begins and do not mean that remainder estate shall not vest until death of the holder of the life estate. *Goodrich v. Bonham* 489

Witnesses.

On issue involving allowance of claim by executor of a will against testator's estate for amount due on note executed by principal debtor and by testator as surety, where statute of limitations was pleaded as a defense, principal debtor had a direct legal interest in the transaction, within meaning of statute, rendering him incompetent

as a witness to testify to conversations between himself and testator showing that testator consented to payment which prevented barring of the claim. *In re Estate of Soukup* 456