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EDNA HAMMOND, APPELLANT, V. DOCTOR'S HOSPITAL, APPELLEE.
17 N. W. 2d 9

FILED JANUARY 5, 1945. No. 31810.

1. **Workmen's Compensation.** To sustain an award under the provisions of the workmen's compensation act there must be proof that the injury was occasioned by an accident arising out of and in the course of the employment.
2. ———. Where there is no evidence in the record as to when, how, and where an injury occurred which is alleged to have been the result of an accident arising out of and in the course of the employment, the case must fail for want of proof. Speculation and conjecture are insufficient to sustain an award.

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

G. H. Seig, for appellant.

Reed & Hruska and *John H. Trennery, Jr.*, *contra.*

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

CARTER, J.

This is a suit to recover benefits under the workmen's compensation act. The trial court found against the plaintiff and the plaintiff appeals from the judgment of dismissal entered against her.

The record shows that since August 10, 1942, plaintiff had been employed as a nurse at the Doctor's Hospital in Omaha. On or about January 23, 1943, plaintiff first observed an infection developing in the index finger of her right hand. The infection developed very rapidly and resulted in a permanent injury to the finger and a permanent disability to the right hand of approximately 25 per cent. It is stipulated in the record that if liability were established the compensation rate would be $15 a week. The only question to be determined here is whether the evidence is sufficient to show that the injury was the result of an accident arising out of and in the course of the employment.

Plaintiff testifies that when the infection first developed

she observed a small puncture of the skin on the infected finger, which she says was caused by a pin prick received while working at the hospital. She has no recollection of receiving the injury, but testifies that she was engaged in changing binders on several patients at the hospital, in which work she was required to use safety pins. She also testifies that it was the custom of the nurses at the hospital to apply mercurochrome to such injuries and that it had been applied when she first observed the infection. The infection proved to be a virulent, streptococcic infection. Plaintiff testifies that she was caring for patients suffering from streptococcic infections and that the danger of acquiring an infection from such patients was a risk well known to the profession. Her evidence can be summed up with the statement that she had no recollection of receiving the pin prick from which the infection entered the blood stream and that she could not give the exact date on which it occurred, although she could give instances when she used pins, that it must have occurred in pinning on a binder, and that she was positive it occurred while she was working at the hospital.

For the purposes of this appeal it is established that the plaintiff suffered an injury as the result of a pin prick on the index finger of the right hand, which brought on a streptococcic infection that permanently disabled plaintiff's right hand to the extent of 25 per cent. Is the evidence sufficient to show that the injury was sustained as a result of an accident arising out of and in the course of the employment?

The burden of proof is upon the plaintiff to establish by a preponderance of the evidence that the injury was sustained as the result of an accident arising out of and in the course of the employment. *Zanski v. Yellow Cab & Baggage Co.*, 143 Neb. 340, 9 N. W. 2d 302.

The words "arising out of" and "in the course of" the employment are used conjunctively in the statute and both conditions must be established to satisfy the requirements of the compensation act. The accident must occur not only

in the course of the employment, but the causative danger must also arise out of it. The words "arising out of" refer to the origin or cause of the accident and are descriptive of its character, while the words "in the course of" refer to the time, place, and circumstances of the accident. *Dietzen Co. v. Industrial Board,* 279 Ill. 11, 116 N. E. 684; 1 Schneider, Workmen's Compensation Law (2d ed.) sec. 266.

The record in the present case simply does not show that the accident arose out of and in the course of the employment. It is true that the evidence contains several unqualified declarations of her certainty that the injury was received while she was at work. This can be nothing more than supposition and conjecture in view of the fact that she has no recollection of when, where or how she received the injury.

In *Kuhtnick v. Carey,* 124 Neb. 762, 248 N. W. 89, this court said: "Further, the fact that the condition of Hugo Kuhtnick might have reasonably resulted from the injury suffered as claimed by him, or that it is conceivable that such results might have followed the same, is not sufficient to justify the conclusion, in the face of the entire record, that such condition was causally related to the claimed injury. Mere conjecture or surmise is not proof."

In *McCall v. Hamilton County Farmers Telephone Assn.,* 135 Neb. 70, 280 N. W. 254, a case wherein plaintiff, a switchboard operator in a telephone office, claimed that she contracted eczema of the ears from an unsterilized head set, this court said: "None of the physicians states that he has ever examined the head set or a similar one, and that it is the cause of the trouble. The statement that it is the cause of the condition is the mere suspicion or speculation of the appellant. She states now, as she stated to the doctors in her history to them, that the head set is the cause. This court is firmly committed to the doctrine that the burden of proof is upon the employee to prove that the accident which caused the disability occurred in the course of her employment. Suspicion and speculation do not pre-

sent sufficient cause upon which to base an award under the workmen's compensation act."

In *Nash v. Citizens Coal Co.*, 224 Ia. 1088, 277 N. W. 728, the plaintiff claimed compensation for an injury resulting from a bump on his leg. Claimant had no recollection of receiving any particular bump at any certain time or place. He testified that he received a bump but he could not tell whereabouts in the mine he received it, and neither did he have any definite recollection as to how it occurred. He further testified that he must have received the bump in the mine because he worked no other place. He also stated that he frequently received bumps while working low ceiling coal on his knees. The medical testimony is to the effect that a bump could have caused the disability, but that there were other causes which might have produced it. In affirming a judgment of dismissal the court said: "The commissioner's findings of fact were to the effect that as to when, how, why, and where said alleged injury occurred, there was nothing in the record but pure conjecture; and that from information acquired from the doctor that such swelling was likely to follow a bruise after the lapse of two days, claimant merely assumed that he received a bump two days before the swelling began. The commissioner further found that it was mere speculation as to whether the claimant's disability arose out of his employment, and therefore claimant failed to sustain the burden of proving that the disability for which he seeks compensation resulted from injury arising out of and in the course of his employment."

In *Hubbard v. Republic Motor Truck Co.*, 216 Mich. 358, 185 N. W. 715, the evidence shows that claimant observed a scratch upon his hand, which had become infected. Based upon the condition and appearance of the hand there was medical testimony that the scratch had been suffered not less than two nor more than six days before. This brought the time of injury within the last week of the employment. There was evidence that the employment was likely to produce scratches and that claimant and other employees had suffered them on other occasions. The court said: "A find-

ing that the scratch was an accidental personal injury arising out of and in the course of the employment rests upon conjecture and cannot be sustained."

In *Finlayson v. Dowd,* 60 S. D. 57, 243 N. W. 92, claimant testified that he had received a scratch while moving barbed wire in the employ of Dowd Brothers. He could not fix the time with any certainty except that it happened on the "Howard job." A statement signed by the claimant stated: "I think I might have stuck a thistle or piece of wire in my hand, but I don't know. I don't remember sticking anything in my hand, but we had a lot of fencing to move, and I helped to do that, and I thought that maybe I stuck something in my hand then." The court said: "The burden of establishing that the scratch was received in the course of employment was upon the claimant. * * * Under the facts as presented, we cannot hold that the commissioner was not justified in finding that the claimant had not met his burden."

We think the evidence is devoid of proof of a causal connection between the injury and the employment. The compensation law does not constitute the employer an insurer against every accidental injury. The burden is upon the plaintiff to establish by a preponderance of the evidence that the injury was the result of accident arising out of and in the course of the employment as required by the act. The evidence offered was based on speculation and conjecture and consequently fails to make a case. The trial court was correct in denying plaintiff's claim to benefits under the act.

AFFIRMED.

CLARENCE M. STOFFEL, APPELLEE, V. METCALFE CONSTRUCTION COMPANY ET AL., APPELLANTS.

17 N. W. 2d 3

FILED JANUARY 5, 1945. No. 31847.

1. **Trial.** 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 their determination.

2. ———. A party is entitled to have his theory of the case, as disclosed by the evidence, submitted to the jury under proper instructions.

3. **Master and Servant.** Among the duties of an employee is the obligation to yield obedience to all reasonable rules, orders and instructions of the employer.

4. ———. Generally any willful or intentional disobedience thereof justifies a rescission of the contract of employment and the peremptory dismissal of the employee.

5. ———. Where the sufficiency of the master's justification of dismissal raises an issue of fact, the proper course is to submit that issue to the jury.

6. ———. The measure of damages in suits for breach of contracts for personal services is the amount of the salary agreed upon for the period involved, less the amount which the servant earned, or with reasonable diligence might have earned from other employment during that period.

7. ———. The "other employment" which the discharged employee is bound to seek is employment of the same or of a substantially similar character to that of which he has been deprived.

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

Joseph T. Votava, for appellant.

M. L. Donovan, contra.

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

WENKE, J.

This action was commenced in the district court for Douglas county by Clarence M. Stoffel, as plaintiff, against the Metcalfe Construction Company, a corporation, the Hamilton Construction Company, a corporation, and the Kansas City Bridge Company, a corporation, as defendants, to recover damages for a breach of contract. From a verdict and judgment thereon in favor of the plaintiff, the defendants have appealed.

For the purpose of this opinion Clarence M. Stoffel will be referred to as plaintiff and the several defendant companies as defendants.

Under the principle that 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 and that such issue should be submitted to the jury for their determination, the defendants contend the court erred in giving instruction No. 4. *Doyle v. Franek*, 82 Neb. 606, 118 N. W. 468; *Stevens v. Fall*, 133 Neb. 610, 276 N. W. 401; *Scott v. New England Mutual Life Ins. Co.*, 128 Neb. 867, 260 N. W. 377.

Instruction No. 4 is in part as follows:

" * * * you are instructed that in this case, notwithstanding the fact that the existence of a contract between the plaintiff and defendants has been denied by the defendants, the uncontradicted evidence discloses that the contract as alleged in the plaintiff's petition had been entered into, and that the plaintiff was discharged by the defendants.

"Therefore you are instructed as a matter of law that the contract as alleged in the plaintiff's petition did exist between the plaintiff and the defendants, and that the plaintiff was discharged therefrom by the defendants."

The undisputed evidence discloses that Thomas J. Durkin was project engineer for the defendants on their Canadian and Alaskan projects and part of his job was to obtain personnel for the engineering department. On December 18, 1942, the plaintiff, a consulting and structural engineer, contacted Durkin at the Pathfinder Hotel in Fremont, Nebraska, and discussed with him the matter of employment. At the conclusion of the meeting plaintiff asked Durkin to hold it open for a day or two and he would make up his mind. On December 20, 1942, he called Durkin and advised him that he would accept the proposition. Durkin then, under date of December 26, 1942, wrote plaintiff a letter setting forth what they had agreed upon. This letter is in part as follows:

"Dear Sir: RE: *Alcan Highway Rail Head Project*

"You are herewith notified to report at Edmonton, Canada, to assume the duties of Chief Structural Designer with a monthly rate of $700.00. You are to report at Edmonton about January 15, 1943. * * *

"Your contract will be for nine (9) months from the day you report to the Edmonton office. Your transportation from your home to Edmonton will be reimbursed shortly after your arrival. Upon satisfactory completion of your contract, your return transportation will be reimbursed. * * *

"Yours very truly,
"Metcalfe Construction Co.
"Hamilton Construction Co.
"Kansas City Bridge Company
"By /S/ T. J. Durkin
"Project Engineer."

By their negotiations the parties discussed the proposed employment and the terms thereof. This offer the plaintiff accepted and the full terms thereof were then set out in the letter of December 26, 1942, which completed the contract of employment and the trial court was correct in so holding.

Under date of January 8, 1943, the defendants, through Durkin, sent plaintiff the following telegram: "Due to developments referred to in my conversation by phone with you this date it becomes necessary for me to withdraw the offer of the position as chief structural designer for this project made to you in our letter dated Dec 26 1942." Durkin also testified that whether they had a contract with plaintiff or whether they did not they would have let him go. Under our holding that the parties entered into the contract of employment, we hold that the acts of the defendants were in effect a discharge of the plaintiff from such employment. Therefore, the instruction was proper.

We have, in this respect, not overlooked the testimony of Durkin with reference to what further requirements he had advised plaintiff were necessary. However, under our holding that the letter of December 26, 1942, consummated the employment, such testimony becomes immaterial.

"A party is entitled to have his theory of his case, as disclosed by the evidence, submitted to the jury, under proper instructions, * * * ." *Mentz v. Omaha & C. B. Street Ry. Co.*, 103 Neb. 216, 170 N. W. 889.

Defendants contend that the nature of their work was a military secret and was to be held confidential and not made public, of which the plaintiff was advised; that plaintiff nevertheless caused and permitted an article about it to be published in the Omaha World Herald on January 6, 1943; that this release to the press was such a breach of the contract as justified plaintiff's discharge; and that this defense was not properly or sufficiently submitted to the jury.

There is evidence to the effect that on January 6, 1943, Mr. Cowan of the Omaha World Herald interviewed the plaintiff about his employment and then on the same day, from the information obtained, caused an article about it to be published therein.

By the latter part of instruction No. 4 and instruction No. 5 the burden of establishing this defense was properly placed on the defendants. However, the court did not define the duties and obligations which the law imposes upon an employee and the right of an employer as to when he may discharge an employee because of a violation thereof.

"Among the fundamental duties of the employee is the obligation to yield obedience to all reasonable rules, orders, and instructions of the employer, and wilful or intentional disobedience thereof, as a general rule, justifies a rescission of the contract of service and the peremptory dismissal of the employee, whether the disobedience consists in a disregard of the express provisions of the contract, general rules or instructions, or particular commands." 35 Am. Jur., sec. 44, p. 478.

"There is an implied obligation in contracts of employment that, as part of the consideration, the employee will be loyal, diligent, faithful, and obedient. His right to compensation depends upon the observance or performance of these duties. If he fails in due fidelity, he forfeits his right to his employment." *Bernstein v. Lipper Mfg. Co.*, 307 Pa. St. 36, 160 Atl. 770.

"Under the law, an employe is required to obey all reasonable orders of the employer." *Bang v. International Sisal Co.*, 212 Minn. 135, 4 N. W. 2d 113, 141 A. L. R. 657.

" * * * a promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law; * * * ." *Lacy v. Getman*, 119 N. Y. 109, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806.

"The privilege of discharge has been said to exist in those cases where there has been a material breach of the employment contract, and 'wilful disobedience' is recognized as such a breach. Restatement, Agency, sec. 409." *Bang v. International Sisal Co., supra.*

" * * * the question whether, in any given instance, a breach was committed, is essentially one of fact, and therefore primarily for the jury." *Dorrance v. Hoopes*, 122 Md. 344, 90 Atl. 92.

"Disobedience of lawful and reasonable orders connected with his employment affords just grounds for the discharge of an employe." *Kenner v. Southwestern Oil Co.*, 113 La. 80, 36 So. 895.

"In any case where the sufficiency of the master's justification of a dismissal is deemed to raise an issue of fact, the proper course is to submit that issue to the jury under suitable instructions, informing them, in general language having relation to the evidence introduced, what kind of acts or omissions on the servant's part constitute a good cause of discharge." 1 Labatt, Master & Servant (2d ed.) sec. 272, p. 823.

The court should instruct what amounts to legal justification and from facts let the jury determine if they existed. *Ernst v. Grand Rapids Engraving Co.*, 173 Mich. 254, 138 N. W. 1050.

While we find no competent evidence that the nature of the work was a military secret, however, whether the matter was a military secret or not, there is evidence to the effect that instructions were given the plaintiff to hold it confidential and not to give it any general publicity. The trial court should have defined the duties and obligations of an

employee to his employer and the rights of an employer as to when he may discharge an employee because of the violation thereof, and thus submitted to the jury the question of whether or not the release to the press was such a breach as entitled the defendants to discharge the plaintiff.

Defendants complain of instruction No. 6. This instruction advised the jury that if their verdict was for the plaintiff he was entitled to recover the full contract price less the sum of $800, which plaintiff admits he received during this period, together with any amount that he might have earned in the exercise of due diligence by securing other employment. Defendants' complaint of this instruction is that it excluded from the jury's consideration the amounts plaintiff received from the Gate City Erection and Supply Company.

There is evidence in the record to the effect that from January, 1943, up until plaintiff left to go to Tennessee in August, 1943, he went to the office of the Gate City Erection and Supply Company two or three times a week and received from the company approximately $125 a month. Plaintiff was the owner of two-thirds of the company and practically its sole manager. He explains the amount received as being $25 for car expense and $100 capital withdrawal.

The instruction does, in effect, exclude this evidence from the jury's consideration. It was for them to consider and determine, under the evidence, whether this was salary or withdrawal of capital.

" * * * the general rule is well settled that under such circumstances the measure of damages is *prima facie* the amount of the wages for the full term: * * * . Such damages may, however, be reduced if after his discharge the employee obtained other work, or if he was offered other employment of the same general kind, which he refused: * * * ." Note appearing in 43 Am. Dec. 762, to the case of *Costigan v. Mohawk & H. R. Co.*, 2 Denio (N. Y.) 609, 43 Am. Dec. 758.

" ' "The measure of damages in such cases is the amount

of salary agreed upon for the entire period of service, less the amount which the servant has earned or with reasonable effort might have earned from other employment." (*Boardman Co. v. Petch*, 186 Cal. 476, 484 (199 Pac. 1047) . . . . . ; *Seymour v. Oelrichs*, 156 Cal. 782, 801 (106 Pac. 88, 97, 134 Am. St. Rep. 154).)' (*Goudal v. C. B. DeMille Pictures Corp.*, 118 Cal. App. 407, 414 (5 Pac. (2d) 432, 7 Pac. (2d) 174).)" *De La Falaise v. Gaumont-British Picture Corporation*, 39 Cal. App. 2d 461, 103 Pac. 2d 447. See, also, *Atholwood Development Co. v. Houston*, 179 Md. 441, 19 Atl. 2d 706.

In the case at bar the court should have instructed the jury that if they found for the plaintiff they should allow him the stipulated salary, less any amount he actually earned during the period of the contract or any amount he might have earned in the same or similar employment by the exercise of reasonable diligence in seeking other employment from the time of his discharge to the expiration of the contract. The court, under the evidence, should not have limited the amount he actually earned to $800, which was admitted, but should have so instructed that the jury could have considered whether or not the money he received from the Gate City Erection and Supply Company was earnings or withdrawal of capital.

In this connection we have examined defendants' contention that the court erred in excluding various exhibits in the form of ads in the Engineering News-Record of help wanted. In this we think the court was correct. These ads were not for work of the same or sufficiently similar employment so as to make them relevant. This court has said that it is the duty of a discharged employee who has been wrongfully discharged to make reasonable efforts to avoid loss by securing other employment. *Helwig v. Aulabaugh*, 83 Neb. 542, 120 N. W. 162; *Kring v. School District*, 105 Neb. 864, 182 N. W. 481. However, the "other employment" which the discharged employee is bound to seek is employment of the same or of a substantially similar character to that of which he has been deprived; he need not

enter upon service of a different or inferior kind. *Gregg v. McDonald,* 73 Cal. App. 748, 239 Pac. 373; *Taylor v. Pope,* (Mo. App.) 259 S. W. 527; 39 C. J., sec. 150, p. 117; 18 R. C. L., sec. 39, p. 529; *Standard Oil Co. v. Lloyd,* 26 Ala. App. 306, 159 So. 371; *De La Falaise v. Gaumont-British Picture Corporation, supra;* and Annotations 28 A. L. R. 737, 141 A. L. R. 663.

Exhibit 11 is a telegram dated January 8, 1943, sent by Frederick Ware, city editor of the Omaha World Herald, seeking to explain the article of January 6, 1943. It was admitted by the court for the limited purpose of showing it was sent and received. This the defendants were willing to admit. This telegram consists primarily of hearsay and conclusions and was not admissible. The court should not have received it in evidence.

The defendants further complain of certain remarks of the trial court made during the course of the trial. During the course of the trial while the defendants were examining their witness Durkin, plaintiff's counsel objected as follows: "Just a minute, I think we are getting a little bit into a lot of hearsay. The Court: Getting into it? You have been into it. That's all the witness has testified to, practically, is hearsay. Mr. Donovan: I don't like to stop the witness, - - The Court: It has been hearsay all along, but I didn't hear any objection. You are getting a little far afield when a colonel in Canada can talk to this fellow and the plaintiff is in Omaha a couple of thousand miles away and still put it in evidence. You are getting pretty far afield." There are other remarks of the court in the record referring to the testimony of the witness Durkin. "In the trial of a cause before a jury, improper comments of the trial judge from the bench may be prejudicially erroneous where they tend to discredit a witness and his testimony." *McCulley v. Anderson,* 119 Neb. 105, 227 N. W. 321. And as stated in *In re Estate of Strelow,* 117 Neb. 168, 220 N. W. 251: " * * * under our practice the jury are the sole judges of the credibility of the witnesses, and the weight to be given their testimony. Hence, it is our

conclusion that such remark made by the trial judge was without the province of the court, and was erroneous and prejudicial." See, also, *Langdon v. Loup River Public Power District*, 144 Neb. 325, 13 N. W. 2d 168. Judges should be careful in jury trials and refrain from commenting upon witnesses or their testimony for each party is entitled to have the jury pass upon the evidence without having its effect or importance altered, either as to credibility or value.

For the reasons herein stated the verdict and judgment of the district court are set aside and a new trial ordered.

REVERSED.

IN RE ESTATE OF JURGENSMEIER.
HENRY JURGENSMEIER, EXECUTOR, APPELLANT, V. JOHN JURGENSMEIER ET AL., APPELLEES: IMPLEADED WITH DWIGHT GRIFFITHS, GUARDIAN AD LITEM, APPELLEE.

17 N. W. 2d 155

FILED JANUARY 10, 1945. No. 31870.

1. **Judgment.** It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action.
2. **Executors and Administrators:** INSANE PERSONS. Neither the incompetent ward nor the guardian of such incompetent possesses the power to consent that the executor of an estate, in which the ward has an interest, may purchase property of the estate, either directly or indirectly; and where the executor does so purchase the property, the guardian cannot ratify the sale so as to bind the incompetent.
3. ———. In estate proceedings it is the duty of the court to protect the interests of all parties, whether actually before the court or not.
4. **Costs.** Generally, representatives of estates are personally liable for costs when they unsuccessfully appeal in their own interest from a settlement of their accounts, or when an appeal results from their fault or misconduct.
5. **Executors and Administrators:** ATTORNEY'S FEES. Generally, the

representative of an estate is entitled to the allowance of an attorney's fee in a controversy over surcharging his account when the account is upheld and denied when the account is not upheld.

6. ———. An estate of a decedent is liable for attorney's fees for services rendered at the request of a legatee when the services preserved the estate, added to its value or was otherwise beneficial to it.

7. ———. The litigant to whom the fee for services of a guardian *ad litem* shall be taxed as costs depends upon the circumstances of each particular case and the discretion of the court.

8. ———. County courts should compel the representatives of estates to charge themselves with interest in their account when, by doing some unauthorized act they have abused their trust or have been guilty of some fault or wrong in its performance and are surcharged because thereof. Interest should be upon the amount so surcharged at the legal rate from the date of such unauthorized act.

APPEAL from the district court for Nemaha county: CLOYDE B. ELLIS, JUDGE. *Reversed, with directions.*

Gerald M. Mullen, John C. Mullen and *William G. Rutledge,* for appellant.

Lee Kelligar and *Fred Hawxby, contra.*

Dwight Griffiths, guardian *ad litem.*

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

WENKE, J.

This cause was previously in this court and is reported as *In re Estate of Jurgensmeier,* 142 Neb. 188, 5 N. W. 2d 233. Thereafter, after the mandate was issued, the district court for Nemaha county remanded the cause to the county court of Nemaha county and it entered a supplemental final decree and order for distribution on October 12, 1943. Appeal was taken therefrom to the district court. The district court entered judgment therein on January 21, 1944. From this judgment Henry Jurgensmeier, executor of the estate of John Jurgensmeier, deceased, appealed to this court. Cross-appeals were taken by John Jurgensmeier, Jr., and Anna Schlosser and Dwight Griffiths, guardian *ad litem* for Joseph Jurgensmeier, incompetent.

For the purpose of this opinion Henry Jurgensmeier, executor of the estate of John Jurgensmeier, deceased, will be referred to as executor and John Jurgensmeier, Jr., Anna Schlosser and Dwight Griffiths, guardian *ad litem* for Joseph Jurgensmeier, incompetent, will be referred to collectively as objectors.

The principal purpose of the executor's appeal is to have us reconsider the findings of fact and questions of law passed upon and determined in the former opinion. Therein the judgment of the lower court was reversed with directions to require the executor to account for the real estate described as the southeast quarter of section 28, township 5, range 14, on the basis of its reasonable value of $16,000, taxing the cost of the appeal in this court to the executor. Mandate was issued thereon. In this situation, under the rulings of this court, the material facts or questions therein determined are conclusively settled. As stated in *Blum v. Truelsen,* 139 Neb. 282, 297 N. W. 136: "It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action.' 30 Am. Jur. 920, sec. 178." See *Bohmont v. Moore,* 141 Neb. 91, 2 N. W. 2d 599; *Callahan v. Prewitt,* 143 Neb. 793, 13 N. W. 2d 660.

The contention that part of the legatees ratified the sale and are now estopped from receiving their distributive share of the funds with which the executor has been surcharged was decided to the contrary in *In re Estate of Jurgensmeier, supra.* As stated therein: "As to the situation of Joseph Jurgensmeier, the incompetent, and his guardian *ad litem,* the unquestioned rule applicable is that neither the incompetent ward nor the guardian of such incompetent possesses the power to consent that the executor of an estate, in which the ward has an interest, may purchase property of the estate, either directly or indirectly; and where the excutor does so purchase the property, the guard-

ian cannot ratify the sale so as to bind the incompetent. *Moore v. Carey,* 116 Ga. 28, 42 S. E. 258; 21 Am. Jur. 734, sec. 629." The same would be true of the guardian of Alice Jurgensmeier, incompetent, and subsequently, after her death, the executor of her estate. As to the other legatees the opinion holds: "We do not overlook the contention that the heirs have ratified the executor's sale under consideration. Undoubtedly certain of them have. * * * In this class of cases, the rule appears to be: 'In this connection it has been held that each of the persons interested has an individual election, and a ratification by some of the heirs or devisees will not preclude a repudiation by the others.' 24 C. J. 637. * * * 'The heirs, therefore, or their assignees, have an election to avoid or confirm the sale. And in doing this, they are not bound to act jointly. Each one has an individual election. If the affirmance of the sale by some, and the avoidance of it by others, will produce a great inconvenience in the final settlement of the estate, it will fall, where it ought, upon the administrator, who has violated his trust and by his wrongful act caused the embarrassment. * * * .' *Litchfield v. Cudworth,* 15 Pick. (Mass.) 23, 31. * * * it was the duty of the executor to account to the legatees named in his final report for such real estate as for personalty in his possession for distribution. He was liable to each of the legatees named in his decedent's will on that basis. And in the instant case, it appearing that the sale by the executor was unlawfully made, that he in fact secured an interest in the property sold by him, and was an indirect purchaser thereof, he is chargeable with, and at the election of the beneficiaries must in his final report account for, the actual value of the property involved which is established by the evidence herein as the sum of $16,000, and not merely with the amount realized at the sale."

With reference to the distribution of these funds, section 30-1302, R. S. 1943, provides in part: " * * * the county court shall, by a decree for that purpose, assign the residue of the estate, if any, to such other persons as are

by law entitled to the same." And section 30-1303, R. S. 1943, provides: "In such decree the court shall name the persons, and the proportions or parts to which each shall be entitled, and such persons shall have the right to demand and recover their respective shares from the executor or administrator, or any person having the same."

It is the duty of an executor to administer the estate promptly and to distribute the property to those entitled thereto without unnecessary delay. *In re Estate of McLean,* 138 Neb. 757, 295 N. W. 273. And it is the duty of the court to protect the interest of all parties, whether actually before the court or not. *Sorensen v. Sorensen,* 68 Neb. 490, 98 N. W. 837.

As to the matter of costs, the rule as stated in 24 C. J., sec. 2532, p. 1058, is generally applicable: "Representatives are personally liable for costs when they unsuccessfully appeal in their own interest from a settlement of their accounts, or when an appeal results from their fault or misconduct, * * * ."

As to costs taxed to the executor personally in the previous appeal of this matter, we stated in *In re Estate of Wilson,* 97 Neb. 780, 151 N. W. 316: "In such a contest, if there has been litigation between the administrator and the heirs of the estate and final judgment determining the liability for costs thereon, the administrator in his final settlement with the estate should be allowed such costs as are adjudged in his favor in such litigation, but not costs adjudged against him therein."

As to the matter of attorneys' fees, both as to counsel for the objectors, including the guardian *ad litem,* and for the executor, the following principles apply:

"The decisions generally sustain the right of an executor or administrator to an allowance of attorneys' fees in a controversy over surcharging his account where the account is upheld, and deny it where the account is not upheld." 21 Am. Jur., sec. 557, p. 694.

" * * * he is not entitled to reimbursements for attorney's fees or other expenditures incurred by him in his

individual contest with the estate." *In re Estate of Wilson, supra.* See, also, *In re Trusteeships under last will of Drake,* 195 Minn. 464, 263 N. W. 439, 101 A. L. R. 801; *In re Guardianship of Morris, ante,* p. 319, 16 N. W. 2d 442.

" * * * no allowance may be made out of the estate of a deceased person for the services of an attorney not employed by the personal representative of the estate unless the services redounded to the interest of all persons interested in the estate and were beneficial to the estate." *In re Estate of Love,* 136 Neb. 458, 286 N. W. 381.

"An estate of a decedent is liable for attorneys' fees for services rendered at the request of a legatee, even when successful, only when the services preserved the estate, added to its value, or were otherwise beneficial to it." *In re Estate of Love, supra.*

"The litigant to whom the fee for services of a guardian *ad litem* shall be taxed as costs depends upon the circumstances of each particular case and the discretion of the court. *Shelby v. Meikle,* 62 Neb. 10, 86 N. W. 939; *Bailey v. Garrison,* 68 Neb. 779, 94 N. W. 990." *Wood Realty Co. v. Wood,* 132 Neb. 817, 273 N. W. 493.

Should interest be charged upon the amount of $6,320 surcharged to the executor because of his sale of the land contrary to the common-law rule that an executor cannot purchase, either directly or indirectly, at a sale of his decedent's land under a power in the will? The latter is the same principle set forth in section 30-1118, R. S. 1943, as to sales authorized by district court. As stated in 4 Schouler, Law of Wills, Executors and Administrators (6th ed.) sec. 2956, p. 2500: "Chancery and probate courts, in modern practice, will compel the executor or administrator to charge himself in his account with interest, * * * where he has abused his trust, or has been guilty of some fault or wrong in its performance." As held in *In re Estate of Wilson, supra*: "The district court also charged him with interest thereon from the time that he improperly obtained credit in the county court therefor, and this interest was also a proper charge."

We have recently held in the case of *In re Guardianship of Morris, supra,* that a guardian is liable for interest on an unauthorized loan from the time it was made. The same reasoning as there discussed is applicable here. Interest is properly chargeable from the date of the executor's unauthorized sale of the premises to his wife.

Applying these principles to the various items in the accounting of the executor, the estate should not be charged with any attorney's fees for the executor in connection with the contest over his final account in which he was surcharged with $6,360. This includes the items of $400 allowed for the services of John C. Mullen and $325 of the amount allowed for the services of William G. Rutledge. It appears from the record that the balance of the fees allowed William G. Rutledge were for the regular administration of the estate. The two items of $26.50 and $26.80 for briefs in the previous appeal of this case are likewise not properly chargeable to the estate. The costs of $26.60 in the district court are not chargeable to the estate but to the executor personally.

Of the costs and expenses allowed the objectors John Jurgensmeier, Jr., and Anna Schlosser in the sum of $129, it includes $52.40 included in the $92.50 taxed to the executor personally in the previous appeal in this matter and not properly chargeable to the estate. The same is true of the $40.10 allowed the guardian *ad litem.*

The record discloses that the objectors, John Jurgensmeier, Jr., and Anna Schlosser, have been allowed $1,200 for legal services in the litigation connected with their objections. We find the reasonable value of these services, including this appeal, to be in the sum of $1,000 and that same is a proper charge against the estate.

The record further discloses that the guardian *ad litem* has been allowed a total of $410 for services for himself in connection with the objections he filed to the final account of the executor. We find that a reasonable fee for his services, including this appeal, to be in the sum of $635, which includes $35 previously allowed, and that the same is a proper charge against the estate.

Therefore, the judgment of the district court is reversed and the cause remanded, with directions to require the executor to account as follows: Balance on hand from the last report as shown by the executor's report dated November 27, 1942, $2,761.92; return of executor's fee, $40; and the difference in the reasonable value of the land sold to executor's wife in the sum of $6,320, as directed by mandate of this court, together with interest thereon at six per cent from March 6, 1939. That there is properly chargeable to said estate and payable out of the funds thereof by the executor: Attorney's fees and expenses to William G. Rutledge, $71.40; county court costs, $131.47; expenses had by the executor, including premiums on his bond, $101.76; John Jurgensmeier, Jr., and Anna Schlosser for services of their attorney in litigation involving their objections, the sum of $1,000 and for expenses connected therewith, $50.70; to Dwight Griffiths, guardian *ad litem* for services, $600; to sheriff Harvey H. Kuenning for costs and expenses, $99.62.

It is further ordered that the balance is to be distributed equally to all of the legatees of the deceased as provided in his last will. The costs of this appeal are taxed to the executor personally.

REVERSED, WITH DIRECTIONS.

EARL D. WILLIAMS, APPELLEE, V. WATSON BROS. TRANSPORTATION COMPANY ET AL., APPELLANTS.
16 N. W. 2d 199

FILED JANUARY 23, 1945. No. 31862.

1. **Workmen's Compensation.** To sustain a claim for compensation under the workmen's compensation act, the employee has the burden of establishing by a preponderance of the evidence that he has incurred a disability arising out of and in the course of his employment.
2. ———. This proof must be made by evidence leading either to the direct conclusion or to a legitimate inference that such is the fact.

3. ———. An award cannot be sustained if based upon possibilities, probabilities, conjectural or speculative evidence.
4. Evidence. The value of the opinion of an expert witness is dependent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true.

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

Votava & McGroarty and *Lyle Q. Hills,* for appellants.

George B. Boland and *David D. Weinberg, contra.*

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

SIMMONS, C. J.

This is a workmen's compensation case. Defendants appeal from a judgment of the district court awarding compensation to the plaintiff. We reverse the judgment and dismiss the plaintiff's petition.

Plaintiff in his petition in the compensation court alleged that while an employee of the defendant, Watson Bros. Transportation Company, as a truck driver, he, on July 7, 1943, received personal injuries arising out of and in the course of his employment, resulting in a concussion of the brain, with edema, possible skull fracture and an aggravation of pre-existing condition, and causing permanent and total disability.

Defendants by answer denied that plaintiff's condition was caused by accident or trauma, and denied liability. The matter was heard by one judge of the compensation court, who awarded compensation, from which the defendants appealed, with the result above indicated.

Some of the facts are not in dispute. There is dispute as to other facts and in the conclusion of the experts called by the parties.

For fourteen years prior to July 7, 1943, plaintiff had been a truck driver for defendant, and, with one exception, working steadily in a satisfactory manner and without accidents. It seems to be conceded that some ten years be-

fore the above date, plaintiff had contracted syphilis and had been treated therefor at the time. It was not disabling.

In April, 1941, he was driving a truck for the defendant near Iowa City, Iowa. He was found unconscious in the cab of his truck. The truck had been parked, brakes applied and motor cut off. Plaintiff was taken to a hospital in Iowa City, where his condition was diagnosed as meningo-vascular syphilis, with a cerebral thrombosis caused by the syphilis, then in the tertiary stage with a four plus Wassermann, which caused convulsive seizures. He had at least one severe convulsion while in the hospital that night. The attending physician, being without a history of the patient, examined for trauma and brain concussion, and found none. He examined for carbon monoxide poisoning, both by laboratory tests and physical examination, and found that the convulsions were not caused by gas poisoning, but were due to an involvement of the brain resulting from the syphilis. Plaintiff testified that the attack was brought on by being overcome by gas fumes from the truck. Plaintiff was taken the following day to a hospital in Omaha, where he was treated for syphilis. He remained off duty for several weeks, when he returned to work, and continued to work without interruption or incident until July 7, 1943. However, during that period of two years, he took regular treatments for his disease. The Wassermann was reduced from a four plus to a three plus positive.

On July 7, 1943, plaintiff was driving a truck consisting of a diesel-motored tractor and attached trailer, en route from Omaha to North Platte. On his direct examination, he testified that he noticed gas coming into the truck before he got to Wahoo, and that "it was gassing" and "I commenced to get sick, thats when I started to stop." He stopped at a point 14 miles west of Wahoo. On cross-examination, he stated that he had commenced to get sick east of Wahoo. He testified that the windows of his cab were "partly closed." He stopped the truck, turned off the ignition, put on the brakes, opened the door to get out and caught his heel "right on the end of the door" and fell to

the pavement. The evidence as to how his fall was caused is not contradicted.

It is to be noted that the pattern of the events of July 7, 1943, including plaintiff's explanation of the cause, follows the pattern of the events in April, 1941.

The testimony as to the cab windows is contradicted by the driver of a truck who came upon the scene shortly thereafter, and who examined the truck and testified that the windows were down. Plaintiff's testimony as to the gassing is corroborated by a fellow employee who passed him a few miles to the east and who testified that his truck was then enveloped in black smoke. The evidence is that the exhaust of the truck was on the right side, extended to the rear of the tractor where the outlet was located. Plaintiff testified that the wind was from the east and blowing in the direction of his movement. The evidence, however, is uncontradicted that the engine of this tractor had been completely overhauled three weeks before the event, was in good mechanical condition, and when driven away from the scene, was in good order. The doctor who treated plaintiff immediately following the event, testified that he had no symptoms of gas poisoning and that "it could not be from gas poisoning." The trial court specifically found that plaintiff's "sickness was not caused by the exhaust gas of the truck." With that finding we agree.

Shortly after the accident, the truck driver came upon the scene, saw plaintiff with his head on the pavement and his feet on the running board. This driver stopped, could hear plaintiff breathing heavily at a distance of 40 to 50 feet, went to him, found his face dark in color, he was frothing at the mouth and his legs kicking. This driver and his wife got plaintiff to the rear of the truck where he had another convulsion. They sent for help and a first-aid car and the sheriff came.

The evidence of the driver, the sheriff, the first-aid man and the doctor as to visible injury to plaintiff's head is that he had an "abrasion" on his forehead. The doctor described it as "very mild" and not having the appearance of

being caused by a severe blow. He treated and bandaged it as a matter of caution. They testify that there was no bleeding and one witness testified that there was some swelling. Plaintiff's wife, who later saw him in the hospital, testified to extensive lacerations, bruises, cuts and a black eye. She further testified that his cap, when found in the truck, was "full of blood in the top." The doctor who examined the plaintiff on July 9, 1943, found "a lot of bruises over his right eye and the forehead." We are of the opinion that the testimony of the wife as to the extent of the visible injuries was an exaggeration.

Plaintiff was taken in the first-aid car to a hospital in Wahoo. Shortly before his arrival there he had a convulsion. He was either unconscious or mentally confused when he reached the hospital. Plaintiff had another convulsion at the hospital, and the doctor administered chloroform which quieted him. He started another convulsion and the doctor administered sodium amytal, which was effective. His mind was still confused the following morning, which could have resulted from the drug that was administered.

Plaintiff, when three years old, had been kicked in the head by a horse, resulting in the loss of an eye. The doctor at Wahoo at the time was of the opinion that these convulsions might have been brought on as a result of the old injury. He did not have the history of syphilis.

On the day following, plaintiff was taken from the hospital to his home in Omaha. There, on July 9, he was examined by a physician, his mind was clear and he complained of a headache. On July 11, his mind was confused and he had developed "a weakness in his arm and face." He was sent to a hospital and specialists called.

This physician testified that in his opinion, the plaintiff was overcome by gas, fell on his head causing an injury to his brain tissue causing edema, and that it "set up some damage which prevented him from coming back to his normal self"; and that plaintiff's syphilitic condition made him more liable to trouble from trauma than an ordinary person. He further testified that in order to aggravate the

pre-existing condition, there must be a blow severe enough to do some injury to the brain, and that the plaintiff in his opinion had sustained a concussion.

On July 13, 1943, plaintiff was examined by a specialist in neurological surgery. He was given plaintiff's history. Plaintiff was conscious but mentally confused, was not in pain, but had a slight weakness of the right arm and right side of the face. A trephine operation was recommended to determine whether or not there had been a hemorrhage and collection of blood. The opening was made in the left temple. Evidence of hemorrhage, injury to the brain or the membrane surrounding the brain, or trauma, was not found. The brain was found reduced in size, was not swollen and there was an excess of cerebro-spinal fluid on the outside in the fissures of the brain, where it lies "because something has to fill up this space." The specialist further testified that there was no edema; that this term means an increase of fluid in the tissue causing a swelling; and that the condition found was just the opposite. He further testified that convulsions caused by brain injury usually happen a considerable time after the injury when scar tissue has grown into the site of the injury.

On July 23, 1943, plaintiff was referred to a specialist in neurosyphilis for treatment, has since been under his care, and has been receiving chemical injections and fever treatment for his disease. As of January 17, 1944, this witness testified that plaintiff was suffering from an organic brain disease known as general paresis. This specialist reviewed the entire history, including his own treatment, the convulsions, the momentary warning that often comes of their approach, the ability to work, the progress of the disease from its intermediate stage of meningo-vascular syphilis to paresis, the brain atrophy, the excess of cerebro-spinal fluid, the absence of evidence of trauma, and gave it as his opinion that the plaintiff on July 7, 1943, suffered a convulsion as the result of his disease, and that his condition since is the result of the normal progress of the disease, in no wise affected by the event of that date. He further

testified that the reduction of the positive Wassermann from a four plus to a three plus before July 7, 1943, was not of importance, as it still showed the disease to be active. He further stated that a brain concussion would aggravate the disease, but that there must be an active brain injury.

In this connection, it is to be noted that while there was a dispute as to the extent of the visible head injury, as pointed out herein, there was no dispute as to the findings of the neurological surgeon that there was no brain injury, and no dispute as to the positive findings which negatived that conclusion.

The applicable rules are: "To sustain a claim for compensation under the workmen's compensation act, the employee has the burden of establishing by a preponderance of the evidence that he has incurred a disability arising out of and in the course of his employment. * * * This proof must be made by evidence leading either to the direct conclusion or to a legitimate inference that such is the fact. * * * An award cannot be sustained if based upon possibilities, probabilities, conjectural or speculative evidence." *Feeney v. City of Omaha,* 140 Neb. 497, 300 N. W. 571.

We reach the conclusion that the head injury which the plaintiff received on July 7 is not shown to have been in any wise a causative factor in plaintiff's disability. A contrary conclusion is clearly indicated. There remains, of course, the possibility that it may have been so caused, but that is not sufficient to establish the right to compensation. In reaching this conclusion, we are mindful of the testimony of the doctor, who examined plaintiff on July 9, to the effect that the injury of July 7 aggravated his disease and contributed to his disability. His opinion cannot be accepted as controlling. It is based on the premise of the plaintiff having been overcome by gas, and to his having had an injury to the brain tissue, an edema and a concussion. Here the premise being false, the conclusion based thereon cannot be accepted as true.

The value of the opinion of an expert witness is depend-

ent on, and is no stronger than, the facts on which it is predicated. The opinion has no probative force unless the premises upon which it is based are shown to be true. 32 C. J. S., sec. 569, p. 395.

It necessarily follows that the trial court erred in awarding compensation. The judgment of the trial court is reversed and plaintiff's petition dismissed.

REVERSED AND DISMISSED.

LINCOLN TRUST COMPANY, APPELLEE, V. ELECTA MCDOWELL ET AL., APPELLANTS.
17 N. W. 2d 349

FILED JANUARY 23, 1945. No. 31867.

Mortgages. An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.

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

R. E. Harris, for appellant.

Evans & Lee, contra.

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

SIMMONS, C. J.

Defendant, Electa McDowell, appeals from an order confirming a sale in a real estate mortgage foreclosure, on the basis that the sale price was far below the actual value of the land.

The rule is: "An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between the value and

the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale." *Kansas City Life Ins. Co. v. Zakrzewski,* 143 Neb. 878, 11 N. W. 2d 496.

The decree of foreclosure was entered May 9, 1932. The land was sold to the plaintiff under the decree on June 19, 1933, for $17,061.33, being $74.65 less than the amount of principal, interest and costs then due. Moratoriums then were had under State and United States statutes. March 20, 1944, on objection to confirmation by defendant, the 1933 sale was set aside and a new sale ordered. The land was sold on April 24, 1944, to plaintiff for $13,000. Defendant objected to the confirmation of this sale and plaintiff in open court raised its bid to $15,000, which bid the trial court accepted and confirmed the sale.

The property consisted of 461 acres of farm and pasture land, improved by a "nice house", a good chicken house, barn and garage, trees and fencing. Plaintiff's witnesses fixed the value of the land at amounts ranging from $8,640 to $13,000. Defendant's witness fixed the value at amounts ranging from $16,000 to $18,440. There is no showing that a higher bid could be obtained in the event of another sale.

Defendant's theory seems to be that since plaintiff bid over $17,000 in 1933, it shows that its present bid of $15,000 is inadequate. Defendant, however, on objection to the confirmation of the first sale offered evidence that the value in 1933 was approximately one-third of the plaintiff's bid.

Under the above-established rule, the judgment of the trial court is affirmed.

AFFIRMED.

CHARLES E. MAY, APPELLANT, V. CITY OF KEARNEY ET AL., APPELLEES.

CONSUMERS PUBLIC POWER DISTRICT, APPELLANT, V. CITY OF KEARNEY ET AL., APPELLEES.

17 N. W. 2d 448

FILED JANUARY 23, 1945. Nos. 31837, 31838.

1. **Municipal Corporations.** Section 18-412, R. S. 1943, authorizes any city or village to construct, purchase or otherwise acquire an electric light and power plant and real and personal property needed or useful in connection therewith and pay the cost thereof by the issue and sale of revenue bonds or debentures or by pledging and hypothecating the revenue and earnings of any such plant owned or to be owned by such city or village only if the proposition is first submitted to the electorate and approved by a majority voting thereon.
2. ———. When bonds or other evidence of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue equity has jurisdiction to grant an injunction; and where the law requires that the question shall be submitted to popular vote any issue of bonds without such a vote will be enjoined.
3. **Estoppel:** MUNICIPAL CORPORATIONS. While ordinarily a municipality may not be estopped by the unauthorized conduct, representations, promises and pledges of its officers, it may within the limitation of its legal powers be estopped by its official acquiescence in and approval of acts originally unauthorized.
4. ———. Ordinarily the doctrine of equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class.
5. ———. The doctrine of estoppel is commensurate with the thing represented and operates to place the party entitled to its benefits in the same position as if the thing represented were true.
6. **Constitutional Law.** The fact that a corporation is organized under a statute does not estop it to deny the constitutionality of an independent and separable provision of the same act, the elimination of which would leave the provisions under which the corporation was organized in full force and effect.
7. **Statutes.** By enacting a statute containing provisions identical to those contained in a prior statute which have received a settled judicial interpretation by the court of last resort of the state

where enacted, they will be presumed to have been retained with their previously established construction.

8. **Courts.** By the term "court," as the word is used in the Constitution, is meant a permanent organization for the administration of justice, and not those special tribunals provided for by law that are occasionally called into existence by particular exigencies, and that cease to exist with such exigencies.

9. **Constitutional Law.** *In re Appraisement of Omaha Gas Plant*, 102 Neb. 782, 169 N. W. 725; *City of Mitchell v. Western Public Service Co.*, 124 Neb. 248, 246 N. W. 484; and *In re Application of City of Sidney*, 144 Neb. 6, 12 N. W. 2d 104, reaffirmed and adhered to.

10. ———: EMINENT DOMAIN. An act of the legislature providing for the taking of private property for a public use under the power of eminent domain, which provides for notice and hearing on the question of just compensation before an impartial tribunal with a right of appeal to the courts limited to the record made before such tribunal, is not inimical to the due process clauses of the state and federal Constitutions in not affording a full and complete hearing before a judicial court.

11. ———. Due process of law in its constitutional sense does not necessarily infer judicial process. It does not guarantee to a citizen any particular form or method of procedure.

12. **Eminent Domain.** The power of eminent domain is an attribute of sovereignty and inherently exists in the state, limited only by applicable provisions of the Constitution. Except as so limited the legislature may provide for its exercise in any manner it sees fit.

13. ———. There is no constitutional limitation in this state on the right to take private property for public use under the power of eminent domain, except as to the right to just compensation. Consequently, the state, acting through the department or agency authorized to exert the legislative power, may proceed at will, and the extent, method and necessity of exercising the power may not be interfered with by the other departments of government.

14. ———. An owner must be given his day in court on the question of just compensation by the statute authorizing the taking, but he has no right to and the statute need not provide a day in court on the question of the right of the state to take the property.

15. **Constitutional Law:** EMINENT DOMAIN. A condemnation statute enacted pursuant to the sovereign power of eminent domain does not offend against the due process clauses of the state and federal Constitutions in failing to provide for notice and hearing on the question of the right to or the regularity of the taking.

16. **Eminent Domain.** Where the owner desires to contest whether or not the use for which his property is to be taken is a public use, or whether the statutory proceedings under which it is taken have been followed, he may be left to other appropriate legal remedies in the same manner as if condemner proceeded without any statutory authorization, without offending due process.

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

Clarence A. Davis, William W. Redmond and *Paul E. Boslaugh,* for appellants.

Kenneth H. Dryden and *H. L. Blackledge, contra.*

Max Kier and *A. A. Whitworth, amici curiæ.*

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

CHAPPELL, J.

Plaintiffs Charles E. May and Consumers Public Power District filed separate amended petitions in the district court for Buffalo county, Nebraska, to permanently enjoin defendant City of Kearney and its officials from issuing bonds for the purpose of raising money to tender an award made by a court of condemnation in proceedings brought by the city against plaintiff Consumers Public Power District as provided by section 70-650, R. S. 1943, and chapter 19, art. 7, R. S. 1943, wherein the city sought to acquire the electric light and power plant and distribution system serving the inhabitants of the city but belonging to the district. Plaintiff Charles E. May, a resident, legally qualified voter and taxpayer of the city of Kearney for more than ten years, and a user of electricity supplied by the district, and two other equally qualified persons petitioned for an injunction on behalf of themselves and all others similarly situated. The two cases were consolidated for trial in the district court and decision by this court. After hearing upon the merits the trial court denied an injunction and dismissed plaintiffs' separate amended petitions. Plaintiffs,

Charles E. May, hereinafter called May, and Consumers Public Power District, hereinafter called Consumers, appeal to this court, contending: (1) That the bonds proposed to be issued and sold are invalid as in violation of section 18-412, R. S. 1943, in that they pledge and hypothecate the revenue and earnings of the electric light and power plant without the approval of a majority of the electors voting upon the proposal submitted; (2) that by reason of certain representations, promises and pledges made by the mayor and city council to the electorate during the election upon the question of acquisition of the property the city is estopped to issue general obligation bonds as it claims the right to do under the provisions of section 19-704, R. S. 1943; and (3) that chapter 19, art. 7, R. S. 1943, and section 70-650, R. S. 1943, in so far as it incorporates chapter 19, art. 7, R. S. 1943, into its provisions, are unconstitutional for the reason that the act deprives the owner of his property without due process of law, there being no provision therein for notice and hearing upon the question of the legality of the preliminary steps taken by the city in the condemnation proceedings and there being no provision therein for a judicial hearing on the matter of just compensation. It is also claimed by plaintiffs that chapter 19, art. 7, R. S. 1943, is unconstitutional in that it is class legislation, and violates the doctrine of the separation of powers. We conclude that plaintiffs' first two contentions have merit, but that the statutes involved are constitutional.

Preliminary to a decision of plaintiffs' first contention we find it necessary to recite some pertinent facts. The record discloses that on March 2, 1942, the city council passed an ordinance providing for submission to the qualified electors at the next regular city election the question whether the city of Kearney, which did not then own any electric light and power plant, should acquire the system owned by Consumers by use of procedure provided in chapter 19, art. 7, R. S. 1943. The electorate of the city approved the proposal by a majority of 27 votes. The result was duly certified to this court and three district judges were appointed as a court

of condemnation. The court of condemnation had a hearing and entered an award fixing the value of Consumers' property at $276,975. It is to tender this amount and secure possession of the system pending an appeal by Consumers that the city seeks to issue and sell bonds which are the subject of this suit. The value having been thus determined by the award of the court of condemnation the city council enacted an ordinance providing for submission to the electorate of the question whether the city should have the power and authority to issue and sell revenue bonds and use the proceeds therefrom for the purpose of paying the costs of acquiring the property. At the election thereon this proposition was defeated by a majority of 560 votes, after which the city council canvassed the election and declared the proposition lost. Nevertheless, and despite this clear expression of the electorate, the city council enacted an ordinance which provided for the issue and sale of the bonds here involved.

Defendant city asserts that Consumers as condemnee cannot challenge the proceedings by which funds are raised or attack the validity of the bonds, its only concern being to receive the money to which it is lawfully entitled for the property. The applicable rule has been stated in *Central Power Co. v. Nebraska City,* 8 Cir., 112 Fed. 2d 471, by use of the following language: "The laws of Nebraska make adequate provision for the raising of money by cities to pay for property acquired under condemnation and since the Company must receive its payment before the City can take possession, the Company may not in this proceeding question how the City is to obtain the money with which it will pay. See *Slocum v. City of North Platte,* 8 Cir., 192 F. 252; *Village of Oshkosh v. Fairbanks-Morse & Co.,* 8 Cir., 8 F. 2d 329." While we follow this rule and conclude that Consumers has no right to raise the question of the validity of the bonds, it is not disputed but conceded that plaintiff May, representing himself and all others similarly situated, does have a legal right to do so.

The city also contends that it has the power by virtue of

section 19-704, R. S. 1943, to issue and sell general obligation bonds and that the bonds authorized by the ordinance are valid as such. Whether the proposed bonds are valid or otherwise depends upon the wording of the bonds themselves, the history and provisions of applicable statutes and their interpretation by this court. The bonds themselves each, after acknowledging the city's indebtedness for their respective amounts and giving its promise to pay the same, contains the provision that, "For the prompt payment of this bond, principal and interest, when due, the full faith, credit, and resources of this city are hereby irrevocably pledged." They further provide: "The revenues and earnings derived and to be derived from the operation of the entire electric light and power plant acquired, owned and operated by the City, including the property acquired by eminent domain, and all extensions and additions thereto, and all improvements thereof hereafter made, are to be owned by the City, *and are pledged and hypothecated for the payment of said bonds; all bonds of said issue are equally and ratably secured by said pledge.* The City further agrees that it will cause to be levied and collected annually a tax on all the taxable property in the City by valuation sufficient in amount to make up any deficiency in the earnings of said plant and promptly pay the interest on said bonds as and when said interest becomes due, and to create a sinking fund to pay the principal of said bonds when said principal becomes due." (Italics supplied.)

It seems clear that the city is attempting to acquire an electric light and power plant and pay for it by the issue and sale of what is designated as negotiable obligation bonds for the payment of which the city has, without favorable vote of the electorate, pledged and hypothecated the revenues and earnings of the plant with the taxing power as collateral security. In other words, the city is attempting to do indirectly that which it cannot do directly.

Turning to the statutes involved and their interpretation, we find that the opinion of this court in *Interstate Power Co. v. City of Ainsworth,* 125 Neb. 419, 250 N. W. 649, dis-

tinguished *Christensen v. City of Fremont*, 45 Neb. 160, 63 N. W. 364, clarified *Carr v. Fenstermacher*, 119 Neb. 172, 228 N. W. 114, and gave judicial construction to both chapter 18, art. 1, Comp. St. 1929, now chapter 19, art. 14, R. S. 1943, and chapter 116, Laws 1931, now chapter 70, art. 5, R. S. 1943. In the *City of Ainsworth* case, *supra*, it was held: "1. * * * A municipal corporation is a creature of the law established for special purposes and its corporate acts must be authorized by its charter or other laws applicable thereto. 1 McQuillin, Municipal Corporations (2d ed.) sec. 367. * * * 3. * * * 'Where a certain power is conferred upon a municipality and the method of its exercise is prescribed, such method constitutes the measure of the power.' *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51. * * * 4. * * * Neither express nor implied power to purchase an electric light and power plant and pay for it by pledge of future net earnings therefrom is conferred on cities by chapter 116, Laws 1931. * * * 5. * * * Section 18-101, Comp. St. 1929, confers on cities of the second class power to purchase, construct, maintain and improve lighting systems. The succeeding section provides two methods for raising funds to pay for a heating or lighting plant, but does not provide any method of raising funds to maintain and improve the lighting plant." See, also, *Southern Nebraska Power Co. v. Village of Deshler*, 130 Neb. 598, 265 N. W. 880.

Chapter 19, art. 7, consisting of sections 19-701 to 19-707, inclusive, Comp. St. 1929, was enacted in 1919 and existent when *Interstate Power Co. v. City of Ainsworth, supra*, was decided. In 1941 these sections were repealed in their entirety but with the title extended, amended to include villages, and, supplemented with validity, savings and emergency clauses, they were immediately reenacted verbatim as theretofore and now appear as sections 19-701 to 19-707, inclusive, R. S. 1943. Section 19-704, R. S. 1943, relied upon by the city here, provides in part as follows: " * * * the city or village authorities, without vote of the people, shall have the power, if necessary, to issue and sell

bonds of the city or village to provide funds to make such tender." It will be noted that nothing appears in the act itself which permits the issue and sale of revenue bonds or pledging and hypothecating the revenue and earnings of the plant. The statute refers only to bonds of the city or village, meaning general obligation bonds of the city or village, precisely that and nothing else. The court indicated as much in *City of Mitchell v. Western Public Service Co.*, 124 Neb. 248, 246 N. W. 484.

But be that as it may, after the decisions in *Interstate Power Co. v. City of Ainsworth, supra,* and *City of Mitchell v. Western Public Service Co., supra,* the legislature of 1935 clarified the situation by enacting what is now section 18-412, R. S. 1943. It provides: "Supplemental to any existing law on the subject, and in lieu of the issuance of general obligation bonds, or the levy of taxes upon property, as by law provided, any city or village within the state of Nebraska may construct, purchase, or otherwise acquire, an electric light and power plant, * * * and real and personal property needed or useful in connection therewith, and pay the cost thereof by pledging and hypothecating the revenue and earnings of any electric light and power plant, * * * owned or to be owned by such city or village. In the exercise of the authority granted in this section, any such city or village may issue and sell revenue bonds or debentures and enter into such contracts in connection therewith as may be proper and necessary. Such revenue bonds or debentures shall be a lien only upon the revenues and earnings of the electric light and power plant, * * * owned or to be owned by such city or village. *No city or village shall pledge or hypothecate the revenue and earnings of any electric light and power plant, * * * nor issue revenue bonds or debentures, as authorized by this section, until the proposition relating thereto has been submitted in the usual manner to the qualified electors of such city or village at a general or special election and approved by a majority of the electors voting on the proposition submitted;* * * . The requirement herein of a vote of the electors, however,

shall not apply when a city or village seeks to pledge or hypothecate such revenue and earnings, or issue revenue bonds or debentures, solely for the maintenance, extension or enlargement of any electric light and power plant, * * * owned by such city or village." (Italics supplied).

Clearly these several acts and decisions heretofore discussed are all related and form an integrated whole of the law from which we arrive at decision upon the first question presented here. In the case at bar the language of the bonds themselves clearly and unequivocally pledges and hypothecates the revenue and earnings of the plant in the very language of the statute which prohibits it, and in direct contravention of the legislative power conferred, since it was done after a substantial majority of the qualified electors of the city voting thereon had at an election disapproved and defeated the proposal when lawfully submitted.

We find no authority in the statute or other precedent supporting the validity of the bonds proposed to be issued. We can only conclude for the reasons heretofore stated that they are invalid. In such a case the applicable rule is that, "When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction, * * * . Where the law requires that the question shall be submitted to popular vote, an issue of bonds without such a vote will be enjoined." 32 C. J., sec. 421, p. 268. See, also, *Cook v. City of Beatrice,* 32 Neb. 80, 48 N. W. 828.

A declaration of invalidity of the proposed bonds for the reasons above stated, however, does not give plaintiff May all of the relief to which he is equitably entitled or completely determine the issues involved since in any event the city still claims the right to issue general obligation bonds as permitted by section 19-704, R. S. 1943, and will do so unless restrained by the court. In view of this situation we find it necessary to determine whether or not because of certain representations, promises and pledges made by the mayor and city council the city is now estopped from issu-

ing general obligation bonds. In this connection we cannot conclude from the evidence that the representations, promises and pledges were fraudulently made and do not so find but it is undisputed that they were made to the electorate of the city of Kearney as an inducement to a favorable result which was attained in the original election to acquire the property. We do not here intend to pass upon the validity of the election itself to carry out the purposes for which it was represented to be held but confine this part of the opinion to the question of whether the city is now estopped from doing that which its mayor and city council solemnly promised and pledged the electorate they would not do. In doing this we are mindful that recently by combination of the law and the electorate public ownership of more and more of the facilities of production have been effected for public purposes and the control of large economic forces have thereby been, and are being, placed in the control of public officials. To preserve self government public officials in charge of, or in obtaining control of, such large public financial and economic operations must be held to strict accountability for promises and pledges made to the electorate who under the law and by their votes confer these powers upon them, in order that the electorate may cast an intelligent ballot and protect their personal and property rights.

The record here discloses that the election upon the question of whether Kearney should purchase Consumers' property was held on April 7, 1942. The mayor testified that some time prior to the election he and a group of men being affirmatively interested had banded themselves together as interested Kearney citizens who desired to acquire Consumers' property for the good of the city of Kearney and its citizens. He testified that they held several meetings which were attended by himself, several members of the council and others to talk over and perfect plans to successfully carry the election. When asked to recall the names of the persons attending these meetings he was able to name but one man who was not either a member of the city council

or the board of public works. These persons each donated to a common fund to pay for radio time, newspaper advertisements and other necessary expenses of the project. They prepared and checked the advertisements and radio programs and approved the language in them. The mayor personally appeared upon the prepared radio programs. He testified that it was the sense of the council after discussion among themselves that they should by these advertisements and programs let the people know what the views of the mayor and city council were concerning the proposal, and that their views were as expressed therein. True, these meetings were not officially held in the council chamber, they were not officially called meetings of the mayor and council, and no record was made of them as the official action of the council, but every promise and pledge made by them had the intended similitude of official conduct and by both precedent and subsequent official acts were given their acquiescence and approval.

On February 17, 1942, the mayor, who had then served as a member of the city council eight years and as mayor approximately three years, appeared with the city water commissioner on a prepared program over radio station KFGW to discuss and enlighten the people upon the question of whether the city of Kearney should purchase Consumers' power interests in that city. They were introduced as representing the city council. They were asked a number of previously prepared questions by two disinterested Kearney citizens. Some of these questions and answers are important here. For example: "(Q.) Is it the opinion of the Mayor, Council and Board of Public Works that Kearney should own its own electric distribution system? (A.) Yes, after an intensive study carried on for more than a year it has been concluded that it will be extremely advantages (advantageous) for the City of Kearney to own and operate its own electric distribution system. * * * (Q.) If the value of the electric distribution system, determined by the Court, is satisfactory to the Mayor, Council and Board of Public Works and they decide to buy the property how

will it be paid for? (A.) It is planned to issue revenue bonds to be paid out of the revenue earned from the operation of the system. (Q.) Are revenue bonds a direct lien upon real property of the City of Kearney? (A.) No, revenue bonds are not a direct lien upon real property. Revenue bonds and their interest are not paid out of taxes. (Q.) Would a general obligation bond issue be necessary to pay any part of the cost of this property? (A.) No it would not! We have been assured by our engineers and by reputable bond houses that the entire project can be financed by revenue bonds bearing low rates of interest; I might add that very reputable house of engineers have been engaged on this project * * * . (Q.) What is the reaction among the citizens and do you feel that they will be receptive to this proposition? (A.) As yet there has been very little talk about it but I do feel that people are very much interested, especially so since the proposition will be financed through revenue bonds and therefore will add nothing to our taxes." In closing the program the original question was repeated and it was again stated that the mayor and water commissioner represented the city council, of whom two disinterested persons had asked a number of questions which were prepared for them.

On March 28, 1942, a large newspaper advertisement appeared in the Kearney Hub, a daily newspaper published and circulated generally in the city of Kearney. Parts of it are important here. Across the top in large type appeared the question, "SHALL KEARNEY ACQUIRE ITS ELECTRIC DISTRIBUTION SYSTEM?" Thereafter in smaller type appeared the following: "WHAT HAS BEEN DONE Your Mayor and Council have called an election to submit to the voters the question of determining the fair value of the property by a court of appraisers * * * WHAT WILL BE DONE If you vote YES (x) for condemnation of the electric system in Kearney your MAYOR and COUNCIL will: 1. Attempt again to negotiate with Consumers for a fair and reasonable price. 2. If negotiations fail, the condemnation court will set a value on the property. 3.

If the price set by the court seems fair and reasonable the proposition of issuing revenue bonds for same will be submitted to the voters. 4. These Revenue Bonds, as required by law, are payable out of earnings from the system. 5. Absolutely not one cent will be added to your property or personal tax. This advertisement is published by authority of the Mayor and Council and paid for by interested Kearney citizens."

On April 6, 1942, another advertisement of large proportions was likewise published in the same newspaper. Parts of it are also important. In large type appeared these words: "THE ELECTRIC QUESTION SIMPLIFIED. Would you like to know what the courts say is a fair price for this property? *This is the only question which will be decided tomorrow!* Vote (x) yes * * * All other factors involved will be voted on at another election. Vote 'yes' to get this *disinterested* valuation. That is why we have courts. Hear Mayor Mattson tonight. 8:15 P. M. over KGFW This ad paid for by interested Kearney citizens."

On April 6, 1942, at 8:15 p. m., as above advertised, the mayor spoke on the question over radio station KGFW. He stated in part: "Then when the court establishes that fair price, the City Council have pledged themselves to again submit to the voters to see if they want to pay it. This silly propaganda that 'You are handing your Council a blank check' or that 'They don't need another election, but will go right ahead and buy it' should not be talk of intelligent people. What's wrong? Is there no honor among men any more? I promise you as long as I am your Mayor we will stand by our promise. * * * Remember this, that all we are doing in tomorrow's election is to ask the courts to set a fair price. *When that price is determined, the people of Kearney will be given full opportunity to decide in another election whether or not they want to pay it. If you at that second election decide to take it over, it will be paid for through revenue bonds.* For the information of some not acquainted with the term, a 'revenue bond' is a bond issued against the earnings of the system. These bonds will all be paid out of the earnings of our electric system, and not

one cent will be added to your taxes."

As heretofore stated, the next day the electorate voted favorably on the proposition thus submitted to them by a majority of 27 votes; the result was certified to this court; and three district judges were appointed as a court of condemnation, who, after hearing, entered an award from which Consumers took an appeal to the district court. On April 6, 1943, the city council by appropriate official resolution submitted to the electorate, as they had previously promised and pledged themselves to do, the proposition of whether the council should have the power and be authorized to issue revenue bonds (as provided in section 18-412, R. S. 1943) for the purpose of tendering and paying the award. This proposition was defeated at the election by a majority of 560 votes.

Thereafter on September 7, 1943, the city council, in violation of its previous promises and pledges, authorized by ordinance the issue of what it calls "general obligation bonds" for payment of which they pledged both the full faith and credit and resources of the city, and, contrary to law and in violation of the will of the people, pledged and hypothecated the revenues and earnings of the plant and agreed to annually levy a tax on all the taxable property in the city sufficient in amount to make up any deficiency in the earnings of the plant necessary to promptly pay the interest and create a sinking fund to pay the principal when it becomes due.

On September 8, 1943, the then mayor vetoed the ordinance, his first reason given therefor being, "The City Administration which promoted this condemnation originally, pledged to the voters of Kearney if they voted to condemn the electric distribution system in Kearney they would proceed to do ONE thing—have the price determined; that if the system were ever purchased by the City it would be paid for by REVENUE BONDS (not general obligation bonds) and that the city administration would not issue bonds until the people voted to do so. The voters were permitted to vote on the bond question last April and they de-

feated the bonds * * * . I cannot overlook the fact that the bonds were defeated in EACH of the four wards of the City. I can only understand from this vote that a substantial majority of the voters said not to issue bonds. I believe it to be the duty of the Mayor and Council in an issue of this kind to represent the people, regardless of their personal beliefs or pleasures." On September 20, 1943, the city council, with one member only dissenting, passed the ordinance over the mayor's veto.

Of course the general rule is that, "No member of a city council or the mayor * * * , each acting separately as an individual, can bind the city by a contractual obligation creatable only by official action of the city council, nor can any one of them ratify or reinstate a void city contract or estop the city from denying the validity thereof." *Helleberg v. City of Kearney,* 139 Neb. 413, 297 N. W. 672. However, such a situation is not presented here. Plaintiff May represents himself as a voter and taxpayer who brings the action for himself and all others similarly situated as provided in section 25-319, R. S. 1943. Therefore, he represents both himself and the public, the electorate and taxpayers of the city of Kearney. As we view it consideration must be given to the entire transaction or proceeding to acquire and pay for Consumers' property, and no part of such transaction or proceeding is or can be of itself decisive of the question of estoppel. Precedent official action followed by promises and pledges given in the similitude of authority and subsequently receiving official acquiescence and approval is decisive of the question of estoppel.

The general rule is that while ordinarily a municipality may not be estopped by unauthorized conduct, representations, promises or pledges of the officers, it may, within the limitation of its legal powers, be estopped by its official acquiescence in, and approval of, acts originally unauthorized. 31 C. J. S., sec. 142b, p. 419.

In *City of Grand Island v. Willis,* 142 Neb. 686, 7 N. W. 2d 457, this court placed its approval upon the following statement: "As a usual thing, the doctrine of equitable es-

toppel cannot be invoked against a municipal * * * 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." See *State v. Haid,* 328 Mo. 739, 747, 41 S. W. 2d 806, 808. It was held in *State ex rel. Cox v. McIlravy,* 105 Neb. 651, 181 N. W. 554, that, "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." It was said in *People v. Thomas,* 361 Ill. 448, 198 N. E. 363: "The doctrine of estoppel may be invoked against a municipal corporation where there have been positive acts by the municipal officers which may have induced the action of a party and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done, * * * ." In *Moran v. Commissioners of Miami County,* 2 Black 722, 17 L. Ed. 342, referring to the county, the court said: " * * * corporations are as strongly bound as individuals are to a careful adherence to truth in their dealings with mankind, and that they cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

Neither will it avail the city under the facts presented to contend that the promises and pledges of the mayor and city council concerned the future as distinguished from either the past or the present. In this connection the rule is that while the doctrine of estoppel by representation is ordinarily applicable only to representations as to facts either past or present, and not to representations or promises concerning the future, there are well recognized exceptions where to enforce the rule would perpetrate a fraud or cause injustice; and this doctrine of promissory estoppel has particular application when the representations relate to an intended abandonment of an existing right, and is made to influence others who have in fact been influenced

by it and substantial injustice will result unless the promise is enforced. 31 C. J. S., sec. 80, p. 289; 21 C. J., sec. 145, p. 1142.

In a broad sense "estoppel is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the acts and proceedings of judicial or legislative officers, or by the act of the party himself, either by conventional writing or by representations, express or implied, *in pais*." 31 C. J. S., sec. 1, p. 191.

" * * * 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." 31 C. J. S., sec. 3, p. 193.

"Equitable estoppels operate as effectually as technical estoppels. They cannot in the nature of things be subjected to fixed and settled rules of universal application, like legal estoppels, nor hampered by the narrow confines of a technical formula. So, 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 circumstances 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. * * * The following, however, may be ventured as the sum of all cases: That a person is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith, relied thereon. Such an estoppel is founded on morality and justice, and especially concerns conscience and equity." 10 R. C. L., sec. 19, p. 689. See, also, 31 C. J. S., sec. 59, p. 236.

That the electorate taxpayers relied upon the promises and pledges made by the mayor and city council in the case

at bar may be and is inferred from the circumstances appearing in the evidence and need not be proved by direct evidence. 31 C. J. S., sec. 162, p. 458. And it cannot be gainsaid that inequitable consequences would result to them were estoppel not applied.

Finally, as this court said in *State ex rel. Cox v. McIlravy, supra,* "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 a 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."

Therefore, we are of the opinion that the circumstances appearing in the case at bar bring the city of Kearney squarely within the rules above stated, and we conclude that the city is estopped to issue general obligation bonds at this time, its right and power to proceed further and do so, being thereby invalidated until another election is held and other required steps are taken as provided in chapter 19, art. 7, R. S. 1943.

It is the contention of the appellants, however, that the condemnation statute, sections 19-701 to 19-707, inclusive, R. S. 1943, is unconstitutional and that the primary right relied upon in the instant case for the issuance of bonds by the city of Kearney is dependent upon the validity of this statute. While we have hereinbefore held that the bonds which the city proposed to issue are absolutely void for want of statutory authorization and irregularities occurring in the conduct of the municipal election at which they were purported to have been authorized, the question whether any valid bonds could be issued by the city in payment for the property here sought to be condemned is an issue properly raised. Whether the city of Kearney is powerless to proceed further or whether it may correct its proceed-

ings and properly acquire the property by condemnation hinges on the validity of the condemnation act under attack. A complete decision of the issues raised requires that constitutional objections to the questioned condemnation statute be finally determined.

The city contends that Consumers, having accepted the benefits and enjoyed the privileges afforded by section 70-705, R. S. 1943, is estopped to attack the contitutionality of the act under which it was organized and now exists. This contention is fully disposed of in *State ex rel. Johnson v. Consumers Public Power District*, 143 Neb. 753, 10 N. W. 2d 784, wherein it was held that "The mere fact that a corporation is organized under a statute does not estop it to deny the constitutionality of a provision of the statute which constitutes a distinct, separable legislative enactment, the elimination of which would leave in full force and effect the provisions under which the corporation was organized."

In determining questions of constitutionality the nature and form of the act become important. The length of the statute prevents any extensive quotation of its provisions. We will consequently summarize its contents to the extent necessary for the determination of the issues here involved.

The act conferred upon the city of Kearney, and other cities of its class, the power to acquire by eminent domain, after an affirmative vote of the electors, any electric light and power plant located or operating within such city. Upon the holding of an election authorizing the taking and acquiring of the property by the required vote, the city council is required to certify the result to the supreme court of the state. The supreme court is then required within thirty days thereafter to appoint three district judges from three of the judicial districts of the state who shall constitute a court of condemnation for the ascertainment and finding of the value of the plant, works or system. The condemnation court thus formed is empowered to require the giving of notice, the filing of pleadings, the taking of evidence, and to perform all the duties of condemnation com-

missioners in the ascertainment of the value of the property taken and in the making of an award therefor. The owners of the property are given the right of appeal to the district court, which appeal is required by the act to be tried and determined upon the pleadings, proceedings, and evidence embraced in the transcript of the proceedings in the condemnation court. Upon the hearing of such appeal in the district court, judgment shall be pronounced for the value of any such works, plant or system. Either party may appeal to the supreme court and upon final judgment being pronounced as to the value of the plant, works or system, the city council is directed to issue and sell the bonds of such city or village for the payment of such judgment without a further vote of the people.

The act does not provide for the institution of condemnation proceedings in a duly constituted court or confer the power upon such a court to determine both the legality of the taking and just compensation. This court has held on three occasions that the court of condemnation created by the act was not a court within the meaning of the Constitution. *In re Appraisement of Omaha Gas Plant*, 102 Neb. 782, 169 N. W. 725; *City of Mitchell v. Western Public Service Co.*, 124 Neb. 248, 246 N. W. 484; *In re Application of City of Sidney*, 144 Neb. 6, 12 N. W. 2d 104. While this court is committed to this view, the suggestion has been advanced that material considerations have been overlooked. It may be argued that the decision in *In re Appraisement of Omaha Gas Plant, supra,* was made under the provisions of the 1875 Consitution, at which time section 1, art. VI provided: "The judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns."

The decision contained the following language: "The board thus constituted cannot be a 'court' under the Constitution of the state, since the legislature has no power to constitute courts other than those named in that instru-

ment, except 'courts inferior to the district courts' for cities and incorporated towns, and we are convinced that it was not its intention to exceed its authority in this respect." However, the effect of this decision is to hold that the condemnation court was not a court at all in the constitutional sense, not that it was a court inhibited by the Constitution. In 1920 this provision of the Constitution was amended to read as follows: "The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, and such other courts inferior to the supreme court as may be created by law * * * ." Const., art. V, sec. 1. It is true, of course, that the provision as amended empowered the legislature to create courts other than those designated, inferior to the supreme court. But such provision does not have the effect of creating any such courts *ipso facto*. The provision is in no sense of the word self-executing; the affirmative action of the legislature is required to give it effect. It might then be suggested that after the adoption of the 1920 Constitution the legislature in 1921 repealed the act in force when *In re Appraisement of Omaha Gas Plant, supra,* was decided and reenacted it in identical language. This evidences no intent on the part of the legislature to create a court in the constitutional sense. The reenactment of the statute in identical language indicates a legislative intent under all rules of statutory construction to adopt the interpretation which the supreme court of this state had previously placed upon it,—that it was a tribunal other than a court within the meaning of the Constitution. It might be well to note that the act was again repealed and reenacted in 1941, but we can see no way in which these subsequent acts of the legislature could be construed as the exercise of the power granted it when section 1, art. VI, was amended by the Constitution of 1920. We think the reenactment of the act in identical language in 1941 has the further effect of a legislative approval of the interpretation given the act in *In re Appraisement of Omaha Gas Plant, supra,* decided in 1918, and *City of Mitchell v. Western Public Service Co., supra,* decided in

1933. We think also that *In re Application of City of Sidney, supra,* decided in 1943 after the reenactment of the act in identical language in 1941, properly interprets the act, although the constitutional and legislative changes herein mentioned were not given consideration in that case. The condemnation court created by the statute under consideration fails to contain the elements necessary to constitute a court in the constitutional sense. The Michigan court in considering a similar question said: "By courts, as the word is used in the constitution, we understand permanent organizations for the administration of justice, and not those special tribunals provided for by law, that are occasionally called into existence by particular exigencies, and that cease to exist with such exigencies." *Streeter v. Paton,* 7 Mich. 341. Another interesting opinion on the elements necessary to constitute a court is *Bank of the State v. Cooper,* 2 Yerger (Tenn.) 599. We adhere to our former holdings cited herein that the condemnation court created by the act is not a court in the constitutional sense in which the word is used.

Appellants contend that the act is unconstitutional for the further reason that it fails to provide the owner of the property a judicial hearing on the matter of just compensation. As we have heretofore stated, that act provides for a full hearing before the condemnation court, a tribunal lacking the elements of a judicial court. An appeal to the district court is provided for, the review being limited to the record made by the condemnation court. We think appellants are in error in assuming that a full and complete hearing on all phases of the valuation of and damages to property taken under the power of eminent domain must be had in a judicial court.

An authoritative text writer states the rule as follows: "In those states in which a jury is not required by the constitution in eminent domain proceedings, the owner is entitled to a hearing conducted in some fair and just manner before an impartial judicial tribunal, and a chance to put in evidence before such tribunal of the value of his proper-

ty and the amount that it has been damaged. The amount of compensation is a judicial question and cannot be decided by the legislature, but the nature and character of the tribunal is in the discretion of the legislature, and it may consist of a justice of the court sitting alone, or of any number of commissioners." 2 Nichols, Eminent Domain (2d ed.) sec. 341, p. 945.

In *United States v. Jones,* 109 U. S. 513, 3 S. Ct. 346, the court said: "The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon."

In *Long Island Water Supply Co. v. Brooklyn,* 166 U. S. 685, 17 S. Ct. 718, the court said: "Neither can it be said that there was not 'due process of law' in these condemnation proceedings. It is not essential that the assessment of damages be made by a jury. Such award may be made by commissioners, at least where there is provision for a review of their proceedings in the courts."

In *Backus v. Fort Street Union Depot Co.,* 169 U. S. 557, 569, 18 S. Ct. 445, the court said: "It is within the power of the State to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge. These are questions of procedure which do not enter into or form the basis of fundamental right. All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required

by the Federal Constitution. *Bauman v. Ross,* 167 U. S. 548, 593."

In *Crane v. Hahlo,* 258 U. S. 142, 42 S. Ct. 214, the court in discussing this subject said: "The right of the plaintiff in error to damages having been established by the decision in 221 N. Y. 283, *supra,* there remained only the problem of determining the amount of the award which should be made and the manner of making it, and the reference of such a question, especially in eminent domain proceedings, to a commission, or board, or sheriff's jury, or other non-judicial tribunal, was so common in England and in this country prior to the adoption of the Federal Constitution that it has been held repeatedly that it is a form of procedure within the power of the State to provide and that when opportunity to be heard is given it satisfies the requirements of due process of law, especially when, as in this case, a right of review in the courts is given. * * * No one has a vested right in any given mode of procedure * * * and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change. *Oshkosh Waterworks Co. v. Oshkosh,* 187 U. S. 437, 439."

In *Missouri ex rel. Hurwitz v. North,* 271 U. S. 40, 46 S. Ct. 384, the general rule was stated in the following language: "It has been so often pointed out in the opinions of this Court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure, as to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

In *State ex rel. Oregon R. & N. Co. v. Fairchild,* 224 U. S. 510, 32 S. Ct. 535, the precise point raised by appellants is discussed in the following language: "Having been given

full opportunity to be heard on the issues made by the complaint and answer, and as to the reasonableness of the proposed order and having adopted the statutory method of review, this company cannot complain. It had the right to offer all competent testimony before the Commission, which, in view of the form of proceedings authorized by the statute, acted in this respect somewhat like a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. The court would test its correctness by the evidence submitted to the master. Nor would there be any impairment of the right to a judicial review, because additional testimony could not be submitted to the chancellor. The statute enlarges what this court has recognized to be proper practice in equity cases attacking such regulations. There the hearing is *de novo* and there is no prohibition in equity against offering all competent evidence to prove that the order was unreasonable. But in *Cinn., N. O. & Tex. Pac. v. I. C. C.,* 162 U. S. 184, 196, it was said: 'We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the Commission, and first adduce it in the Circuit Court. * * * The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the commission.' See also *Texas & Pacific v. I. C. C.,* 162 U. S. 197, 238, 239; *Missouri &c. Ry. v. I. C. C.,* 164 Fed. Rep. 645, 649."

It seems to us that the hearing provided before the court of condemnation with a right of review in the courts on the record, meets all the requirements of due process in the fixing of the compensation in a condemnation proceeding. An impartial tribunal has been established to determine the compensation, notice to the interested parties is provided for, an opportunity to be heard is afforded and an appeal to the courts provided. This, under all the decisions, constitutes due process. It must be borne in mind that due proc-

ess is not necessarily judicial process. *Reetz v. Michigan*, 188 U. S. 505, 23 S. Ct. 390; *United States v. Ju Toy*, 198 U. S. 253, 25 S. Ct. 644. Nor does the fact that the act requires the court on appeal to decide the case upon the evidence adduced before the condemnation court constitute a want of due process. *Ross v. Board of Supervisors*, 128 Ia. 427, 104 N. W. 506; *Long Island Water Supply Co. v. Brooklyn, supra; State ex rel. Oregon R. & N. Co. v. Fairchild, supra.*

It is the further contention of appellants that the condemnation act, in order to meet the requirements of due process, must itself provide for notice and hearing on the question of the legality of the proceeding and that the owner cannot be forced to resort to collateral attack to secure his constitutional rights.

A discussion of this subject necessitates an understanding of the nature of the power of eminent domain. It is an attribute of sovereignty, inherent in a sovereign state whether or not reference is made to it in the Constitution of the state. In other words, the power of a sovereign state to take property, or to authorize its taking for a public use, rests upon necessity because there can be no effective government without it. The power exists independent of the Constitution, the provision of the Constitution with reference thereto being a limitation on the exercise of the power, and in no sense of the word a grant of power. In former times the right of a sovereign state to take for a public purpose was absolute, and property could be taken without compensation being paid and without requiring the intervention of a court to afford effective use of the power. The exercise of the power of eminent domain has been limited in this state by a constitutional requirement that just compensation shall be paid for all property taken or damaged. Const., art. I, sec. 21. Consequently, compensation for property taken or damaged in the exercise of the right of eminent domain, unless the amount is agreed upon must be determined in accordance with the due process clauses of the state and federal Constitutions, but otherwise judicial

action is not necessary except where required by constitutional or statutory provisions. The language of the Constitution presupposes the existence of the power outside the Constitution and simply limits the right to use it. No procedure is prescribed in the Constitution for its exercise, but it imposes certain limits to which the state itself must conform. Within these limits the state, acting through the department or agency authorized to exert the legislative power, may proceed at will, and the extent, method and necessity of exercising the power to take private property for public use may not be interfered with by either of the other departments of government. *Garrison v. City of New York*, 88 U. S. 196. There is, consequently, no limitation upon the exercise of the power except that the use must be public, compensation must be made and due process of law observed. We have heretofore determined that due process was afforded by the statute for the determination of adequate and just compensation. What application does the due process clause have to the exercise of the sovereign power of eminent domain? The correct answer was given, we think, in *People v. Adirondack Ry. Co.*, 160 N. Y. 225, 54 N. E. 689, wherein the court said: "Now, what does the phrase 'due process of law' mean, when thus applied to the exercise of a sovereign power, and to the effort of government through that power to accomplish a great public purpose? Does it have the same meaning as when applied to the action of the state in punishing a man for crime, or of one individual in seeking to enforce a civil right against another? Due process of law necessarily varies with the facts of the case and depends upon the necessity for safeguards against the exercise of arbitrary power. It consists in the observance of those safeguards which time and experience have shown are necessary to protect the citizen in the enjoyment of life, liberty and property. In public prosecutions, as well as private controversies, an opportunity to be heard is essential to protect private rights; but here we have a case where the state has the right to take a man's property against his will, although he has been guilty of no wrong.

It is a case where of necessity, if there is any action at all, it must be arbitrary. The state needs the property and takes it, and while the citizen cannot resist, he has the right to insist upon just compensation to be ascertained by an impartial tribunal. It is a compulsory purchase by public authority, and the individual receives money in the place of the property taken. He has a right to his day in court on the question of compensation, but he has no right to a day in court on the question of appropriation by the state unless some statute requires it. (*Matter of Village of Middletown,* 82 N. Y. 196, 201.) There is no necessity for any safeguard against taking, because the right to take is all there is of the power of eminent domain, and is necessarily conceded to exist when the existence of the power is admitted. Safeguards become necessary only when the question of compensation is reached, and then the courts are careful to see that the owner receives all that he is entitled to. Until then the courts could not help him, unless some statutory right were invaded, as the method of taking is within the exclusive control of the legislature. If a statute requires judgment of condemnation, judgment must be had accordingly before the property can be taken, but otherwise a certificate of condemnation by an executive officer, followed by payment, satisfies every requirement of the Constitution. If the use is not public, the statute authorizing condemnation is void, but this question of law need not be settled in the proceeding to take, as it can be raised by the property owner in a variety of ways. It would be the same in effect as if the attempt to condemn had been made without any statute whatever, and an action of trespass against those who undertook to take possession of the property would settle the question. (*Wheelock v. Young,* 4 Wend, 648.)" The Supreme Court of the United States, in affirming the foregoing case, said: "The general rule is that the necessity or expediency of appropriating particular property for public use is not a matter of judicial cognizance but one for the determination of the legislative branch of the government, and this must obviously be so where the

State takes for its own purposes. The State possesses the power as a sovereign and as a sovereign exerts it. How can its citizens call on the courts to review the grounds on which the State has acted in the absence of legislation permitting that to be done?" *Adirondack Ry. Co. v. New York State,* 176 U. S. 335, 20 S. Ct. 460.

In *Vinegar Bend Lumber Co. v. Oak Grove & Georgetown R. Co.,* 89 Miss. 84, 105, 43 So. 292, a situation on both the facts and the issues presented were very similar to the case at bar. The court said: "On a review of the whole chapter on the subject of eminent domain, we unhesitatingly arrive at the conclusion that the legislature never intended to create a tribunal of full jurisdiction to try any and all issues that might be raised on the subject of the right to condemn. The court created by this chapter is a special court, created for a special purpose, having an exceedingly limited jurisdiction, exercising no judicial functions, and clothed with the power to try the only issue that is confided to it by the statute; and that issue is, singly and solely, to fix the compensation which shall be paid to the landowner for his land. In truth, sec. 1680 declares that it is a special court. The chapter itself presupposes that the right to condemn property exists, and there is no provision made in the whole chapter on this subject giving to the eminent domain court the power to adjudicate the issue as to whether or not the right to exercise the power of eminent domain does or does not exist. The sole and only power conferred by this chapter, from its first section to its last, is the right, and the right only, to ascertain and fix compensation for the taking of the land where the right to do so exists. * * * Since neither the constitution nor the statutes provide a particular tribunal in which to try the question of whether or not the use for which private property is to be taken is a public or private use, and since it is made a judicial question by the constitution, when it is sought to try the question it must be by injunction, and in the chancery court, enjoining the entry upon or appropriation of the land, because the use for which land is sought to be tak-

en is not a public use. If it be argued that this remedy is complex, we answer by saying that its simplification rests with the legislature of the state, and not with the courts; but the constitution is not violated when there is a tribunal in which to try the question of the use to which the property is to be put. In no other forum, except the chancery court and by the method pointed out, is there any adequate remedy under the laws of this state, or, in fact, any remedy at all." In *Louisville & Nashville R. Co. v. Western Union Telegraph Co.*, 250 U. S. 363, 39 S. Ct. 513, the supreme court of the United States cites the foregoing case with approval as follows: "The Mississippi proceedings in eminent domain are limited in their effect to determining the amount of damages to be paid. If the right to condemn is disputed that is left to be decided by a suit in equity." The opinion goes on to say: "So far as it alleged a failure to comply with the state laws the state decision is conclusive against it, and of course it cannot complain of not being given a hearing simply because it is referred for that hearing to a different suit from that in which the value of the property is fixed. The separation is familiar." The effect of this holding is that an act providing for the assessment of damages and leaving the determination of the right of condemnation to a separate proceeding is not inconsistent with due process.

In *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 482, 51 S. E. 485, the court in passing on a similar question said: "The first, second, fourth and fifth exceptions make the point that the act under which the defendant seeks to condemn plaintiff's property is unconstitutional in that no tribunal is provided for the determination of any question that may be made by the land owner as to the right and power of the defendant company to take plaintiffs' property. This contention cannot be sustained. While it is true, the condemnation statutes provide no special tribunal, except for the determination of the amount of compensation to be paid, nevertheless the regular machinery of the Courts is available for the determination of any issue with respect

to the right and power to condemn. *Riley v. Union Station Co.*, 67 S. C. 93, 45 S. E. 149. The remedy provided by the condemnation statute is exclusive only as to matters falling within its provisions. These statutes, in conjunction with the general law, provide for full hearing before a lawful tribunal after due notice, and thus answer every requirement of the Federal and State Constitutions, with reference to due process of law."

Summarizing the reasoning of the foregoing authorities, we come to the following conclusion: The power of eminent domain is a sovereign power inherent in the state irrespective of constitutional provisions, which in former times was absolute; that the provisions of our Constitution have the effect only of limiting the exercise of the power; that the provisions of the Constitution requiring the payment of a just compensation for property taken or damaged must comply with the requirements of the due process clause; that the power of the state to take or to delegate its power to take has not been limited by the Constitution and consequently the legislature can lawfully provide the method of taking without the aid of the other departments of government; that a contest of the right to take may properly be left to other appropriate legal action in the same manner as if the condemner proceeded without any statutory authorization; and that a statute providing due process on the matter of just compensation and which is silent on the question of affording a hearing on the right to take meets all the requirements of due process under the state and federal Constitutions. The sovereign nature of the power of eminent domain is such that the function of the courts is limited to a determination of whether constitutional provisions have been violated, and if they have not, the right of the legislature to exercise it in any manner it sees fit must be sustained. If the property be taken irregularly, or if the taking is not for a public purpose, the owner can proceed against the taker the same as any other trespasser by injunction, ejectment or any other available remedy. We are of the opinion, therefore, that the failure to provide in the

act for notice and hearing on the question of the right to take is not incompatible with due process. See *Chicago, B. & Q. R. Co. v. State ex rel. City of Omaha,* 47 Neb. 549, 66 N. W. 624. In fact, it appears that any such requirement, unless provided for in the act itself, would constitute an unwarranted limitation on the sovereign right of the state, acting through the legislative branch thereof, to take private property for a public purpose. 1 Nichols, Eminent Domain (2d ed.) sec. 17, p. 58.

We have examined plaintiffs' contention that the statutes violate the seventh and 22d interdictions of section 18, art. III, Nebraska Constitution, as class or special legislation. As to the seventh interdiction we reaffirm the rule stated in *City of Mitchell v. Western Public Service Co., supra,* that, "The act is not a special act regulating the practice of courts of justice prohibited by the seventh interdiction of section 18, art. III of the Constitution." As to the 22d interdiction the rule is that it prohibits class legislation which does not operate equally and uniformly upon all members of the class brought within its operation. In this connection the court has held that, "The legislature may make a reasonable classification of persons, corporations and property for purposes of legislation concerning them, but the classification must rest upon real differences in situation and circumstances surrounding the members of the class, relative to the subject of the legislation, which render appropriate its enactment; and to be valid the law must operate uniformly and alike upon every member of the class so designated." *State ex rel. Taylor v. Hall,* 129 Neb. 669, 262 N. W. 835. See, also, *Steinacher v. Swanson,* 131 Neb. 439, 268 N. W. 317; *Cox v. State,* 134 Neb. 751, 279 N. W. 482; *Department of Banking v. Foe,* 136 Neb. 422, 286 N. W. 264; *Eckerson v. City of Des Moines,* 137 Ia. 452, 115 N. W. 177; 29 C. J. S., sec. 212, p. 1132. We find that the classification designated in chapter 19, art. 7, R. S. 1943, is reasonable and not inimical to section 18, art. III, Nebraska Constitution.

It is already well established that the act does not violate the doctrine of the separation of powers. Const., art. 2,

sec. 1. We need not give it further discussion. *In re Appraisement of Omaha Gas Plant, supra; City of Mitchell v. Western Public Service Co., supra; In re Application of City of Sidney, supra.*

We come to the conclusion that the act complies with all requirements of the Constitution which have been called to our attention. We think the attacks upon its validity made by the appellants are without merit.

The judgment is hereby reversed and the cause remanded with directions that a decree be entered by the trial court in conformity with this opinion.

REVERSED, WITH DIRECTIONS.

RAY HOWERTER, APPELLEE, V. WALLACE A. OLSON ET AL., APPELLANTS.

17 N. W. 2d 483

FILED FEBRUARY 2, 1945. No. 31839.

Appeal and Error. Where the jury arrive at the only conclusion that the evidence would sustain and where, in the light of the pleadings and the competent evidence introduced, the trial court should have directed a verdict in favor of the prevailing party had it been requested, this court will not consider errors assigned by the defeated party complaining of instructions given or refused relating thereto.

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

Gaines & Shoemaker, for appellants.

Wear, Boland & Nye, contra.

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

SIMMONS, C. J.

This action, involving only property damage, arises as the result of a collision between a gasoline transport unit owned by the plaintiff, and a truck owned by the defendants. It was tried in the district court where a jury found

for the plaintiff. Defendants appeal. We affirm the judgment of the trial court.

The accident occurred about midafternoon, May 7, 1943, on U. S. Highway 20-87 just west of the city of Douglas, Wyoming. The highway there had a restricted speed limit of 35 miles per hour. About a quarter of a mile west of the point of collision, the highway came over a hill and for some distance east had a down grade of 5.5 per cent, then leveled out somewhat into an average down grade of 2.5 per cent, to the point of the accident. This highway had a two-lane oil-paved surface, averaging 20 feet in width, with gravel shoulders on either side. Just west of the point of the accident a graveled county road intersected the U. S. highway at right angles and from the south. The collision occurred just east of this intersection. There were no obstructions to visibility from either highway to the other.

Plaintiff's unit consisted of a tractor and a detachable trailer tank. The tractor was painted red and the tank white, with black lettered signs. At the time of the accident, the tank contained over 4,000 gallons of gasoline, and the entire unit loaded weighed over 19 tons. Defendants' unit was a light 3/4 ton truck, carrying a small load of building material.

Plaintiff's unit was being driven east on the U. S. highway with only the driver in it. Defendants' truck with a second person in it, was driven onto the U. S. highway from the south. It turned east and had proceeded to a point about 75 feet east of the intersection of the center of the county road with the center of the U. S. highway, when plaintiff's unit collided with it. The right front of plaintiff's tractor struck the left rear of defendants' truck. The impact width was 2 feet, 8 inches. The vehicles went on down the highway a distance of 300 to 350 feet. The tractor and the trailer separated during the movement. The tractor and defendants' truck stopped on the south side of the highway. The trailer tank overturned and "rolled" about 75 feet before coming to a stop on the highway. The tractor was wrecked beyond repair. The trailer tank was

badly damaged but repairable. The weather was cloudy and the oiled highway was dry. The above facts are not in dispute.

There is a dispute as to whether there was a yellow line painted, solid or broken, down the center of the pavement.

There is some dispute as to whether the highway "stop" sign was standing on the right of the county highway just south of the intersection. Defendants' driver testified the stop sign was there. There is no dispute but that both drivers knew that a stop sign had been erected there.

There is a direct dispute as to whether or not defendants' truck stopped before entering the U. S. highway. Plaintiff's driver testified that it did not. Defendants' driver testified that he stopped the truck before entering the highway. This evidence will be outlined later herein.

There is a dispute as to the speed of the two vehicles. Plaintiff's driver testified that his speed at about 750 feet west of the intersection was from 30 to 35 miles per hour; that he slackened his speed and when about 50 feet west of the intersection, was going at a speed of 25 to 30 miles per hour; that just before the collision, he set all his brakes and was going from 15 to 20 miles per hour when the collision occurred. The patrolman interviewed plaintiff's driver at the hospital after the accident. He testified that the driver told him his speed was about 45 miles per hour "prior to the accident or when the danger was first noticed * * * ." Defendants offered the testimony of a witness to the effect that from a point near the intersection, he saw plaintiff's truck about a quarter of a mile west, watched it coming down the highway for 100 feet and that its speed was then 60 miles per hour. Plaintiff's driver testified that he first observed defendants' truck about 500 feet south of the intersection; that it was then going from 25 to 30 miles per hour; and that when it entered the highway, it was going 20 miles per hour. Defendants' evidence was that their truck was going about 10 miles per hour when hit.

The testimony as to how and where the accident occurred is not conflicting. Plaintiff's driver testified that when de-

fendants' truck came upon the highway in front of him, it did so on the right-hand side of the road and started east on its proper side; that plaintiff's driver then turned to the left to pass defendants' truck, blew his horn repeatedly, and got entirely over on the left-hand side of the oiled portion of the highway, when suddenly defendants' truck "lurched" over in front of him when they were a matter of a few feet apart. Plaintiff's driver then set his brakes, got to the far (north) side of the highway, so that his left tractor wheels were on the gravel. He could not avoid the collision. The impact occurred, the door of the tractor opened and he was thrown out.

The under-sheriff and the highway patrolman came to the scene at separate times thereafter. They are not contradicted on their evidence as to what was visible. There were dark, heavy skid marks all well over on the north half of the pavement, beginning about 15 to 25 feet west of the point of impact, as they determined it, and continuing to where the trailer turned over and the tractor left the pavement. There were lighter marks beginning at the point of impact and continuing down the pavement to where defendants' truck left the pavement. They located the point of impact from the skid marks and glass. It was 75 feet east of the intersection, and on the north half of the highway. The patrolman made exact measurements. The oiled surface at the point of impact was 21 feet, 9 inches wide. As shown by the skid marks, the right wheels of the defendants' truck were 8 feet, 7 inches from the edge of the pavement on the south side, and 12 feet, 3 inches from the north edge of the oiled surface, and the left wheels were 7 feet, 2 inches from the edge on the north side.

Milton J. Olson, one of the defendants, arrived at the scene of the accident about five minutes after it happened, and was there when the patrolman arrived. He placed the point of impact at about 75 to 80 feet east of the intersection. He was asked where the point of impact was with reference to whether it was north or south of the center of the road. He testified that there was a definite marking as

to where the skidding first occurred; and that "at the time" he could not quite agree with the patrolman that the lighter marks on the pavement were made by "our truck," the disagreement being that they could not establish "at the time whether the truck was picked up and then set down at that point and the marks start from there. There was no visible markings we could see at the time as to just what the route was before the impact." When asked on what side of the highway the collision occurred, he answered: "I would say it wasn't in the middle—it was practically—it was on the right side of the highway, mostly on the right side of the highway." And "From the angle of the skid marks it was a little to the left of the highway—or the center line of the highway, * * * ." And later on, "The point of impact showed a darker line, but not what you would call a definite skid mark" but "a mark made by" the tires of defendants' truck.

On direct examination, the passenger in defendants' truck testified: " * * * we was on our side of the road, I am sure" and again he testified that he thought" they were on their own side. But on cross-examination he testified that he was not positive this accident happened on the south side of the road. He further testified that he gave the county attorney an affidavit stating: "I don't know what side of the road we were on although I think we were on our side."

Defendants' driver was asked on direct examination where he was on the highway when he was hit. He answered: "I believe I was on my side. * * * My right-hand side." On cross-examination, he testified: "I don't think it was past the center." He further was examined with reference to a chart that some one had drawn, purporting to show the position of the two vehicles at the time of the impact. He then was asked to mark the center of the highway. He did so, showing his truck to be partly on the north half of the highway, but he "couldn't say" if it was correct.

The evidence shows that defendants' driver, while not positive as to whether he was across the center of the road,

was testifying as to where he was on the highway when he entered and turned to go east. Plaintiff's driver puts him on the south side at that time. It further is noted that there was no denial of plaintiff's testimony that just before the impact the defendants' truck suddenly turned or "lurched" across the center of the highway and into the path of the transport on the left-hand side, nor is there any denial of plaintiff's driver's testimony that he could not then avoid the collision.

Defendants offered the testimony of three witnesses as to the events immediately preceding the accident. A foreman of defendants testified that, in a car headed south, he met defendants' truck about 75 to 100 feet south of the intersection, and there stopped the driver briefly and gave him work instructions. The man in the truck with the driver puts this meeting at the same point. In an earlier statement, the foreman located the point of this conversation at 200 feet south of the intersection. The driver puts the point of meeting 10 to 15 feet south of the intersection and opposite the stop sign. After this brief conversation, the driver testified that he drove into the highway and turned east. He did not testify that he stopped again before entering the highway. Therefore, according to the driver, whether he stopped before entering the highway depends upon where that conversation took place. Defendants' driver further testified that from the time he started his truck, after talking with the foreman, until the accident "wasn't over three or four minutes." According to his testimony, he did not drive more than 100 feet during that time.

The foreman testified that after this conversation, he looked north and west, preparatory to turning around to go back to the highway. It was at that time he saw plaintiff's transport coming concerning which he gave the testimony as to speed. He then turned his car around and was facing north when he saw the accident. He testified that the defendants' truck when hit "looked like it raised up off the pavement about three or four feet and on down the road." The rider in defendants' truck testified that he did not look

up or down the road and saw and heard nothing before the accident. The driver testified that he looked in both directions, saw a car coming over the hill "way up to the left," drove onto and east on the highway, and saw and heard nothing more until the collision.

The defendants offered and there were admitted in evidence parts of the decisions in *Hill v. Walters,* 55 Wyo. 334, 100 Pac. 2d 98, and *Pierce v. Bean,* 57 Wyo. 189, 115 Pac. 2d 660, supporting the propositions that "The doctrine of comparative negligence does not prevail generally" in Wyoming, and that contributory negligence on the part of the plaintiff defeats a recovery. Defendants also placed in evidence parts of the opinion in *Loney v. Laramie Auto Co.,* 36 Wyo. 339, 255 Pac. 350, to the effect that where a danger " * * * was patent and obvious, so that a man of ordinary prudence should have known of it, he cannot recover." Defendants also placed in evidence section 26-101, Wyoming Revised Statutes 1931, with reference to the adoption of the common law in Wyoming.

Plaintiff offered in evidence parts of the above opinions of the supreme court of Wyoming, supporting the proposition that the issue of negligence or contributory negligence is ordinarily one to be determined by the jury.

The defendants requested the court to instruct the jury that the evidence did not show sufficient negligence on the part of the defendants to sustain a verdict for the plaintiff, and, in any event, as a matter of law, the evidence established contributory negligence of the plaintiff which was the proximate cause of the accident, and that they should find for the defendants. The court refused to give the requested instruction. That refusal is defendants' first assignment of error.

This contention is bottomed on the proposition that Wyoming does not have a comparative negligence statute and that negligence on the part of the plaintiff which contributed to an accident defeats recovery, and further that under the Nebraska decisions (Wyoming not having spoken on the matter), plaintiff's negligence was such as to bar recovery as a matter of law.

As we see this situation, the speed of plaintiff's unit was not an element in the cause of this accident. The speed of 60 miles per hour was fixed at a point a quarter of a mile away, and the evidence is undisputed that it was reduced as stated herein. The speed which the patrolman testified was fixed by plaintiff's driver as at 45 miles per hour was "when the danger was first noticed," and again the undisputed evidence is that the brakes were being applied and the speed reduced after that time. The distance the vehicles traveled after the impact is likewise not controlling as evidencing speed before the impact, particularly in view of the undisputed testimony of the patrolman that in his opinion the driverless tractor had operated after the accident. Neither do we consider of controlling importance the evidence as to the speed of defendants' truck when it entered the highway, nor whether or not there was a stop sign there, nor whether or not defendants' truck stopped before entering the highway.

So far as determining the proximate cause of this accident, we think a line can be drawn across the highway just east of the intersecting road, and that only the evidence as to what happened thereafter should be considered.

The proximate cause of this accident and its only cause occurred after the defendants' truck was on the highway. It was then proceeding east on the highway on its proper side. Plaintiff's unit moved to the left of the highway to pass as he had a right to do, and where, without dispute, there was ample room for him to pass. Excessive speed at that time is not shown. All the testimony is that the plaintiff's truck was on the north side of the highway well beyond the center line; that it was there before, at and after the impact is conclusively shown by the pictures of the skid marks and the testimony of the witnesses. There is no evidence to the contrary. Plaintiff's unit would not and could not have hit the defendants' truck had it not been on the left or north half of the highway also. Defendant, Milton J. Olson, admitted that the skid marks of his truck first appeared on the north half of the highway, but seemed to have

had the theory "at the time" that somehow the impact of the tractor against his truck picked it up and set it over and down on the north side of the highway. Just how that could happen in the face of the undisputed testimony that plaintiff's tractor was then well to the north of the center is not explained. Had the defendants' truck remained on its own half of the road, this accident would not have happened. The accident occurred because the defendants' truck moved over onto the left side of the highway into a place of danger and at a time when it was impossible for plaintiff to prevent hitting him, although in an effort to do so, he set his brakes and skidded his wheels for 15 to 25 feet before the impact.

This obviously is not a case calling for an application of the rule that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction within the range of his vision ahead. *Most v. Cedar County,* 126 Neb. 54, 252 N. W. 465. As we see this evidence, it shows without dispute that the sole and proximate cause of this accident was the act of defendants' driver in not seeing or looking to see what was to be seen behind him, and not hearing what was to be heard, and driving suddenly upon the north half of the highway and into the path of plaintiff's unit.

The trial court did not err in refusing to give the proffered instructions.

Defendants' second and third assignments are that the court erred in its instruction to the jury as to speed and with reference to the issues, claiming that the court failed to instruct as to the defense of improper braking equipment. The rule applicable here has been variously stated and, at times, not too exactly applied. We think the proper rule is: Where the jury arrive at the only conclusion that the evidence would sustain and where, in the light of the pleadings and the competent evidence introduced, the trial court should have directed a verdict in favor of the prevailing party had it been requested, this court will not consider

errors assigned by the defeated party complaining of instructions given or refused relating thereto. *U. P. Steam Baking Co. v. Omaha Street Ry. Co.*, 4 Neb. (Unof.) 396, 94 N. W. 533; *Buzzello v. Sramek*, 110 Neb. 262, 193 N. W. 743; *Stiefler v. Miller*, 120 Neb. 6, 11, 231 N. W. 153, 232 N. W. 620; *Nielsen v. Yellow Cab & Baggage Co.*, 130 Neb. 457, 265 N. W. 420. Since the jury arrived at the only conclusion as to liability that the evidence would sustain, error, if any there was, in the giving of instructions relating thereto, was not prejudicial to the defendants.

Defendants' next assignment of error is that they offered and the trial court refused to admit in evidence a statute of the state of Wyoming, which provided that the brakes should be able to stop a vehicle in a fixed distance when going at a certain speed, upon pavement meeting certain specifications as to quality and grade. Plaintiff's vehicle was not shown to have been put to that test, nor were the road conditions at the time of the accident within the specifications of the statute. As we view this record, the condition of the brakes on plaintiff's unit not being a proximate cause of, nor contributing to the cause of, the accident, error, if any, in the ruling was not prejudicial.

Defendants' final assignment of error is that the trial court erred in sustaining an objection to the admission of an answer of the patrolman. His testimony was by deposition. He was asked as to what plaintiff's driver said while in the hospital about the brakes. His answer in part was that the driver had said "something was wrong" with the condition of the brakes and "he didn't exactly state what it was, but it seemed that the brakes on the semi were holding better than the brakes on the tractor unit." The quoted language is obviously the conclusion of the witness. The court properly refused its admission.

The judgment of the trial court is affirmed.

AFFIRMED.

The following opinion on motion for rehearing was filed June 22, 1945. *Former opinion set aside and judgment*

19 N. W. 2d 346

1. **Negligence.** Under the laws of Wyoming the issue of negligence or contributory negligence is ordinarily one to be determined by the jury. This is so even where the testimony is undisputed, if different minds may fairly arrive at different conclusions, and where the inferences from the facts are not so certain that all reasonable men, in the exercise of fair and impartial judgment, must agree upon them.
2. **Trial.** Tire tracks made on a highway by the collision of motor vehicles are circumstantial evidence to be weighed or considered by a jury along with the other evidence in the case.
3. **Evidence.** In the absence of proof to the contrary, the laws of a sister state will be presumed to be the same as the laws of Nebraska.

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

YEAGER, J.

An opinion was previously adopted in this case which appears *ante*, p. 507, 17 N. W. 2d 483. A motion for rehearing was presented. On reconsideration we have arrived at conclusions which conflict with the former opinion. The statement of the case in the former opinion without its conclusions is correct but we deem it advisable to make a brief restatement herein in order that the portion of the opinion which shall follow may be intelligible.

This is an action for damages by Ray Howerter, plaintiff and appellee, against Wallace A. Olson, Milton J. Olson, Myron S. Olson and Olson Bros., a copartnership, defendants and appellants. The action grows out of a collision between an oil transport truck owned by plaintiff and a pick-up truck owned by the defendants. The date of the collision was May 7, 1943, and the place a few miles west of Douglas, Wyoming, on U. S. Highway 20-87. At the point of the collision the grade of the highway was 2.5 per cent, with the decline to the eastward. About a quarter of a mile west the grade was 5.5 per cent. There was a leveling off between these two points. This was a two-lane east and west arterial highway with oil-paved surface and was protected by stop signs at intersecting roads. It appears that

there was a yellow broken line down the center of the paving although this is disputed. A short distance west of the point of the collision was a county road entering from the south. At this intersection there had been a stop sign the purpose of which was to cause vehicles coming from the south to stop before entering upon this highway. Whether the stop sign was in position at the time involved herein is not made certain by the evidence. The paving at this point was about 20 feet in width. Beyond the paving on both sides were gravel shoulders. Plantiff's truck empty weighed over 14,000 pounds and at the time of the collision was carrying over 4,000 gallons of gasoline. The unit was composed of a tractor with a detachable tank on a separate carriage. Defendants' truck was 3/4 ton capacity and was carrying a small load of building material. Both trucks at the time of the collison were traveling in an easterly direction on U. S. Highway 20-87. The collision was between the rear end of defendants' truck and the front end of plaintiff's. It occurred about 75 feet east of the point where the road from the south enters U. S. Highway 20-87.

Substantially the claim of plaintiff is that when his truck was coming eastward under control and yet back of the intersection of the road from the south with U. S. Highway 20-87 his driver saw defendants' truck come out from the south without stopping before entry and turn east on the right side of the highway; that thereupon his driver pulled over to the left of the center with the purpose and intention of passing; that when the two trucks were close together defendants' driver suddenly and without warning pulled over to the left of the center and in front of plaintiff's truck; that plaintiff's driver immediately set his brakes which he was using theretofore and sounded his horn but no sufficient time or opportunity was afforded to avoid a collision; that the right front of plaintiff's and the left rear of defendants' truck came into collision with great force and violence resulting in the damage to plaintiff's truck.

The charges of negligence to the extent necessary to set them forth here are that the driver of defendants' truck

failed to stop at the stop sign before entering U. S. Highway 20-87; that the said driver failed to keep a proper lookout for traffic on U. S. Highway 20-87; that he failed to accord to plaintiff's truck the right of way; that he failed to heed the warning signal given by plaintiff's driver; that suddenly and without warning he pulled onto the north side of the highway at a time and in such manner that a collision was unavoidable.

For answer to the petition the defendants first filed a general denial, then alleged specially that the collision came about because of the negligence and contributory negligence of plaintiff's driver in the following particulars: That he was operating the truck at a high, dangerous and unreasonable rate of speed; that the truck was out of control; that he attempted to pass at a time and under circumstances when passing was dangerous. Further answering they pleaded the applicability of the laws of Wyoming with regard to negligence and asserted that contributory negligence on the part of plaintiff's driver was a bar to recovery.

At the conclusion of plaintiff's evidence the defendants moved for a directed verdict which was overruled.

At the conclusion of all of the evidence the cause was submitted to a jury under instructions outlining the theory contained in the petition and in part the theory of the answer. The jury returned a verdict in favor of plaintiff in the amount of $4,250. Judgment was entered on the verdict. Motion for new trial was filed and overruled. From this judgment and the order overruling the motion for new trial the defendants have appealed.

The defendants predicate their first ground for reversal on the ground that the court should have directed a verdict in favor of defendants, it being their contention first, that negligence was not proven and second, that plaintiff's driver was guilty of contributory negligence sufficient as a matter of law to defeat a recovery.

The evidence of plaintiff is that at a point about 750 feet west of the side road plaintiff's truck was traveling from 30 to 35 miles per hour; that the driver slackened the speed

of the truck so that when he was about 50 feet west of the intersection it had been reduced to about 25 to 30 miles per hour; that just before the collision the speed was from 15 to 20 miles per hour; that when plaintiff's driver was about 50 feet back from the intersection defendants' truck came into the intersection without stopping and turned east onto and proceeded eastward on the right or south side of U. S. Highway 20-87; that at about this point plaintiff's driver sounded his horn and pulled over north beyond the center of the highway and kept riding his brakes and reducing the speed of his truck; that between 50 and 75 feet east of the intersection defendants' truck lurched over in front of plaintiff's truck so suddenly that plaintiff's driver was unable to avoid a collision. After the collision the trucks traveled 300 to 350 feet eastward and turned over. There were tire marks on the highway in the vicinity of the collision. These marks were north of the center.

On these facts in the light of the allegations of the petition it cannot be said that the trial court erred in refusing to direct a verdict in favor of the defendants. The question of whether or not defendants' driver was negligent under the circumstances is one upon which different minds might fairly arrive at different conclusions. This being true a jury question was presented.

"The issue of negligence or contributory negligence is ordinarily one to be determined by the jury. * * * That is true even in a case where the testimony, as in the case at bar, is undisputed, if different minds may fairly arrive at different conclusions, and where the inferences from the facts are not so certain that all reasonable men, in the exercise of fair and impartial judgment, must agree upon them." *Loney v. Laramie Auto Co.*, 36 Wyo. 339, 255 Pac. 350.

Defendants assert that the evidence discloses that plaintiff's driver was guilty of contributory negligence as a matter of law, that is, contributory negligence was shown without dispute and so conclusively that different minds could not fairly arrive at a different conclusion and that opposite

inferences by reasonable men in the exercise of fair and impartial judgment could not be drawn. The witnesses for defendants do not concede that defendants' driver came out from the side road without stopping. Their testimony was to the contrary. They do not concede that defendants' truck was on the north side of the highway at the time of the collision. While there is not too much certainty in their testimony in this regard yet it is a sufficient denial to prevent a trial court or this court from saying that plaintiff's evidence must be taken as true and that no opposing inference may reasonably be drawn from the entire evidence.

Contrary to the determination made in the former opinion, we now conclude that plaintiff was not entitled to a directed verdict. To hold that he was so entitled would be to say that the negligence of defendants was proven without refutation and also that the allegations of contributory negligence were without support in the evidence.

It was contended substantially in the former opinion that the evidence of tire marks irrefutably fixes the point of collision as that claimed by plaintiff. The theory of the contention is that these are physical facts which point to a single conclusion or inference. With this contention and this theory we cannot agree.

Instead of uncontroverted facts they are circumstantial evidence to be weighed and considered by the jury along with the other evidence in the case. *Jones v. Union P. R. Co.*, 141 Neb. 112, 2 N. W. 2d 624.

As to the question of contributory negligence the court instructed the jury that if they found that plaintiff's driver was guilty of contributory negligence plaintiff could not recover. This was a proper instruction under the laws of Wyoming.

With this in mind and the rule laid down in *Loney v. Laramie Auto Co., supra,* we conclude that the court did not err in the submission of the question of plaintiff's contributory negligence to the jury.

The next assignment of error is that the court erred in giving the following portions of instruction No. 7:

affirmed.

"The Statutes applicable in this case are, in substance, as follows:

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

"All motor vehicles entering * * * state highways on which stop signs are erected shall come to a full stop as near the right-of-way line as possible before entering onto such state highway, and, regardless of direction shall give the right-of-way to vehicles upon said highway."

The two paragraphs following the introduction state Nebraska statutory rules. The first of the two obviously has application to the plaintiff since the speed of defendants' truck under the evidence is not a matter of controversy. The second has application to the defendants.

The matters contemplated by these portions of instruction No. 7 were put in issue by the pleadings and evidence was offered and received thereon. The Wyoming statute dealing with these subjects, if any that state has, was neither offered nor received in evidence. The rule in such circumstances, as stated in the syllabus of *National Fidelity Life Ins. Co. v. Gordon,* 130 Neb. 130, 264 N. W. 155, is as follows: "In the absence of proof to the contrary, the laws of a sister state will be presumed to be the same as the laws of Nebraska." See, also, *Stark v. Olsen,* 44 Neb. 646, 63 N. W. 37; *Franks v. Horrigan,* 120 Neb. 1, 231 N. W. 27.

The court therefore did not err in the giving of the questioned portions of instruction No. 7.

The third assignment of error is directed to the refusal of the court to include in instruction No. 2 negligence on the part of plaintiff's driver "In operating the said tractor-trailer on a highway with improper braking equipment."

The fourth is the refusal to admit in evidence chapter 72, section 282, paragraph 4, sub-section B1, of the 1940 Wyoming Supplement pertaining to motor vehicles or combination of vehicles.

The fifth is the refusal to permit a witness to give testimony as to what the driver of plaintiff's truck said about the condition of his brakes after the accident.

E. L. Collier interviewed plaintiff's driver, Nestor L. Callahan, after he had been taken to a hospital in Douglas, Wyoming. His testimony was taken by deposition and offered and parts of it read in evidence at the trial. Plaintiff as part of his case read in evidence certain parts of the deposition. At the time and before defendants had adduced any evidence on their behalf defendants read the following questions and answer: "Q—Did you interrogate Mr. Callahan concerning the condition of his brakes when you saw him at the Douglas Hospital?" "A—Yes, sir, I asked him about his brakes." "Q—What did he say about them, if anything?" The latter question was objected to on the ground that it was hearsay, not binding on the plaintiff and called for a conclusion of the witness and the party interrogated, and that no foundation had been laid for impeachment. The objection was sustained. The answer to the question as follows was offered and objection to the offer sustained: "A—As I recall, he made the statement at the time that he was unable to stop his vehicle and stated that apparently his truck or tractor seemed to have mechanical brakes and the brakes on the semi were air controlled or hydraulic controlled and that something was wrong with the condition of the brakes at the time of the accident and he didn't exactly state what it was, but it seemed that the brakes on the semi were holding better than the brakes on the tractor unit."

This statement was offered in support of the allegation that the brakes on plaintiff's truck were faulty. It contains nothing more than an opinion or conclusion that the brakes were faulty and for that reason the objection to the offer was properly sustained.

There was no evidence offered or adduced tending to show that the brakes on plaintiff's truck were defective other than that offered from the deposition of Collier and this was properly rejected. It follows then that assignments

Nos. 3 and 4 must fall. As to No. 3 it was not error to fail to submit an issue of negligence based on defective brakes without evidence to support the issue. As to No. 4 it was not error to sustain an objection to an offer of the statutes of Wyoming providing braking standards in the absence of evidence or an offer showing a violation of such requirements.

Finding no reversible error the judgment of the district court is affirmed.

AFFIRMED.

SIMMONS, C. J., concurring in part and dissenting in part.

I concur in the judgment of affirmance. I dissent to that portion of the opinion setting aside the opinion previously adopted in this case. Reference here is made to the earlier opinion for a more detailed recital of the evidence than that contained in the majority opinion.

The majority state that the statement of the case is correct, but disagree with its conclusions. Two conclusions are set out with which the majority take issue. The majority conclude that there was evidence to go to the jury here as to the questions of plaintiff's contributory negligence and defendants' negligence.

The majority recite the evidence in conflict upon which I assume they base their finding of a dispute on these questions. The first one is that defendants' witnesses do not concede that defendants' driver entered the highway from the side road without stopping. I agree that there is a conflict in the evidence—but it goes to a matter that proves neither negligence nor contributory negligence. Both parties agree that when defendants' truck entered the highway, it did so on its own side of the road and proceeded east on that side of the road. The negligence proved was that about 75 feet east of the intersection, defendants' truck suddenly lurched over to the left and in front of the plaintiff's vehicle. That evidence is not denied by defendants' witnesses. It stands unchallenged as a fact. Neither is it challenged that when the lurch occurred, it was then impossible for plaintiff's driver to avoid a collision. That

negligence of the defendant was, in the language of the majority, "proven without refutation." Certainly there is nothing in the evidence that the defendants' driver did or did not stop when entering the highway which goes to show contributory negligence on the part of the plaintiff.

The next and apparently only other conclusion in the former opinion with which the majority disagree is that which goes to the location of the defendants' truck at the point of the collision, i e., is there a dispute in the evidence sufficient to go to the jury as to whether or not it was on the north side of the highway? They admit that there is not "too much certainty" in defendants' testimony, but yet hold there is a sufficient denial. They do not set out the evidence. They say it was contended in the former opinion that the evidence of tire marks irrefutably fixes the point of collision, and that the theory was that these tire marks are physical facts which point to a single conclusion or inference. What was said in the former opinion was: "All the testimony is that the plaintiff's truck was on the north side of the highway well beyond the center line; that it was there before, at and after the impact is conclusively shown by the pictures of the skid marks and the testimony of the witnesses. There is no evidence to the contrary. Plaintiff's unit would not and could not have hit the defendants' truck had it not been on the left or north half of the highway also. Defendant, Milton J. Olson, admitted that the skid marks of his truck first appeared on the north half of the highway, but seemed to have had the theory 'at the time' that somehow the impact of the tractor against his truck picked it up and set it over and down on the north side of the highway. Just how that could happen in the face of the undisputed testimony that plaintiff's tractor was then well to the north of the center is not explained."

The conclusion in the former opinion rests upon the evidence as to the skid marks *and* the testimony of the witnesses.

Now, what is the evidence as to the skid marks on the pavement? It is set out in the former opinion as follows:

"The under-sheriff and the highway patrolman came to the scene at separate times thereafter. They are not contradicted on their evidence as to what was visible. There were dark, heavy skid marks all well over on the north half of the pavement, beginning about 15 to 25 feet west of the point of impact, as they determined it, and continuing to where the trailer turned over and the tractor left the pavement. There were lighter marks beginning at the point of impact and continuing down the pavement to where defendants' truck left the pavement. They located the point of impact from the skid marks and glass. It was 75 feet east of the intersection, and on the north half of the highway. The patrolman made exact measurements. The oiled surface at the point of impact was 21 feet, 9 inches wide. As shown by the skid marks, the right wheels of the defendants' truck were 8 feet, 7 inches from the edge of the pavement on the south side, and 12 feet, 3 inches from the north edge of the oiled surface, and the left wheels were 7 feet, 2 inches from the edge on the north side." The majority do not disagree with that statement. It is fully sustained by pictures in evidence taken both by plaintiff's and defendants' witnesses. These pictures cannot argue, surmise, evade, or lie. They are not challenged.

Now, what is the defendants' evidence which the majority state constitutes a denial with "not too much certainty?" First, there is the testimony of Johnson, who was a passenger in defendants' truck. He neither saw nor heard anything. He testified that they turned onto the highway and went about 100 feet when "our truck went up in the air," came down and started to skid. So he puts the collision at the point where they started to skid—and the pictures and the undisputed evidence of the skid marks show that that was well over on the north half of the highway. His own counsel did not ask him what position they were in "at the point of the collision" but rather "what position in the highway you were in." This relates, if it relates to anything, to a previous "as you were going down the highway" question. He answered: "Well, we was on our side of the

road, I am sure." On cross-examination he was asked: "And you are not sure either that this accident happened on the south side of the road, are you?" He answered: "Not positive." He then was asked about an affidavit he had given, and in answer to whether or not he had given it he volunteered the answer: "We was on our side of the road." He was not then being asked as to where he was when the collision occurred. He then admitted that he had given an affidavit that "I don't know what side of the road we were on although I think we were on our side." So I submit that fairly construed, this witness was testifying as to where they were "as you were going down the highway." He did not deny and was not asked to deny the sudden lurch to the left into the path of plaintiff's transport.

Engstrom was the driver of defendants' truck. He was asked his position "at the time you were hit." His answer was that he was down the highway 75 to 100 feet. He later was asked: "Where were you on the highway?" He answered: "I believe I was on my side." It was not a statement of fact but a statement of present opinion. On cross-examination he was asked: "You said you believe you were on your side. What makes you believe that?" He then said that there was a hole just before the place where he turned into the highway; that he pulled around that and he did not think it made him go "past the center." So he clearly was testifying that he was on his own side of the highway when he went onto it—75 feet before the accident. No one disputes that. He later was shown a "little drawing" and was asked if that was substantially the position of the vehicles "when the accident occurred." He studied the drawing and said: "Yes, I believe so." He identified the truck, numbered 1 on the chart, as his truck. He marked an "x" as the center of the highway. He admitted that the diagram showed that his truck was over the center. He was asked if that was right and his final answer in all this was: "I couldn't say if it was." But he did not say that it was not. He did not deny and was not asked to deny the sudden lurch to the left and into the path of plaintiff's transport.

Next, one of the defendants Olson testified. He was at the scene of the accident shortly after it happened. He observed the skid marks and he took pictures. He was there with the highway patrolman. He was asked if he was able to determine where the impact of the vehicles occurred. His answer was: "Well, *at the time* I couldn't quite agree with him" (the patrolman), as to whether the lighter tracks "were our truck, those marks, or not." He did not say that the marks were not on the north side of the pavement. He just did not agree "at the time" that they were the marks of his truck. He did not even say he disagreed at the time of the trial. The evidence shows without dispute that those marks went from that point right to his truck. He then was asked if there was anything on the highway to tell where the collision occurred. He said yes, there were definite markings where the skidding first occurred and from there on down the highway was littered with wreckage. He was asked on cross-examination: "Did you determine on what side of the highway the collision occurred?" His answer was: "I would say it wasn't in the middle—*it was practically*—it was on the right side of the highway, *mostly* on the right side of the highway." He then was asked if it was not plain that the skid marks made by his truck were north of the center. He answered: "From the angle of the skid marks it was a little to the left of the highway—or the center line of the highway, * * * ." He then volunteered the statement that the reason for his disagreement with the patrolman was that "at the time" he couldn't establish whether the "truck was picked up and then set down at that point and the marks start from there." He further said that there were "no visible markings we could see at the time as to just what the route was *before* the impact." He did not deny that the route from the point of impact was on the north side of the highway. He probably referred to the route of his truck. But there were visible markings which he testified to and clearly showing in the pictures as to the route before the impact of plaintiff's truck, and they are all

shown in the pictures and are far to the north of the center of the highway. No one denies the location of those marks and that they were made by plaintiff's truck. He then said that "The point of impact showed a darker line, but not what you would call a definite skid mark" but a mark made by the tires of his truck. Those marks, without dispute, are shown by the pictures and other evidence to have been on the north side of the highway. So the defendant himself on direct and cross-examination puts his truck on the north side of the highway at "the point of impact."

The conclusion of the majority is that this evidence is sufficient to raise a jury question as to whether or not the collision occurred on the north half of the highway. I submit that the location of the point of impact as north of the center line was "proven without refutation."

It was not held in the former opinion that the tire marks alone were conclusive as to the point of the impact, but it was held that these tire marks, plus the evidence of the plaintiff, plus the admissions of the defendants' witnesses, denied only by evasive "I think", "I am not positive" and "I believe" answers, removed that question from the category of an issue to be determined by a jury.

The majority then say that the tire marks are not "uncontroverted facts" but circumstantial evidence to go to the jury. I submit they are uncontroverted evidence of the facts. Apparently the majority mean to say that they are not physical facts. The authorities are to the contrary. The position of tire marks and skid marks has been recognized as important physical facts within the rule that courts will not allow verdicts to stand when they rest upon evidence which is contrary to physical facts and human experience. 10 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.), sec. 6554, p. 237. Skid marks are treated as physical facts in *Jones v. Union P. R. Co.*, 141 Neb. 112, 2 N. W. 2d 624, cited by the majority. This court has said: " * * * where the statements of the witnesses are opposed to natural laws and conclusive inferences arising from the undisputed physical facts, there is no question

of weight of evidence, and the latter must prevail." *Varnum v. Union P. R. Co.*, 112 Neb. 340, 199 N. W. 503.

In *Hahn v. Doyle*, 136 Neb. 469, 286 N. W. 389, this court approved an instruction to a jury which stated that the physical facts surrounding an accident were very important, and, if the jury found that the verbal testimony of any witness or witnesses was in conflict with the physical facts and could not be reconciled therewith, the physical facts should be accepted as reflecting the truth.

Even accepting the majority's contention that there was a controversy in the parol evidence, I submit that the evidence of the tire marks controls. That plaintiff's vehicle was on the north side of the highway before, at and after the impact is established by the uncontroverted evidence of the witnesses and the unchallenged evidence of the skid marks as shown by the pictures taken by both the parties. No witness undertook to say that those marks were not made by plaintiff's truck. In *Jones v. Union P. R. Co., supra*, we said: " * * * if but one inference may be arrived at in the minds of reasonable men from an examination of the physical facts, then that inference must be accepted, but if with equal force and propriety an opposite inference or inferences may be drawn the question becomes one for the jury."

We need not argue here from the premise of a general rule. The Supreme Court of Connecticut has directly considered this question and stated an applicable rule. In *Willows v. Snyder*, 116 Conn. 213, 164 Atl. 385, that court had before it the effect to be given to evidence of tire marks. It tested them by this rule: "Marks such as those of which evidence was given in this case can become conclusively determinative between conflicting oral testimony as to the circumstances of an accident only when their existence and location are admitted or undisputed." That court has treated tire marks as physical facts. See *Flynn v. Peracchio*, 118 Conn. 124, 170 Atl. 926, where the rule in the *Willows* case was referred to as one under which "indisputable physical facts" can be established.

I submit that the existence and the location of these tire

marks is both admitted and undisputed, and that, standing alone, they are conclusively determinative and, as the Connecticut court said, are indisputable physical facts. See, also, *Missouri P. R. Co. v. Moore,* 199 Ark. 1035, 138 S. W. 2d 384, where skid marks made before an accident as some were here, were held to control over the parol testimony of a party contrary thereto. The court there held the parol testimony could not be accepted as substantial evidence in the face of the physical facts—one of which was a skid mark.

The majority seem to hold that under this evidence a jury of reasonable men could properly hold the fact to be that plaintiff's vehicle without leaving its course on the north side of the highway, reached out to the south side, collided with and picked up defendants' truck, carried it back to the north half of the highway, set it down and proceeded on its way. May it be said with "equal force and propriety" that such an inference can be drawn from this evidence? I do not agree.

IN RE ESTATE OF JOSEPH VANICEK.
LLOYD L. POSPISHIL ET AL., APPELLEES, V. ANNA VANICEK KEMP ET AL., APPELLANTS: IMPLEADED WITH JOSEPH F. VANICEK ET AL., INTERVENERS, APPELLEES.

17 N. W. 2d 477

FILED FEBRUARY 2, 1945. No. 31845.

1. **Appeal and Error.** When a proper objection has once been made to the admission of testimony and overruled, it is unnecessary for counsel to repeat this same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received.
2. **Gifts.** If a witness testifying to a gift *inter vivos* is a creditable witness, and there is no evidence in opposition thereto, it then becomes a question of the sufficiency of the evidence, rather than the weight of the evidence.
3. ———. Postal savings certificates may be the subject of a valid

gift *inter vivos*, and the transaction is completed by the voluntary transfer of possession, even though they are nonnegotiable and nontransferable.

4. **Judgment**: UNITED STATES. The final judgment of a court of competent jurisdiction, adjudicating the right of any person to any sum deposited in a postal savings depository, shall be accepted as conclusive of the title thereto, and is a full discharge of the United States from the claim of any other person to the same.
5. **Gifts**. The legal inference arising from a gift *inter vivos* from a father to a child is that such transfer is a natural one, and less evidence is required to establish such a gift than to a stranger.
6. ———. To make a valid and effective gift *inter vivos*, there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee.
7. ———. It is generally held that the transfer *inter vivos* should be sustained if all the facts and circumstances show the desire and the act completed, whatever may have been the method adopted.

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

Coufal & Shaw, for appellants.

Lloyd L. Pospishil, W. B. Sadilek, Edward Asche and *William H. Roether, contra.*

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

PAINE, J.

This is an appeal from the district court for Colfax county in proceedings for the final settlement of the account of the executors of the estate of Joseph Vanicek. A daughter claims ownership, for herself and her two sisters, of five postal savings certificates as a gift from her father. The district court denied her claim, and held that said certificates were a part of the estate. From such finding the three sisters as claimants appeal.

The six errors relied upon for reversal may be summarized as follows: That the court erred in determining that the postal savings certificates were the property of the estate of Joseph Vanicek, and in directing their conversion into cash, and distribution thereof as a part of his personal

estate; that the court erred in holding that the postal savings certificates are not subject to transfer by a gift *inter vivos;* that the court erred in reversing its ruling excluding evidence of daughter's conversation with her deceased father, which was previously admitted; "The court erred in the decision that a gift inter vivos may not be proved by circumstantial evidence, ruling the gift must be established by direct evidence." "The court erred in its determination that the standard of the quantum of proof in a gift from parent to child, when no fraud or undue influence is shown, is the same as in a gift between strangers where fraud or undue influence is proved." "The court erred in holding the evidence is insufficient to establish the gift inter vivos." "The court erred in its general finding that none of the evidence as to gift and delivery given by Mamie Vanicek was admissible."

The record in this case discloses that Joseph Vanicek, a retired farmer, living alone in his own home in Schuyler, died testate on April 27, 1941. His estate consisted of farm lands, this house in town, and personal property, all having a value of about $25,000. The farm lands were divided between the two sons, and the three daughters were given the house in town and each a cash bequest of $2,000. In case the personal property failed to pay such legacies, the same were to be a lien on the farm land.

The only contest in this case is in reference to the ownership of five postal savings certificates, of the face amount of $2,200.

The testator's wife died in 1922, after which his youngest daughter, Mamie, continued to keep house for him until she married Elmer Kunkle February 24, 1927, and moved to a home about two blocks away, but continued to visit him daily, bringing him food, and with another sister assisted in doing housework for the father.

The son Joseph had lived in Oregon since 1935. The son Rudolph lived on his mother-in-law's farm, nine miles northeast of Schuyler, and visited his father only occasionally. The oldest daughter, Anna Kemp, lived in Schuyler, and

did regular washing for her father every two weeks for 75 cents. Carrie Strnad, the third daughter, lived in the country, did not drive a car herself, and could not visit her father as often as the other daughters, until his cancer took a serious turn, when she came more frequently.

In the case at bar, there is no dispute that after the death of the father the postal savings certificates were in the possession of his daughter Mamie, nor that she had received them from her father at his home, when she was there doing up his work on the evening of February 24, 1941.

She reached home about 6 o'clock and laid the postal savings certificates in the cedar chest in her bedroom. After 9 o'clock, when her husband came home from work, she testified, she "made a comment it was our wedding anniversary and I told him dad had given us the postal savings for three of us girls. * * * Q. And what did he say? A. He asked to see them because he had never seen postal savings. Q. What was done then, if anything. A. I went in the bedroom and brought them out and handed them to him while he was sitting on the day bed. Q. That is to say, you handed him these postal savings certificates and the envelope which encloses them and which this litigation is about, is that right? A. Yes."

There is evidence to the effect that, at a conference in the county court on May 22, 1941, William H. Roether, who was at that time an attorney for Joseph F. Vanicek, but is not now connected with the case, asked generally of the heirs sitting in the courtroom what the assets consisted of, and various notes were mentioned, and he then asked about postal savings, and testified: "Mamie Kunkle sat in one of the rear seats back of where I sat and stated 'Those are mine'."

Elmer Kunkle testified as to what happened at his home that evening after 9 o'clock when he got home. "Q. What then was done by you or Mrs. Kunkle? A. Well, my wife went in the bedroom and she got those postal savings and handed them to me in an envelope and I opened them up, looked at them and handed them to her."

Attempt was made to prove the details of the delivery

by the father to his daughter Mamie of the envelope containing these certificates at his home on the evening of February 24, 1941, and the trial judge permitted her to testify that her father handed her the envelope containing the postal savings certificates, although objection to the question and motion to strike out the answer were seasonably made, as follows: "Q. And the envelope in which the certificates were contained has been offered in evidence. Now did you see this envelope and these certificates in your father's hands at any time in his home on this afternoon when you were at the sink? A. Yes, when he handed them to me. Mr. Asche: Objected to and move that the answer be stricken for the reason that it is detailing a transaction had with a deceased person in a controversy involving a matter in which this witness has a direct legal interest and for which reason this witness is incompetent to testify. The Court: Overruled."

The trial court, after having the case under advisement for something over a year, decided that the answer above, stating the delivery of the certificates to the daughter by the father, was as much a transaction as detailing a conversation with the deceased father would be, and therefore that it should be stricken out. In this the trial court was correct.

Section 25-1141, R. S. 1943, reads as follows: "Where an objection has once been made to the admission of testimony and overruled by the court it shall be unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to save the error, if any, in the ruling of the court whereby such testimony was received." It has been so held in *Zediker v. State,* 114 Neb. 292, 207 N. W. 168.

If the question relates to the same identical transaction or conversation, and calls for testimony of the same nature, it is not necessary that the objection be repeated to save the error for the appellate court. *Triplett v. Western Public Service Co.,* 129 Neb. 799, 263 N. W. 229.

Anna Kemp, a sister of Mamie Kunkle, who came fre-

quently to help Mamie do the work, testified that Mamie told her that their father had given her the postal savings certificates for the three girls, also that Mamie stated in the county court, in answer to Mr. Roether's question, that "she had the postal savings for us three girls."

Joseph Kemp, son-in-law of the testator, and who is named as one of the executors, asked Lloyd L. Pospishil, an attorney, to draw the will. He found testator seated at a round table, with papers around him, and he stated that he wanted to make his will. Mr. and Mrs. Kemp went out in the kitchen and the door was closed, and he then proceeded with the execution of the will. Testator told of all his real estate, money in the bank, and notes, and the bequests to each. "Then I asked him if he had any postal savings and he looked up at me and said 'Yes, I had postal savings.' I didn't press him any further on the matter." Arthur E. Wolfe, a member of the board of county commissioners and a very close friend of years' standing, who had been a pallbearer at the funeral of testator's wife, visited the testator about a month before his death and asked about what he intended to do with his property, and testified, "He said he had given the land to the boys and the home in town and the postal savings and the money to the girls."

There is considerable evidence relating to the father destroying a note which his son Rudolph had given him for $1,989. Mamie Kunkle testified that on February 24, 1941, when she brought back some laundry she had done for her father, she put it away in the closet and then went to the sink to wash up some dishes, and at the kitchen stove she found pieces of a note of $1,989 which Rudolph had given his father, and which the father had just destroyed. She said: "He just walked over and saw me looking at it and he said that was a note of Rudy's he tore up."

Lloyd L. Pospishil, who drew the will, testified in reference to the examination of Rudolph Vanicek in the county court in this case as follows: "Q. Do you recall whether at that time he testified with reference to the character of the service that was rendered by Mamie Kunkle to her fath-

er? A. Yes. * * * Q. What, if anything, did he testify to there under oath with respect to her character, her loyalty to her parents and her loyal service to the parents during their lifetime?" Objection overruled. "A. He testified at length on cross examination when questioned regarding her good character and her integrity he admitted that he believed that she was honest and of good character and with respect to the work that she did for her parents, he admitted that she rendered service to them."

Therefore, in the case at bar, the evidence showing Mamie to be a creditable witness, it becomes a question of the sufficiency of the evidence of the gift *inter vivos* of the certificates to the three daughters, and not a question of the weight of the evidence, as there is no direct evidence in opposition thereto.

It might be noted in this connection that, in addition to the destruction by the testator of this note of Rudolph's of $1,989, a provision of the will reads as follows: " * * * and I hereby give, devise and bequeath to my said son Rudolph L. Vanicek, the rest and residue of my estate after the foregoing bequests and devises have been paid and satisfied in full."

We will next consider the claim that the postal savings certificates are not only nonnegotiable, but nontransferable, and therefore a gift of them would be invalid if not transferred according to the laws of the United States.

It has been held that "Gift of postal savings certificates in envelope, delivered by donor to donee, was completed when contents thereof passed to latter.

"That postal savings certificates were marked, 'non-negotiable—non-transferable,' did not affect validity of owner's transfer thereof to donee." *Estate of Diskin,* 161 Atl. 893 (105 Pa. Super. 519). See, also, to same effect, *Dietzen v. American Trust & Banking Co.,* 175 Tenn. 49, 131 S. W. 2d 69.

These decisions are in strict accord with the law itself, which says: "The final judgment, order, or decree of any court of competent jurisdiction adjudicating any right or

interest in the credit of any sums deposited by any person with a postal savings depository if the same shall not have been appealed from and the time for appeal has expired shall, * * * be accepted * * * as conclusive of the title, right, interest, or possession so adjudicated, and any payment of said sum in accordance with such order, judgment, or decree shall operate as a full and complete discharge of the United States from the claim or demand of any person or persons to the same." 39 U. S. C. A., sec. 767, p. 291. See, also, *United States v. Stewart*, 119 Fed. 2d 492.

"'It is now well settled that a valid gift of non-negotiable securities may be made by delivery of them to the donee without assignment or indorsement in writing. This principle has been applied to notes, bonds, stocks, and deposit certificates and life insurance policies. * * * While a gift needs no consideration to support it, yet the conditions surrounding the donor and donee are frequently cited to interpret the intention of the parties, and, if they are competent to give and competent to receive, and the transaction is completed by a voluntary transfer of possession, it is regarded by law as an executed contract': *Hafer v. McKelvey*, 23 Pa. Superior Ct. 202, 204; * * * It is urged that this result does not follow in the present instance, since no title could pass until the proper tax stamps had been affixed, as required by the Act of June 4, 1915 * * * . This legislation does not affect the title of the holder of the stock to whom it has been transferred, though it makes the offender against its provisions liable to criminal prosecution: * * * ." *Connell's Estate*, 282 Pa. St. 555, 128 Atl. 503.

This court, in *In re Estate of Dayton*, 121 Neb. 402, 237 N. W. 303, had before it a case involving the delivery of certain bonds from a practicing physician to one who had been his faithful assistant and nurse for some 14 years, and who brought an action to establish her ownership to ten $1,000 bonds. This action was resisted by the daughter and son. The estate was upwards of $100,000 in value.

"A witness testified that she had been acquainted with the decedent and his family for many years and that she

has also been acquainted with the plaintiff for many years. This witness testified that the decedent told her about the bonds in suit and that he had purchased and registered them in the plaintiff's name. She also testified that the doctor informed her that he purchased the bonds as a gift to plaintiff in recognition of her long and faithful service as his assistant.

"Another witness, also a long time acquaintance of the Dayton family, testified that the doctor, in the course of a conversation with her, informed her that he had remembered the plaintiff's services in a former will, but that he was not satisfied with the provision he had made therein in her behalf, and that the bonds were therefore purchased and presented to her instead. And this witness also testified that the doctor informed her that when he died he did not want any trouble over his property. She also testified that Dr. Dayton then, in view of the foregoing, obtained a promise from her that, in event trouble did arise over his estate, she would relate the circumstance of this gift to the end that the plaintiff would receive the bonds intended for her."

The decedent kept these ten bonds in his safety deposit box, and collected the interest paid on them so long as he lived. Outside of keeping possession of the bonds, he made no attempt whatever to conceal the gift of the bonds to the plaintiff, and this court held: "The delivery of certain Nebraska state fair bonds may be established by the declarations of the donor, since deceased, that such bonds were a gift to the donee."

Another case, also by our court, involving a complete gift by the father, is *Novak v. Reeson,* 110 Neb. 229, 193 N. W. 348.

The legal inference arising from the transfer of personal property from a father to a child, who claims it as a gift *inter vivos,* is that such action of the father was a natural one, and less evidence is required to establish a gift to a child than to a stranger. See *Chapple's Estate,* 332 Pa. St. 168, 2 Atl. 2d 719, 121 A. L. R. 422; *Pierce v. Boston Five*

Cents Savings Bank, 129 Mass. 425, 37 Am. Rep. 371; *In re Morse's Estate,* 170 Mich. 114, 135 N. W. 1057; *Union Trust & Savings Bank v. Tyler,* 161 Mich. 561, 126 N. W. 713; 39 Am. Jur., sec. 97, p. 742.

"One of the essential elements of a gift is the intention to make it. A clear and unmistakable intention on the part of the donor to make a gift of his property is an essential element of the gift, and this contention must be inconsistent with any other theory." *Hild v. Hild,* 135 Neb. 896, 284 N. W. 730.

In the case of *Henley v. Live Stock Nat. Bank,* 127 Neb. 857, 257 N. W. 244, this court held:

"To make a valid and effective gift *inter vivos,* there must be an intention to transfer title to the property, as well as a delivery by the donor and an acceptance by the donee.

"A gift *inter vivos* does not differ in its essential elements from a gift *causa mortis,* except that in the latter the survival of the donor may defeat the gift." See, also, *Ralston v. Marget,* 138 Neb. 358, 293 N. W. 124; *Smith v. Pacific Mutual Life Ins. Co.,* 130 Neb. 501, 265 N. W. 534; *First Nat. Bank v. Thomas,* 151 Md. 241, 134 Atl. 210, 47 A. L. R. 730.

It is a well-settled doctrine that all of the facts necessary to constitute a valid gift *inter vivos* may be inferred from subsequent declarations of the donor, which are in the nature of admissions by him against interest. Such statements are admissible in evidence as tending to show that he had given the property to the donee. See annotation, 105 A. L. R. 398; *Reid v. Colcock,* 1 Nott & McCord (S. C.) 592, 9 Am. Dec. 729; *Jones v. Ewart,* 143 Neb. 717, 10 N. W. 2d 708.

A gift *inter vivos* does not require positive proof of a witness who saw the delivery, but it may be inferred from circumstances which clearly and satisfactorily show a delivery. See 28 C. J., sec. 83, p. 678.

It is generally held that the transfer *inter vivos* should be sustained if all the facts and circumstances show the de-

sire and the act completed, whatever may have been the method adopted. (See discussion by Professor Mechem in 21 Ill. Law Review, 341.)

In the case at bar, the postal savings certificates were transferred by delivery to the daughter, Mamie Kunkle, by her father as a gift *inter vivos*. Mrs. Kunkle had legal possession of these certificates at the time of the death of her father. One of his friends of long standing said the father told him that he had given the postal savings to the girls. The United States supreme court has held that the final order of any court of competent jurisdiction will be recognized as transferring the title to such certificates even though such certificates are marked nontransferable.

The testimony of Lloyd L. Pospishil, the scrivener, is that when he was in the act of drawing his last will and inquired if he had postal savings certificates, the testator replied, "I had postal savings," indicating clearly that he had none to be mentioned in his will.

We have reached the conclusion that the judgment of the trial court is wrong, and that a judgment should be entered in accordance with this opinion.

REVERSED, WITH DIRECTIONS.

COLUMBIAN STEEL TANK COMPANY, APPELLANT, V. JOSEPH A. VOSIKA ET AL., APPELLEES.

17 N. W. 2d 488

FILED FEBRUARY 2, 1945. No. 31850.

1. **Fixtures.** Conditional sales contracts are entered into primarily for the protection of vendors of personalty, where the parties to such contracts contemplate that the property shall retain its character as personalty. They are, however, not intended to and cannot apply to such articles of personalty as are sold for the purpose of being incorporated into a building and becoming a part of realty.
2. ———. Where removal of property sold under conditional sales contract with title remaining in the vendor is sought, such vendor may exercise his right of ownership and obtain possession

thereof as against the owner of the real estate on which the property sold is located or against a prior real estate mortgage if such possession may be obtained and removal had without material injury to the premises.

3. **Trial:** APPEAL AND ERROR. The trial court is required to consider any competent and relevant facts revealed by a view of premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings.
4. **Appeal and Error.** While the law requires this court, in determining an appeal in an equity action involving questions of fact, to reach an independent conclusion without reference to the findings of the district court, this court will, in determining the weight of the evidence, where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

APPEAL from the district court for Saline county: STANLEY BARTOS, JUDGE. *Affirmed in part and reversed in part, with directions.*

Stewart, Stewart & Whitworth and *Roy W. Crimm,* for appellant.

Perry, Van Pelt & Marti, Joseph O'Gara and *John E. Mekota, contra.*

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

YEAGER, J.

This is an action by Columbian Steel Tank Company, a partnership, plaintiff and appellant, against Joseph A. Vosika, Frank H. Tavis, Trustee, and Lincoln Steel Works, a corporation, defendants and appellees. The action was to foreclose a conditional contract of sale on equipment sold to and placed in a brewery at Crete, Nebraska. Trial was had to the court at the conclusion of which a decree was rendered granting foreclosure of the contract as to a part of the equipment and denying it as to the remainder. From this decree the plaintiff has appealed. There is no cross-appeal.

The factual background of the action is substantially as follows: On August 25, 1933, the Dr. Miller Company, a corporation, was the owner of certain real estate in the city of Crete, Saline county, Nebraska, on which was located certain buildings, a portion of which had been previously used for a grain elevator and mill. The buildings were redesigned and made over into a brewery. On the said August 25, 1933, the Dr. Miller Company executed and delivered to the defendant, Frank H. Tavis, as trustee, a real estate mortgage on the real estate for $9,000. On October 5, 1933, the Dr. Miller Company, under conditional contract of sale, purchased equipment to be installed in the brewery, the agreed price of which was $10,990. After deduction of down payments there remained a balance due the plaintiff in the amount of $6,990. For this amount, in accordance with the contract, the Dr. Miller Company executed and delivered to plaintiff 12 promissory notes each for $582.50 with interest at seven per cent per annum until paid. By the terms of the contract it was agreed that title should remain in plaintiff until all payments were made, that the property should remain personal, that for failure of the Dr. Miller Company to make payment the full purchase price became due, and in that event plaintiff was empowered to take possession. This contract was filed for record November 29, 1933. A total of $5,796.96 was paid on the notes and interest. The last payment was made in August, 1939. At the time of the commencement of this action the amount remaining due and owing was $3,491.47.

In December, 1934, the Dr. Miller Company filed its petition in the United States District Court for reorganization under section 77b of the federal bankruptcy act whereupon a reorganization was effected and pursuant to the plan therein adopted certain of the payments to plaintiff were made. The details of this reorganization are not important. The reasons will become apparent later on in this opinion.

In February, 1942, the Dr. Miller Company was adjudicated to be bankrupt under the federal bankruptcy act and

in August of that year the trustee of the bankrupt sold the real estate and equipment to the defendant Vosika, subject to liens and encumbrances.

The action here is against Tavis as prior mortgagee of the real estate, Vosika as purchaser at the bankruptcy sale and Lincoln Steel Works, a corporation, mechanic's lien holder. The Lincoln Steel Works defaulted for failure to appear or answer.

The petition was for foreclosure with right to remove the property in accordance with the terms of the conditional contract of sale.

At the conclusion of the trial the court found that there was due and owing the sum of $3,735.95 and rendered a decree accordingly. It did not, however, grant foreclosure as against all of the property sold under the conditional sales contract and installed in the buildings referred to.

In their answers defendants alleged as a defense that the property against which foreclosure was sought was firmly attached to the buildings and became a part thereof and a part of the realty and that removal would irreparably damage and materially injure and weaken the buildings.

On this defense the trial court held in part in favor of plaintiff and in part in favor of defendants.

It should be pointed out here that the issue raised by this defense is the only one presented for determination on this appeal. The defendants did not cross-appeal. In fact in their brief they have asked that the decree of the district court be affirmed. The right of foreclosure of the conditional contract of sale for the balance claimed thereon was sustained, but it was decreed that by reason of the condition and character of attachment of a part of the property to the realty such part could not be removed and applied to the satisfaction of the obligation. It is only of this portion of the decree that plaintiff in truth complains.

The applicable rules of law declaring the rights of parties to secure possession of property under conditional sales contracts are the following: "Conditional sales contracts are entered into primarily for the protection of vendors of

personalty, where the parties to such contracts contemplate that the property shall retain its character as personalty. They are not intended to and cannot apply to such articles of personalty as are sold for the purpose of being incorporated into a building and becoming a part of the realty." *Geer Co. v. Wolcott,* 124 Neb. 306, 246 N. W. 456. Where the removal of property sold under a conditional sales contract with title remaining in the vendor is sought, such vendor may exercise his right of ownership and obtain possession thereof as against the owner of the real estate on which the property sold is located or against a prior real estate mortgage if such possession may be obtained and removal had without material injury to the premises. See *Frost v. Schinkel,* 121 Neb. 784, 238 N. W. 659; *Geer Co. v. Wolcott, supra; Swift Lumber & Fuel Co. v. Elwanger,* 127 Neb. 740, 256 N. W. 875. For other cases where the right of removal is dependent on the question of damage or injury to the realty, see *Arlington Mill & Elevator Co. v. Yates,* 57 Neb. 286, 77 N. W. 677; *Edwards & Bradford Lumber Co. v. Rank,* 57 Neb. 323, 77 N. W. 765; *Rothery v. Dohrse,* 122 Neb. 259, 240 N. W. 296.

By application of these rules to the evidence in this case we are called upon to determine whether or not the court erred in denying to plaintiff the right to foreclosure and possession of a portion of the property described in the conditional sales contract.

The plaintiff contends here that most of the remaining property can be removed without material injury to the realty. The defendants on the other hand contend that none of it can be so removed.

In an approach to this question a general description of the buildings and the character and qualities of certain of their components is necessary.

The first building on the premises was circular and built of hollow tile reinforced with metal rods laid between the tile, the purpose of which was to prevent spreading or separation. The building was designed for use as a grain elevator. Immediately to the east was a rectangular wooden

structure designed for use as a mill. On the east side of the wooden building was a loading platform. There was no basement under either of the buildings when erected. At or about the time of the purchase of the premises by the Dr. Miller Company the buildings were redesigned and reconstructed for use as a brewery. As part of the reconstruction, basements were excavated and walls of hollow tile built under the wooden building and at least a part of the other building. The walls were insulated and with the insulation were 19 to 20 inches in thickness. At about the same time the exterior of the wooden building was covered with stucco. The basement of the wooden building was used for the location of tanks. There were two rooms in which tanks were located. On the east side is a partition and between the two rooms is a wall 19 inches in thickness with a door in it of the width of 3 or 4 feet and a height of 6 feet. There is no other opening. In these two rooms are a number of vertical "I" beams supporting the upper floors. In the west room are 13 steel 7′ x 5½′ storage tanks. In the east room are 15 steel 8′ x 8′ storage tanks. On the first floor of the building to the east and north is a room enclosed by a wall 1 foot in thickness. In this room are two steel 7′ x 5½′ storage tanks. The opening into this room is a door 2′ 8″ wide and 6′ high. On the second floor in a room are 12 steel tanks. Six are 7′ x 7½′ and six are 7′ x 5½′. The entrance to this room is through a door 3 feet wide and 6 feet high. Extending from below the main floor to a point above is a 9′ x 7′ copper kettle. It rests on a platform supported by steel "I" beams.

The plaintiff urges on appeal that the court should have awarded possession of the articles thus described and located, in addition to those the possession of which was awarded. Doubtless all of them were installed at the time of reconstruction of the buildings and at that time they were enclosed as they now are found.

The witnesses are not agreed as to method of removal but from an examination of the record it appears that the following would be required for removal: To remove the

tanks from the east of the two rooms of the basement would require the making of an opening in the east basement wall of at least 8 feet in width, the removal of a section of the loading platform and the digging of a hole outside the basement wall. In order to remove the tanks from the west room in addition it would be necessary to widen the doorway between the rooms to at least 7 feet. In addition to this, to remove probably four of these it would be necessary to remove certain supporting steel "I" beams. To remove the tanks from the first floor would require the widening of the door of the partition to at least 7 feet and to make a hole in the outer wall of the same width. To remove the tanks from the second floor would necessitate making an opening at least 7 feet wide in the north or south second floor wall. It is not made clear how the copper kettle could be removed except by dismantling it and taking it out as scrap copper. In its brief plaintiff has indicated a willingness to do this as a condition of the award of possession to it of the kettle.

It will be observed that to remove the tanks would require that three large openings be made through outer walls of a thickness of from 19 to 20 inches, at least two would be required through inner walls or partitions and vertical building support would have to be removed in order that a few could be removed.

No witness has said that after removal the buildings could not be repaired. On the other hand no witness having experience in building construction has said that the making of these openings would not impair the strength of the buildings. On behalf of the defendants a contractor and builder of wide experience testified that repairs could be made so that the vertical strength would not be impaired but that the horizontal strength would be reduced.

On stipulation of the parties the trial judge made an inspection of the premises and from his observations and the evidence made findings which appear in the transcript. With respect to materiality of damage the following finding was made: " * * * and common knowledge would lead

anyone to know that the many openings in the walls and partitions necessary to take out the equipment, the cutting of 'I' beams, the removal of the concrete stairways, all would have a tendency to materially weaken the structure as it is. For the foregoing reasons I find that all of these items are fixtures."

While the mere item of costs of repair of a building occasioned by the removal of property in circumstances such as are presented in this case is not controlling, yet it appears proper to consider it for the bearing it has, if any, on the element of materiality of damage to buildings. The trial court did so consider it. In the finding the following appears: " * * * I cannot disregard the testimony of John Kerst, called by the defendant, who testified that it would cost $3,000 to $3,500 to make the openings necessary to take out the equipment and to close up the openings. While it is true that on cross-examination he was unable to give the costs of tearing down and rebuilding any one opening with any degree of certainty, I believe that after he saw the interior of that building, with the many passages, stairways and heating pipes, his general answer would be quite correct, taking into consideration the present value of labor and material."

The trial court is required to consider any competent and relevant facts revealed by a view of premises as evidence in the case, and a duty is imposed on this court on review of findings made by the trial court to give consideration to the fact that the trial court did view the premises; provided, that the record contains competent evidence to support the findings. In *Carter v. Parsons*, 136 Neb. 515, 286 N. W. 696, it is said: "As in the case of an inspection by a jury, any restrictions attempted to be imposed by an appellate court upon the effect which a trial court may give to such a view are purely artificial. Actually, it constitutes evidence, because the relevant and competent facts revealed thereby necessarily affect the mind of the trial judge and tend to produce belief or disbelief on an issue. Any other rule is psychological fiction. For this reason it may as well

squarely be declared that the trial judge is entitled to make such a view a factor in his determination of the case. It follows also that this fact is entitled to consideration and weight in examining the evidence on appeal, although, of course, the record itself must contain competent evidence to support the findings of the trial court."

In the light of all of the evidence, including that obtained by view of the trial judge, the district court found that the removal of the property described in the conditional sales contract, with the exceptions specified in the decree, would materially damage the building in which it is situated. The evidence on this question was in dispute, therefore in deciding this issue it is the duty of this court to give careful consideration to the finding of the trial court.

In *Johnson v. Erickson,* 110 Neb. 511, 194 N. W. 670, it was said: "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." See, also, *Gentry v. Burge,* 129 Neb. 493, 261 N. W. 854.

The evidence having been considered in the light of this rule, we conclude that the decree of the district court is correct in all respects except as to the copper kettle. In the light of the declaration of intention to dismantle and take the kettle out as scrap plaintiff should be permitted to so remove it.

In one other respect there should be a change in the decree. A provision of the decree requires that plaintiff shall give a bond "to indemnify the defendants for any unnecessary damage that may be done to the freehold in the removal of said equipment; * * * ." The word "unnecessary" should be deleted from this provision of the decree. The defendants should not be required to suffer any damage to the freehold in consequence of the removal of this property.

To the extent that the decree grants relief to the plaintiff it is affirmed. To the further extent indicated herein the cause is reversed and remanded with directions to enter decree in favor of plaintiff and to modify the requirement of the indemnity bond.

AFFIRMED IN PART AND REVERSED IN PART, WITH DIRECTIONS.

DOROTHY CUTRELL, APPELLANT, V. JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, APPELLEE.
17 N. W. 2d 465

FILED FEBRUARY 2, 1945. No. 31828.

1. **Insurance.** An accident within the meaning of contracts of insurance against accidents includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby.
2. ———. Death resulting from an accident is not effected by accidental means where insured brings the assault upon himself by his own wrongful acts, or voluntarily incurs an obvious hazard thereof under such circumstances that he would naturally be presumed to know that the injury is likely to be inflicted, or places himself in a position that may be reasonably expected to bring such an assault upon him.
3. ———. The fact that an accident policy does not contain a clause excluding liability for violation of law by the insured is not always conclusive upon the question of liability because if death results to an insured as the direct, natural and probable consequence of a violation of law criminal in its nature, in which he was intentionally engaged at the very time of his death, it is not accidental; however, it will not be presumed in any case that the law has been violated but every alleged violation must be established by competent evidence.
4. ———: EVIDENCE. In a suit on an accident insurance policy the burden of proof is ordinarily upon the plaintiff to show that death was accidental, but the law indulges in a presumption against suicide and murder, and against injuries intentionally self-inflicted or resulting from a criminal assault or unlawful acts of the deceased. By reason of such presumption the plaintiff has made a *prima facie* case of liability under the usual insuring clause in an accident policy when it has been shown that

the insured died as the result of an obvious external and violent injury unless the circumstances disclosed are such as to overcome the presumption.

5. ———. The presumption, however, is rebuttable by direct or circumstantial evidence, and when plaintiff has made a *prima facie* case defendant, to avoid a verdict for plaintiff by direction, should go forward with the evidence tending to overcome or remove the presumption, and if competent evidence is adduced by defendant which is contrary to or inconsistent with such presumption it disappears although the fact upon which it rests may still remain proper to be considered in arriving at a conclusion.

6. ———. In such a situation it is ordinarily incumbent upon plaintiff to then take the initiative and show by other evidence that death was accidental. Nevertheless if evidence or inferences which may be logically drawn from facts appear in defendant's evidence consistent with or favorable to and supporting plaintiff's theory that death was accidental the plaintiff is entitled to the benefit thereof.

7. **Trial.** Where upon a jury trial at the close of all the evidence defendant moves the court for a directed verdict in his favor, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiff and all proper inferences to be drawn therefrom; and if the evidence tends to, and if believed is sufficient to, sustain the material allegations of the petition and the petition states a cause of action, the case should be submitted to the jury for their determination.

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

Russell C. Anderson and *Clinton Brome,* for appellant.

Gray & Brumbaugh, contra.

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

CHAPPELL, J.

The plaintiff brought this action at law to recover as beneficiary upon a life insurance policy which contained a clause providing for payment of double indemnity if death of the insured resulted from bodily injury sustained solely through external, violent and accidental means. Defendant admitted liability for and paid the face of the policy, $250,

but denied liability for double indemnity. Defendant contends that the gunshot wound sustained by the insured and death resulting therefrom was not effected solely through accidental means but was brought about by, and was the direct, natural and probable result of, the insured's own voluntary, intentional, wrongful acts and violation of law.

Upon trial to the court and jury defendant's motion to direct a verdict in its favor made at the conclusion of plaintiff's evidence was overruled, but upon its renewal at the conclusion of all the evidence the motion was sustained. Thereupon the trial court discharged the jury and dismissed the case at plaintiff's costs. Motion for new trial was overruled and plaintiff appealed, contending that the trial court erred in so doing for the reason that under all the evidence adduced the issue of accidental death was a question for the jury. We find that this contention has merit.

The facts are simple and there is not much dispute about them. In making plaintiff's case the beneficiary testified that she was the wife of Clarence A. Cutrell, the insured, at the time of his death on May 28, 1942; that she last saw him alive between 7:00 and 7:30 p. m. in the evening before his death, when they were together at the home of his sister; that insured left the sister's home but witness stayed for approximately an hour thereafter; that insured then, generally speaking, was in good physical condition, but was not feeling very well because of a toothache he had been having for a few days; and that the next time witness saw him was at the undertaker's, he was dead.

A police surgeon testified for plaintiff that on May 28, 1942, at about 2 o'clock a. m. he was called to 42nd & Q streets in Omaha, Nebraska, for the purpose of examining the body of a man lying dead in the street who had possibly been run over by an automobile. The police arrived ahead of the doctor. Upon the doctor's arrival the body of the insured was found lying prone, with head toward the east, four to six feet from the curb on Q street. An examination of the body disclosed that the insured had a puncture wound three or four inches below the nipple on the left side of his

chest. There was no evidence of other external injuries. No gun or other firearm was found upon him but it was presumed to be a gunshot wound since the officers soon thereafter discovered a bullet hole in a window of a small house near by. The coroner's physician took possession of the body and a post mortem conclusively disclosed that it was a gunshot wound and that the death of insured was caused thereby.

In presenting the defense a city engineer testified that he made certain measurements and prepared a plat showing the contour and physical surroundings at 42nd & Q streets. The plat appears in the record. From it, and his testimony, we adduce that Q street runs east and west, and 42nd street enters it from the south at an angle to the southwest but does not extend north of Q street. A small house, the only building on either the south or north side of Q street between 41st and 42nd streets, stands, facing or fronting north, on the southeast corner of 42nd & Q streets. It is known as 4145 Q street. It has a small lean-to or entrance vestibule on the north side, and the only door entering the house is on the east side of this vestibule. There is a window in the house itself just east of the vestibule door and facing north from which a person can observe the door and to the north across the sidewalk, the south side of which is only six feet distant, and into Q street, the curb of which is only twelve feet distant therefrom. The sidewalk runs east and west and is four feet wide. The north side of the vestibule is only 1.3 feet from the south edge of the sidewalk from which a concrete base extends continuously up to the vestibule, the door and the window. In other words, the only door entering the house was from the front and but a step from the public sidewalk. There are two street lights on the north side of Q street, one a short distance to the east of the house, and the other farther to the west of it.

A police officer testified that at about 3 o'clock a. m., May 28, 1942, he made photographs of the small house from the northeast. These photographs appear in the record and show the window with the bullet hole in it and the vestibule,

door, sidewalk, curb, and part of Q street, with the body of the insured lying thereon to the north and east of the door.

One John Patrick Hurley testified in substance, that he owned the house at 4145 Q street, lived in it, and worked on WPA. Further, there are two rooms in the house, a bedroom and a room used as a kitchen and sitting room. On the night in question he was not feeling well and went to bed early. In the night, while he was still awake, he heard a racket and saw the shadow of a person passing an east window. He then heard somebody pounding on the door and he called in a loud voice to get out of there. He called three or four times but got no reply and the person kept pounding on the door as if with his fists. The door was loose and you could hear it plainly. He waited a minute or two and then got his revolver from under his pillow, pulled back the curtain on the window next to the door, looked out and saw a man, whom he could not recognize, pounding on the door with his fists and putting first one shoulder against it and then the other as if to break the door in. With the barrel of his revolver a foot and a half distant from the window he then fired a shot through the window to scare the person, without intending to kill him. The man at the door then left running away fast to the northwest and witness went back to bed.

The witness Hurley is positive that the man ran northwest, but it will be remembered that the body of the deceased was found lying in the street to the northeast of the door. Hurley further testified that the street lights were burning at the time and that although the house shaded the light a little right in the doorway and the window was dirty, he could see any one there in front of the house or on the sidewalk, and that the man pounding on the door was the only person seen by him. The police came an hour or so after the shooting and this witness then saw the body of a man, a stranger whom he had never personally known, lying on a stretcher.

The question presented is whether the insured brought about the assault upon himself by his own wrongful act or

voluntarily incurred an obvious hazard of the assault under such circumstances that he would naturally be presumed to know that the injury would probably be inflicted, or voluntarily placed himself in a position that would naturally and probably be expected to bring about such an assault upon him. If the insured did not bring about the assault upon himself in such manner the bodily injury received and death resulting therefrom was effected by accidental means; otherwise it was not effected by accidental means. See *Bernhard v. Prudential Ins. Co.*, 134 Neb. 402, 278 N. W. 846; Cornelius, Accidental Means (2d ed.) 50.

In *Railway Officials & Employees Accident Assn. v. Drummond*, 56 Neb. 235, 76 N. W. 562, it was held: "An accident, within the meaning of contracts of insurance against accidents, includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby." The opinion quotes with approval from *American Accident Co. v. Carson*, 99 Ky. 441, 59 Am. St. Rep. 473, in part as follows: " * * * if as to the person injured the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight or was a casualty or mishap not intended to befall him, then the occurrence was accidental, and the injury one inflicted by accidental means within the meaning of such policies." See, also, Cornelius, Accidental Means (2d ed.) 49.

Statements of the rule applicable to accident cases generally will be found in *Western Commercial Travelers' Assn. v. Smith*, 8 Cir., 85 Fed. 401, 40 L. R. A. 653. See, also, *Zurich General Accident & Liability Ins. Co. v. Flickinger*, 4 Cir., 33 Fed. 2d 853. They are summarized in 6 Cooley's Briefs on Insurance (2d ed.) sec. 2(a), p. 5234, as follows: "Accidental means are those which produce effects which are not their natural and probable consequences. The natural consequence of means used is the consequence which ordinarily follows from its use—the result which may be reasonably anticipated from its use, and which ought to be expected. The probable consequence of the use of a given

means is the consequence which is more likely to follow from its use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of such means, an effect which the actor did not intend to produce and which he cannot be charged (by reason of his own conduct) with the design of producing, is produced by accidental means. It is produced by means which was neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means * * * ."

The fact that an accident policy does not contain a clause excluding liability for violation of law by the insured (as in the case at bar), is not always conclusive upon the question of liability. The rule is that if death results to an insured as the direct, natural, and probable consequence of a violation of law criminal in its nature in which the insured was intentionally engaged at the very time of his death, it is not accidental. *DeMello v. John Hancock Mutual Life Ins. Co.*, 281 Mass. 190, 183 N. E. 255. And, in this connection, there is also an applicable rule that, "It will not be presumed in any case that the law has been violated; every alleged violation must be established by competent proof." *State ex rel. Freeman v. Scheve*, 65 Neb. 876, 93 N. W. 169.

The case at bar is not one in which defendant seeks to enforce any exception created by the insurance contract. Therefore, as was held in *Dodder v. Aetna Life Ins. Co.*, 104 Neb. 70, 175 N. W. 651, "In suit on an accident insurance policy, the burden of proof is upon the plaintiff to show that death was accidental." See, also, *Clark v. Bankers Ac-*

cident Ins. Co., 96 Neb. 381, 147 N. W. 1118; 6 Cooley's Briefs on Insurance (2d ed.) sec. 2(h), p. 5283. Be that as it may, it is fundamental that the law indulges in a presumption against suicide and murder, and against injuries intentionally self-inflicted or resulting from a criminal assault or unlawful acts of the deceased, and plaintiff has made a *prima facie* case of liability under the usual insuring clause of an accident policy when it has been shown that the insured died as the result of an obvious external and violent bodily injury such as a gunshot wound unless the circumstances disclosed are such as to overcome the presumption. Cornelius, Accidental Means (2d ed.) 73, 74; 31 C. J. S., sec. 135, p. 772; 1 C. J., sec. 278, p. 495; *Sawyer v. Mutual Benefit Health & Accident Assn.*, 121 Neb. 504, 237 N. W. 615.

If plaintiff has made such a *prima facie* case and defendants fails to introduce any evidence, the trial court should properly direct a verdict for plaintiff. The presumption, however, is rebuttable by direct or circumstantial evidence, and to avoid such a result defendant should go forward with or produce evidence tending to overcome or remove the presumption, and if competent evidence is adduced by defendant which is contrary to or inconsistent with such presumption, it disappears, although the facts upon which it rests may still remain proper to be considered in arriving at a conclusion. *Grosvenor v. Fidelity & Casualty Co.*, 102 Neb. 629, 168 N. W. 596; *Sawyer v. Mutual Benefit Health & Accident Assn., supra.* In such a situation it is ordinarily incumbent upon plaintiff to then take the initiative and show by other evidence that death was accidental. (*Bernhard v. Prudential Ins. Co., supra.*) Nevertheless, if evidence or inferences which may be logically drawn from facts appear in defendant's evidence consistent with or favorable to and supporting plaintiff's theory that death was accidental, the plaintiff is entitled to the benefit thereof. Thus is made effective and applicable the well-known rule that, where upon a jury trial at the close of all the evidence defendant moves the court for a directed verdict in

his favor, such motion must be treated as an admission of the truth of all material and relevant evidence admitted favorable to plaintiff, and all proper inferences to be drawn therefrom; and if the evidence tends to, and if believed is sufficient to, sustain the material allegations of the petition, and the petition states a cause of action, the case should be submitted to the jury for their determination. *Rhoads v. Columbia Fire Underwriters Agency*, 128 Neb. 710, 260 N. W. 174.

We are of the opinion that, under the evidence, facts and circumstances appearing herein, and applicable rules of law heretofore stated, the question of whether the death of insured was caused by accidental means was a question for the jury to determine under appropriate instructions, and that the trial court erred in sustaining defendant's motion and dismissing the plaintiff's case. Therefore, the judgment is reversed and the cause is remanded for a new trial.

REVERSED.

MAUD HERT, APPELLANT, V. JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

17 N. W. 2d 471

FILED FEBRUARY 2, 1945. No. 31829.

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

Russell C. Anderson and *Clinton Brome*, for appellant.

Gray & Brumbaugh, *contra.*

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

CHAPPELL, J.

The material facts and applicable law in this case are identical in every respect with that in *Cutrell v. John Hancock Mutual Life Ins. Co.*, No. 31828; *ante*, p. 550, 17 N. W.

2d 465, and the decision herein is governed thereby. Therefore, the judgment is reversed and the cause is remanded for a new trial.

REVERSED.

IN RE ESTATE OF DEWITT C. MARSH.
RALPH A. MESSECAR ET AL., APPELLANTS, V. BERT M. MARSH ET AL., APPELLEES.

17 N. W. 2d 471

FILED FEBRUARY 2, 1945. No. 31894.

1. **Courts.** The county court has original and exclusive jurisdiction in all matters of probate and the only jurisdiction which the district court can acquire is by appellate procedure.
2. ———. The appeal, when perfected, confers upon the district court, in the matter appealed, the same power possessed by the county court.
3. ———. After the district court becomes so possessed of the case the county court has no further jurisdiction over the issues so removed. If there is another trial of the case it must be in the district court and that court shall proceed to hear, try and determine the same and, as provided by section 30-1607, R. S. 1943, the result, not the case itself, certified back to the county court.
4. **Appeal and Error.** The general rule is that the dismissal of an appeal from an appellate court, without an examination of the case upon its merits, operates as an affirmance of the judgment appealed or attempted to be appealed from.
5. **Executors and Administrators.** A proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem*, and every one interested in such settlement is a party in the probate court whether he is named or not.
6. ———. Because of the nature of the action the parties in a proceeding to administer or probate an estate, including a contest thereof, do not themselves have the power to dismiss the proceeding. But the county court and the district court on appeal, whose duty it is to protect all parties interested in such proceeding whether before the court or not, have such power and may, in their discretion, dismiss the same.
7. **Courts.** The effect of a dismissal of an appeal by the district court is to leave the parties as they were before the appeal was

perfected and is an affirmance of the order of the lower court.

8. **Judgment.** The rule here obtains that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy.

APPEAL from the district court for Saline county. EDMUND P. NUSS, JUDGE. *Affirmed.*

John E. Mekota and *W. G. Henke,* for appellants.

Brown, Crossman, West, Barton & Fitch, Kennedy, Holland, DeLacy & Svoboda and *Lester L. Dunn, contra.*

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

WENKE, J.

On May 7, 1943, Ralph A. Messecar, Hearold J. Messecar, Lola Gericke, Fred E. Kuhn, Henry G. Kuhn, Daniel C. Kuhn, Elmer Kuhn, Wilbur Kuhn, Edna Morehouse Woldruff, Henry M. Morehouse, Walter M. Morehouse and Percy Lyon, in their own behalf and in behalf of all other persons similarly situated, as plaintiffs, filed their petition and application in the district court for Saline county in In the Matter of the Estate of DeWitt C. Marsh, Deceased, naming as defendants, Bert M. Marsh and Fred H. Bruning, as pretended and purported executors of the pretended last will and testament of DeWitt C. Marsh, deceased, A. C. Blattspieler, as special administrator of the estate of DeWitt C. Marsh, deceased, Ira C. Marsh, Bert M. Marsh, Harry Marsh, DeWitt C. Marsh, II, Retta McGee Dunning, Irene Bragg, Harold Lyon, Helen Tidman, G. H. Lyon, Beverly Lyon, Jennie C. Lyon, Frank Harmon, William Marsh, A. C. Blattspieler, Fred H. Bruning, The Massachusetts Bonding and Insurance Company, a corporation, and United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, and the unknown children of Minnie Messecar Morehouse who are not named as plaintiffs above, and unknown heirs at law of the unknown persons having

or claiming to have any interest in or claim against the estate of DeWitt C. Marsh, deceased. On April 18, 1944, they filed an amended petition and application. The purpose of this petition and application, as amended, is to have the order of dismissal entered by the district court in the appeal of William E. Lyon, contestant, declared without force and effect; that the action on appeal is still pending in the district court for Saline county; that the will of DeWitt C. Marsh, deceased, has not been allowed and admitted; and that the cause be set down for trial and an adjudication had upon the merits.

From an order sustaining the separate demurrers of the defendants, Arnold C. Blattspieler, United States Fidelity & Guaranty Company, Irene Bragg, Retta McGee Dunning, DeWitt C. Marsh, II, Harry Marsh, Ira C. Marsh, Fred H. Bruning, executor of the estate of DeWitt C. Marsh, Bert M. Marsh, executor of the estate of DeWitt C. Marsh, deceased, Fred H. Bruning, Bert M. Marsh, Massachusetts Bonding and Insurance Company and A. C. Blattspieler, as special administrator of the estate of DeWitt C. Marsh, deceased, to the petition and application of the plaintiffs, as amended, and dismissing plaintiff's action, the plaintiffs have appealed.

DeWitt C. Marsh died on April 15, 1932, a resident of Saline county. On April 19, 1932, an instrument purporting to be his last will and testament was filed with the county court of Saline county together with a petition asking that it be admitted and allowed as such. Hearing thereon was set for May 19, 1932. On that date William E. Lyon filed his objections to its allowance. After hearing thereon, on May 19 and 20, 1932, the county court, on May 20, 1932, found the instrument to be the last will and testament of the deceased and admitted and allowed it to probate. William E. Lyon, the contestant, perfected an appeal from this order to the district court.

After the appeal was lodged in the district court the contestant, on August 3, 1932, filed his motion in that court asking it to dismiss his appeal. On August 8, 1932, the

court sustained the motion and entered its order in part as follows: " * * * that the appeal of the said William E Lyon, contestant, pending herein be and the same is hereby dismissed, * * * . It is further ordered that a certified copy of this order be filed with the County Court of Saline County, Nebraska."

The first question presented is, did the district court have the power to dismiss the appeal, and if it did, what effect did such appeal and dismissal have upon the order appealed from?

The county court is by section 16, art. V of the Constitution of Nebraska, given "original jurisdiction in all matters of probate" and by section 24-503, R. S. 1943, it has "exclusive jurisdiction of the probate of wills." Section 30-1601, R. S. 1943, provides that, "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment or decree of the county court to the district court * * * ." " * * * the only jurisdiction which the district court could acquire would be by appellate proceedings." *Smith v. Estate of Bayer,* 95 Neb. 488, 145 N. W. 1030. Sections 30-1606, 24-544 and 27-1305, R. S. 1943, provide that when the appeal has been perfected the district court shall be possessed of the action and shall proceed to hear, try and determine the same as though the action had been originally instituted in that court. "The appeal conferred upon the district court the same power possessed in the matter by the county court, * * * ." *In re Miller,* 32 Neb. 480, 49 N. W. 427. "When this order was appealed from and the transcript filed, the district court acquired jurisdiction of the whole matter and power to deal with it as though the application had been filed in that court originally." *Ribble v. Furmin,* 69 Neb. 38, 94 N. W. 967.

After the district court becomes so possessed of the case the county court has no further jurisdiction over the issues so removed. If there is another trial of the case it must be in the district court and that court shall proceed to hear, try and determine the same and, as provided by section 30-1607, R. S. 1943, the result, not the case itself, certified back

to the county court. As stated in *Williams v. Miles*, 73 Neb. 193, 102 N. W. 482: "This removes the issues to the district court for final determination. The district court must 'hear, try, and determine the same.' The evidence is taken and the cause tried without regard to the evidence in the lower court. The result, not the case itself, is certified back to the county court. After the district court becomes so possessed of the case, the county court will never have any further jurisdiction over the issues so removed. If there is another trial of the case it must be in the district court."

The general rule as to the effect of the appeal on the judgment of the lower court is: "'As to the force and effect of a judgment pending proceedings for review, aside from controlling influence of positive statute, this distinction is to be observed; where the proceeding is one in which the cause is retried as upon original process, the judgment is vacated, but if the proceeding is in the nature of an ancient writ of error, merely requiring a review of errors and an affirmance of the judgment, or a reversal and remanding for further trial, the judgment of the lower court is not vacated, but merely suspended. Hence, if a statutory remedy by appeal provides for a complete trial *de novo* in the appellate court, or it expressly so provided, the perfection of the proceeding usually operates to vacate the judgment of the court below.' 4 C. J. S. sec. 611." *Chilen v. Commercial Casualty Ins. Co.*, 135 Neb. 619, 283 N. W. 366. "The appeal vacates the judgment of the county court, the case is tried in the district court *de novo*, and if no proof is offered by the proponent, she must fail." *Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. 650. "On appeal to a court not of last resort, the appellate court proceeds as if it had original jurisdiction of the matter brought before it by appeal, which vacates and annuls, for the purposes of such trial, the judgment of the court below." 3 Woerner, The American Law of Administration (3d ed.) sec. 550, p. 1874.

On appeal in civil actions from a justice of the peace court, which is the statutory procedure made applicable to probate matters, after the appeal is lodged in the district

court not only the court but the proper parties have the power to dismiss the appeal or the action. That the party may dismiss or cause his action to be dismissed, see *Thornhill v. Hargreaves*, 76 Neb. 582, 107 N. W. 847; *Home Fire Ins. Co. v. Deets*, 54 Neb. 620, 74 N. W. 1088. As stated in *Eden Musee Co. v. Yohe*, 37 Neb. 452, 55 N. W. 866: " * * * an appellant has a perfect right, in an ordinary action, to dismiss his appeal at any time before the cause is submitted to the court or jury, even though his adversary does not consent thereto." See, also, *United States Nat. Bank v. Loup River Public Power District*, 139 Neb. 645, 298 N. W. 529.

"The general rule is that the dismissal of an appeal from an appellate court without an examination of the case upon its merits operates as an affirmance of the judgment appealed or attempted to be appealed from." *Dunterman v. Storey*, 40 Neb. 447, 58 N. W. 949. See, also, *Power v. Federal Land Bank*, 141 Neb. 139, 2 N. W. 2d 924; *State ex rel. Campbell v. Slavik*, 144 Neb. 633, 14 N. W. 2d 186. "Had the appeal been dismissed, the rights of the appellee would not have been in the least prejudiced thereby, inasmuch as such a dismissal would have left the case precisely the same as though no appeal had been taken." *Eden Musee Co. v. Yohe, supra.* "The rule is upheld in a number of cases that the dismissal of an appeal by the appellate court operates as an affirmance of the judgment of the trial court, * * * and that it is equivalent to an affirmance of the case on its merits." 4 C. J. S., sec. 1385, p. 2006. "On the dismissal of an appeal * * * the cause stands in the trial court as if no appeal had ever been taken * * * ; the decree or order appealed from becomes final, and the effect of such dismissal is to leave the parties where they were before the appellate proceeding was instituted." 4 C. J. S., sec. 1386, p. 2007.

Therefore, the power of the district court being the same as that of the county court in matters of probate appealed therefrom, it has the power to dismiss not only the appeal but the action itself unless there is something in the nature of the action which would prevent it.

" 'A proceeding in the probate court to settle the estate of a decedent is a proceeding *in rem,* and every one interested in such settlement is a party in the probate court whether he is named or not.' *In re Estate of Sweeney,* 94 Neb. 834, 144 N. W. 902." *Nilson v. Tekamah Investment Co.,* 133 Neb. 180, 274 N. W. 465. See, also, *In re Estate of Creighton,* 91 Neb. 654, 136 N. W. 1001. In the case of *In re Estate of Glover,* 104 Neb. 151, 175 N. W. 1017, we held that, "The filing of a petition in the county court for the appointment of an administrator of the estate of a deceased person is not an 'action' as contemplated in section 7654, Rev. St. 1913 (now section 25-601, R. S. 1943)", and that the petitioner by filing a dismissal of his petition, no action being taken thereon by the court, could not deprive the court of its jurisdiction thereof and its power to continue with the administration. The same would be true of a petition filed for the purpose of probating a will and any contest thereof. When a petition is filed to administer or probate an estate the proceeding becomes one *in rem* to which every one interested is a party. To permit any one or more of these parties to dismiss the action or an appeal therefrom, might prevent the court from performing its duty of safeguarding the interests of all parties whether before the court in person or not. As stated in *In re Estate of Jurgensmeier, ante,* p. 459, 17 N. W. 2d 155: " * * * it is the duty of the court to protect the interests of all parties, whether actually before the court or not. *Sorensen v. Sorensen,* 68 Neb. 490, 98 N. W. 837." However, this does not prevent the court from exercising complete power over the actions of which it is given jurisdiction. The county court has original and exclusive jurisdiction in probate matters, which is conferred upon the district court in those matters appealed to it. Within this jurisdiction it has power over all proceedings before it, including the right to dismiss. In exercising this power it is the duty of the court to protect all parties to the proceeding, whether before the court in person or not, and any failure to do so is subject to review. It is not, however, subject to collateral attack as

it is within the powers of the court. The effect of such dismissal of an appeal by the district court is to leave the parties as they were before the appeal was perfected and is an affirmance of the order of the lower court.

In this regard we have considered sections 30-1608 and 30-1609, R. S. 1943, which deal with appeals from the allowance and disallowance of claims and dismissal thereof under certain circumstances, but we find nothing therein that limits the powers of the court in actions of this character.

We recognize that some jurisdictions, including Missouri and North Carolina, hold that an action of this character cannot be dismissed either by the parties or the court without an adjudication upon the will. Whereas, in other jurisdictions, including California, Illinois, Indiana and Kansas, the action is considered the same as a civil action *inter partes* and can be dismissed by either the court or the parties.

As stated in 68 C. J., sec. 834, p. 1040: "In still other jurisdictions the proponent of a will cannot, as a matter of right, withdraw the will from probate or dismiss the proceedings against the objection of an interested party, it resting in the discretion of the court whether or not plaintiff shall be permitted to discontinue it; * * * ." As stated in *French v. Brooke*, 241 Mass. 315, 135 N. E. 168: " * * * according to the weight of authority that court may allow the withdrawal of the petition for the probate of a will or dismiss the proceedings." See, also, *In re Lasak's Will*, 131 N. Y. 624, 30 N. E. 112.

Because of the nature of the action the parties in proceedings to administer or probate estates, including a contest thereof, do not themselves have the power to dismiss the proceedings but the county court, which has original and exclusive jurisdiction in such matters, and the district court on appeal, whose duty it is to protect all parties interested in such proceedings whether before the court or not, have such power and may, in their discretion, dismiss the same. Such dismissal, being within their power, is not

subject to collateral attack because "'A judicial order or judgment cannot be attacked in a collateral proceeding unless affected by some jurisdictional infirmity.' *Dryden v. Parrotte,* 61 Neb. 339." *In re Estate of Nelson,* 81 Neb. 363, 115 N. W. 1087. The effect thereof, in cases where an appeal is dismissed, is to leave the parties in the same position as before the appeal was taken, in effect an affirmance of the order or judgment of the court appealed from.

Plaintiffs further allege that the defendants, Bert M. Marsh, Ira C. Marsh, Harry Marsh, DeWitt C. Marsh, II, and Retta McGee Dunning, who are the residuary legatees, entered into a plan and conspiracy, knowing DeWitt C. Marsh, the deceased, to be mentally incompetent, whereby they agreed and undertook to make and, through Bert M. Marsh, one of the conspirators who stood in a close and confidential relation to deceased, had the deceased execute a will leaving them the residuum of the estate of the deceased which, in fact, was not the last will and testament of the deceased but the will of the coconspirators and thereby defrauded the others heirs of the deceased out of their interests in the estate. All of these matters could have been raised directly in the proceeding in the county court of Saline county instituted on April 19, 1932, for the allowance and admission of the will as objections thereto or subsequently by statutory proceedings within the time fixed by statute. But the time within which such proceedings could be brought has long passed as more than ten years have lapsed between the dismissal of the appeal on August 8, 1932, and the filing of plaintiffs' petition and application. The rule as announced by this court in *Brandeen v. Beale,* 117 Neb. 291, 220 N. W. 298, is applicable: "'The rule obtains in this and some other jurisdictions that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy. *Van Antwerp v. Lathrop,* 70 Neb. 747; *State v. Lincoln Medical College,* 86

Neb. 269; *Bankers Life Ins. Co. v. Robbins*, 53 Neb. 44; *Proctor v. Pettitt*, 25 Neb. 96; 23 Cyc. 981; *Wirth v. Weigand*, 85 Neb. 115; *National Surety Co. v. State Bank*, 56 C. C. A. 657; *Thompson v. Laughlin*, 91 Cal. 313.' " See *Krause v. Long*, 109 Neb. 846, 192 N. W. 729.

For the reasons herein stated the judgment of the lower court is affirmed.

AFFIRMED.

CLIFTON FOCHT, APPELLANT, V. JOHN WAKEFIELD ET AL., APPELLEES.

17 N. W. 2d 627

FILED FEBRUARY 9, 1945. No. 31853.

1. **Husband and Wife.** Whether or not a husband and wife may contract with each other under modern statutes depends upon the nature of the statute in force in the jurisdiction whose law governs the occasion and the construction that the courts of such jurisdiction put upon the statute applicable.
2. **Descent and Distribution:** HUSBAND AND WIFE. By the provisions of section 30-101, R. S. 1943, providing for the descent of real property where a husband or wife survive; and of section 30-105, R. S. 1943, providing methods whereby the right of inheritance of real property may be barred; and of section 30-106, R. S. 1943, providing that the right to inherit real property may be barred by a contract "before marriage"; and of section 30-107, giving the surviving husband or wife the right to elect to take by will or by descent under the statute; the legislature has safeguarded the rights of inheritance of married persons and provided the method or methods by which such rights may be barred.
3. ———: ———. By the above provisions and also section 42-202, R. S. 1943, the legislature has placed a married man and woman on a parity with reference to the subject matter of the acts.
4. **Husband and Wife.** Postnuptial contracts entered into between husband and wife while residents of this state in which they settle their property rights, including their respective rights of inheritance in the property of the other, are not authorized by express statute and are invalid and unenforceable.
5. ———. Where the parties to a marriage contract find it impossible to dwell together in harmony and unity because of misconduct of one of the parties justifying a legal separation, and en-

ter into a contract, which provides for immediate separation and for the settlement of all the property rights of the parties, in which each relinquishes all rights in and to inherit the property of the other, and the contract is fair and equitable and has been observed by both parties until the death of one of them, the survivor is estopped to assert the invalidity of the contract.

6. ———. The above rule requires that there exist at the time of the postnuptial agreement those conditions upon which one of the parties could successfully institute a divorce proceeding and secure a separation decree with the resultant allocation of property rights by the court.
7. **Estoppel.** An heir stands in privity with an ancestor, and an estoppel enforceable against the ancestor is likewise enforceable against the heir.
8. **Descent and Distribution.** Where a husband or wife conveys real property direct to the other, the right of inheritance attaches in the grantor concurrently with the vesting of title in the grantee.

APPEAL from the district court for Dundy county: CHARLES E. ELDRED, JUDGE. *Reversed, with directions.*

Don Postlethwaite and *Victor Westermark*, for appellant.

Daniel E. Owens, contra.

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

SIMMONS, C. J.

In this action, plaintiff seeks a decree that he is the owner of an undivided one-fourth interest in certain described real estate, and for a partition of the same. The appeal involves the force and effect of a postnuptial property settlement. The trial court decreed that plaintiff was not the owner of any interest in the property and dismissed his petition. Plaintiff appeals. We reverse the judgment of the trial court and remand the cause.

The facts of the case are not in dispute. Plaintiff is the residuary devisee under the will of Alonzo J. Henderson. The defendants, John Wakefield and Annie Thompson, are the children of Mary J. Henderson. The other defendants are the husband of Annie Thompson and the tenants in possession of the real estate, and are not involved in this appeal.

Alonzo J. Henderson and Mary J. Henderson were married June 25, 1936. Mary J. Henderson had been married previously. The defendants here are the children of the former marriage. At the time of the marriage, Mrs. Henderson was, with one exception, the owner of the several parcels of real estate involved in this action. Mr. Henderson contributed nothing to the acquisition of the property. The parties lived together until about July 1, 1937, when they separated. While living apart they, on August 11, 1938, entered into a property settlement agreement, and concurrently therewith gave each other quitclaim deeds to the property which each held in fee. Mrs. Henderson at that time paid Mr. Henderson $600, which he used to acquire an undivided one-half interest in the property which he then occupied as a home. This payment was made by bank check and was endorsed "full settlement of Property rights." The agreement recited that each of the parties was a resident of Nebraska and was entered into in this state.

Thereafter about January 1, 1940, the parties resumed the marriage relation and lived together until about November 1, 1940, when they again separated and lived apart until Mrs. Henderson's death. Causes for the two separations are not shown.

On January 6, 1941, Mrs. Henderson conveyed a part of her real estate to one Stute. Mr. Henderson joined in the conveyance, saying to the notary at the time: "I and Mrs. Mary Henderson has had writings. She has got her stuff and I have got mine, and I don't want anything to do with hers."

On January 6, 1941, while living apart from her husband, Mrs. Henderson purchased one parcel of real estate involved in this action.

Mrs. Henderson died intestate, a resident of this state, on August 1, 1943. Mr. Henderson died testate, a resident of this state, on August 19, 1943. The estate of each is being probated. Debts of the estates and costs of administration are not involved here.

The property settlement agreement recited that the par-

ties had decided "to live seperately and apart and to discontinue to maintain a home as husband and wife"; that the parties were possessed of real and personal property "in their own right" and desired to "preserve said property and save needless waste there of in litigation". The settlement recited that in consideration of $600 paid by Mrs. Henderson to her husband and the execution to him by her of a quitclaim deed to described real estate, Mr. Henderson "relinquishes all interest he now has or may at any time acquire to any property" of Mrs. Henderson; and that Mr. Henderson "agrees to and hereby does" execute a quitclaim deed to Mrs. Henderson of described real estate. It further was agreed that "this settlement is a full, final and complete settlement of all claims and demands that either of the parties hereto may have against each other or any property either real or personal now owned by either of the parties hereto or which may be hereafter acquired by either of said parties; that all of the property now owned" by Mrs. Henderson "or which she may hereafter acquire, both real and personal, shall be clear and free from any claim of the party of the second part whatsoever, and any property either real or personal now owned" by Mr. Henderson "or that may be hereafter acquired by him, either real or personal, shall be free of any claim or demand of any nature whatsoever of" Mrs. Henderson.

The settlement further provided that in case an action for divorce was instituted by either of the parties, the cost shall be paid by the party instituting the proceedings and that if either party employed an attorney "in said divorce proceeding" he was to pay his own attorney and, in case a divorce action was instituted by one of the parties, the other party "agrees not to in any manner contest said proceeding." It further was agreed that if either party desired to sell any of his or her property "before decree of divorce is granted", the other party would join in the conveyance "without any consideration." The agreement was acknowledged before a notary and promptly filed for record.

Neither party obtained a divorce, nor is it shown that a divorce action was instituted.

The quitclaim deed in the usual form from Mr. Henderson to his wife, of the same date as the agreement, recited a consideration of $600 "and full and complete settlement of property rights" and described the real estate then owned by Mrs. Henderson. It was acknowledged before a notary and promptly filed for record.

Plaintiff contends that the property settlement agreement was entered into for the sole purpose of giving each party exclusive control of the property then owned by each; that neither party relinquished his right of inheritance in the property of the other; that by resuming marital relations, the parties abrogated the agreement; and further that the agreement was one to facilitate divorce and was accordingly against public policy and void; and that a one-fourth interest in this property descended to Mr. Henderson as surviving spouse and that plaintiff, as residuary devisee, is now the owner thereof. He prays for a decree confirming that right and for partition. Defendants contend that because of said agreement and quitclaim deed, Mr. Henderson was not one of the heirs and accordingly plaintiff has no interest in the real estate, and pray for a decree confirming their ownership as sole heirs at law of Mrs. Henderson. Both parties pray for equitable relief.

The trial court found for the defendants, entered a decree confirming their ownership and denying the prayer of plaintiff.

We go first to the principal question presented here, which is: Do a husband and wife have the legal capacity to contract with each other, whereby one or both surrender his or their rights of inheritance in the property of the other? In *Jorgensen v. Crandell,* 134 Neb. 33, 277 N. W. 785, it was held: "Whether or not a husband and wife may contract with each other under modern statutes depends upon the nature of the statute in force in the jurisdiction whose law governs the occasion and the construction that the courts of such jurisdiction put upon the statute applicable."

Subsequent to the entering of the decree in the district court, we decided the case of *Smith v. Johnson,* 144 Neb.

769, 14 N. W. 2d 424. It there was held that "Postnuptial contracts entered into between husband and wife while residents of this state in which they settle their property rights, including their respective rights of inheritance in the property of the other, are not authorized by express statute and are invalid and unenforceable." That decision rests upon the proposition that rights of inheritance in Nebraska are controlled by statute; that the legislature has prescribed the methods whereby rights of inheritance may be barred; and that barring by postnuptial contract is not one of the methods provided.

Section 30-101, R. S. 1943, is the statute of descent applicable here. It provides, so far as relevant here, that real property (1) which has not been lawfully conveyed, or (2) which has not been sold under execution or judicial sale, or (3) which has not been lawfully devised, shall descend, where the survivor is not the parent of all the children of the deceased and there are one or more children of deceased living, in a one-fourth part to the surviving husband or wife. Under this statute, the plaintiff claims that a one-fourth part of the real estate descended to Mr. Henderson, and by will was devised and passed to plaintiff. Section 30-105, R. S. 1943, provides that the right of inheritance of the husband or wife may be barred (1) by conveyance, and (2) by sale under execution or other judicial sale. Section 30-107, R. S. 1943, provides that where the deceased husband or wife by will devises real estate to the survivor or makes other provisions for the survivor, the survivor may elect to take the land devised or provision made, or take under the provisions of the statute for descent and distribution. It thus will be seen that the legislature has carefully protected the right of inheritance in real property, unless it be surrendered or lost in one or more of the manners specified.

The legislature also has provided that "A man or woman may also bar his or her right to inherit part or all of the lands of his or her husband or wife by a contract made in lieu thereof before marriage." R. S. 1943, sec. 30-106.

This latter provision clearly excludes the barring of the right of inheritance by a postnuptial contract. The legislature having carefully safeguarded the right of inheritance, and provided the method or methods by which it may be barred, must necessarily be held to have intended that the right cannot be barred otherwise. Accordingly, as was held in *Smith v. Johnson, supra,* the postnuptial contract here relied upon by defendants is invalid and unenforceable.

It is to be noted further that the provisions of sections 30-101, 30-105, 30-106, and 30-107, R. S. 1943, hereinbefore discussed, apply alike to husband and wife. The legislature also has provided that "A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property." R. S. 1943, sec. 42-202. By these several acts the legislature has placed a married man and woman on a parity with reference to the subject matter of the acts.

It is argued, however, that Mr. Henderson conveyed his interest in his wife's property to her by quitclaim and therefore he barred his right of inheritance. It is not shown that he had any interest in his wife's property at that time, other than the right of inheritance. But, assuming that he had an interest that could be conveyed to his wife, of necescity when that title passed from him to her, his right of inheritance attached thereto concurrently with the vesting of title in her. Accordingly, it must be held that the right of inheritance was not barred by the quitclaim deed which was executed and delivered at the time of the contract.

But defendants, arguing that the contract may be enforced, rely upon the decision in *In re Estate of Lauderback,* 106 Neb. 461, 184 N. W. 128. The decision there is that where the parties to a marriage contract find it impossible to dwell together in harmony and unity because of misconduct of one of the parties justifying a legal separation, a contract, which provides for immediate separation

and for the settlement of all the property rights of the parties, in which each relinquishes all rights in and to inherit the property of the other, will be enforced with respect to property rights if the contract is fair and equitable and has been observed by both parties until the death of one of them. The parties in the *Lauderback* case did not present the question that was determined in *Smith v. Johnson, supra,* and followed here, upon which it is held that the contract, here involved, is invalid and unenforceable.

In *Erb v. McMaster,* 88 Neb. 817, 130 N. W. 576, we determined a case where before marriage an oral agreement was made with reference to the interest of each of the parties in the property of the other. It was reduced to writing immediately after the marriage. After the death of the wife, the husband asserted that the contract was void under the statute of frauds. We there held: "Even if the contract were wholly invalid, which we do not decide, under these circumstances the plaintiff is estopped to allege its invalidity."

In *Sovereign Camp, W. O. W. v. Billings,* 107 Neb. 218, 185 N. W. 426, it is suggested, but not determined, that property rights springing by operation of law from the marriage relation may be barred by estoppel.

In *In re Estate of Holmberg,* 108 Neb. 382, 187 N. W. 903, the husband obtained a decree of divorce, in which alimony was awarded the wife. Before the decree became final, the wife through the medium of a quitclaim deed released the husband of all claims, rights and interests in his property arising out of the marriage relation. There, a divorce having been granted, misconduct justifying legal separation was shown. It also was shown that the parties had not lived together before the divorce, nor at any time afterward. The husband died before the decree became final, and it was held that the divorce decree never became effective. *Holmberg v. Holmberg,* 106 Neb. 717, 184 N. W. 134. Thereafter the widow asked for an allowance during the settlement of the estate. It was held that the widow was estopped by the agreement, and support money was denied.

The *Lauderback* case was relied upon as an authority for the decision.

In the *Erb* case we held the husband estopped to assert the invalidity of an antenuptial contract. In the *Holmberg* case we held the wife estopped to assert the invalidity of a postnuptial contract that met the conditions as to cause, separation and surrender of property rights laid down in the *Lauderback* case, there being no showing as to the wife's separate estate and she having released all rights to the husband's property. The rule applicable to the wife must, under our statutes cited herein, apply also to the husband.

Accordingly, it follows that, where the heirs of the deceased wife bring the contract, as to cause, terms and performance, within the holding of the *Lauderback* case, estoppel prevents the surviving husband from asserting the invalidity of the postnuptial contract.

It is the rule that "An heir stands in privity with an ancestor, and an estoppel enforceable against the ancestor is likewise enforceable against the heir." *Jorgensen v. Crandell, supra.*

Accordingly, the question is: Have the defendants brought their case within the requirements of the rule announced in the *Lauderback* case? Obviously they have not, for they have neither pleaded nor proved that there was misconduct of one of the parties justifying a legal separation. But defendants answer this with the contention that a valid reason for a separation will be presumed from the failure of the adverse party to allege the nonexistence of such a valid reason. We see no merit to this contention. To so hold would be to materially modify and relax the rule. Defendants plead the contract and rely upon it to bar the claim of the plaintiff. It was incumbent upon them to plead and prove the facts that made their defense good. But we do not rest the decision on this question upon that ground alone. It was advanced in the *Lauderback* case that such a showing was essential to contracts of this nature. That contention was controverted. We there held that such a showing was essential. The rule in the *Lauderback* case re-

quires that there exist at the time of the postnuptial agreement those conditions upon which one of the parties could successfully institute a divorce proceeding and secure a separation decree, with the resultant allocation of property rights by the court. The standards there required should not be lowered. Consistent with this holding we, in *Smith v. Johnson, supra,* denied a plea of estoppel where there was neither a separation nor misconduct of either party justifying a legal separation. The plea of estoppel must be denied here.

In this view of the case, it becomes unnecessary to consider the contention of the plaintiff that the contract does not renounce rights of inheritance; that it was abrogated by a resumption of the marriage relation; or that it was void because entered into to facilitate a divorce.

The judgment of the district court is reversed and the cause remanded with directions to enter a judgment that the plaintiff is the owner of an undivided one-fourth interest in the property involved, confirming his title thereto, and granting him appropriate relief based upon that finding.

REVERSED.

CHAPPELL, J., dissents.

PAINE, J., dissenting.

Because of a firm conviction that the majority opinion in this case is unjust and inequitable to the heirs of Mary J. Henderson, in taking from them a one-fourth interest in the real estate of which their mother had died seized, and for which she had paid her husband $600 cash for a quitclaim deed releasing all his interests therein, I respectfully dissent, and will review the record to set out some of the important facts in greater detail.

This was an appeal by plaintiff from a decree dismissing his petition for the partition of certain real estate and confirming the title thereof in the defendants.

The petition alleged the death of Mary J. Henderson, intestate, and described the property that she owned, and said that her heirs were her husband and a son and daugh-

ter; that the plaintiff was the sole legatee of all the interest in said real estate belonging to the deceased husband, to wit, an undivided one-fourth interest therein, and prayed for partition of said real estate.

The defendants in their answer admit the death of their mother, Mary J. Henderson, intestate, on August 1, 1943, and admit the death of her husband 19 days thereafter. The defendants then allege that the parties entered into a property settlement, in which each relinquished all interest in the property of the other, and executed quitclaim deeds in accordance therewith, and attach to the answer copies of said settlement and deeds, and by reason thereof the husband relinquished all interest in his wife's property, and was not one of her heirs.

The reply admits the property settlement and the delivery of the deeds, but contends that nothing in said agreement released or relinquished the right of inheritance to the property of the other. It is also alleged that, after executing said agreement, the parties became reconciled, resumed marital relations, and lived together for some time, and disregarded said agreement, when they again separated.

The decree of the district court found that plaintiff was not the owner of, nor entitled to any interest in, the real estate involved, and the prayer of the petition was denied, costs taxed to plaintiff, and title to the real estate confirmed in the defendants.

The assignment of errors sets out that the judgment of the court is contrary to the evidence and the law.

Alonzo J. Henderson and Mary J. Henderson were married June 25, 1936, at Goodland, Kansas, he being 76 years old, and she a little younger. Mary J. Henderson had at that time two adult children by a former marriage, John Wakefield and Annie Thompson, who are defendants in this case. Alonzo J. Henderson had an adult daughter by his former marriage, Frances Henderson, and also a nephew, Clifton Focht, who is the plaintiff herein.

At the time of their marriage Mrs. Henderson owned con-

siderable real estate in Dundy county, some of which she had acquired from her first husband, and the balance from her sister's estate, while Mr. Henderson owned a half interest in a house and small tract of land south of the depot in Benkelman.

The parties lived together for a year and five days after their marriage, and separated July 1, 1937. On August 11, 1938, after they had been separated over a year, they met at the office of Leona I. Latham, an attorney, and entered into a property settlement and separation agreement. The first provision of this agreement was that, in consideration of $600 cash paid by Mary J. Henderson to Alonzo J. Henderson, he agreed to give a quitclaim deed to her of all his interest in all of her real estate, and she relinquished and quitclaimed to him all of her interest in his half-interest in his home place. The check, exhibit No. 4, which she gave for the $600, stated it was "For full settlement of Property rights," and he gave this $600 check to Jesse Mowry to buy the other half-interest in his home place.

The parties lived separate and apart until January 1, 1940, when they were reconciled, and these elderly people lived together about nine months, but nothing was done about the separation agreement, nor did he repay to her the $600, and when they finally separated the second time, October 1, 1940, no new agreement of any kind was made, and there was never any attempt made by either of them to secure a divorce. They lived separate and apart two years and ten months before her death.

Their property settlement agreement provided in the last clause, "in case either party hereto desires to sell any of his or her property before decree of divorce is granted the other party agrees to join in deed of conveyance without any consideration", and in strict accordance therewith Alonzo J. Henderson, after they had separated the last time, went into the State Bank of Benkelman on January 6, 1941, and joined in a deed which his wife had executed and left there the week before, conveying 1,120 acres of her land for $3,600. The cashier, who was the notary, testified that at that

time Mr. Henderson said to him: " 'Yes,' * * * 'I'll sign it.' * * * 'I and Mrs. Mary Henderson has had writings. She has got her stuff and I have got mine, and I don't want anything to do with hers.' " In the same way, he executed another deed for her when she sold 160 acres to Albert Hansen, all in strict accordance with their property settlement.

Mary J. Henderson died on August 1, 1943, intestate and owning all the tracts of real estate set out in the petition, none of which land was acquired by their joint efforts.

Alonzo J. Henderson died August 19, 1943, testate, and in his last will, made October 25, 1941, he gave his daughter one dollar and all the remainder of his property to his nephew, Clifton Focht, the plaintiff herein, and in this will he did not mention his wife, which is proof that he considered their separation agreement still binding upon him.

Two years and five months after their final separation, in March, 1943, he had a talk about their property with his brother John, who testified: "Well, all that I know about it that he told me was that he had received six hundred dollars in settlement in a contract; that they were done with each other's business; and that they wasn't to bother each other. As far as I know that's all he told me."

The instrument, exhibit No. 2, was entitled "Property Settlement," and recites that the wife is paying to the husband the sum of $600, in consideration of which he will give her a "Quitclaim Deed to the following described real estate," which money was paid and the deed made and delivered by the husband at the time, and as a part of the property settlement, and in this deed the grantor states that neither he nor any person in his behalf "shall or will hereafter claim or demand any right or title to the premises or any part thereof, but they and every one of them shall by these presents be excluded and forever barred." Such deed, together with the property settlement, was duly recorded in the office of the county clerk before 9 o'clock the next morning.

The fact that these parties went back to living together for a few months, some months after the property settle-

ment was entered into, would not set aside this property settlement, for there is no evidence that either of these parties intended that to be the effect of their living together, but each by their actions indicated that each was still firmly bound thereby.

There has never been any statutory inhibition against the transfer by a deed, from one spouse to another, of all the interest of the grantor in the property conveyed, and where it rests upon a good and valid consideration it should be enforced, and recently the legislature has stamped approval upon deeds from husband to wife by section 76-119, R. S. 1943.

"A postnuptial agreement between husband and wife as to, or settlement and adjustment of, property rights and interests, whereby one spouse settles or agrees to settle certain property on the other, agrees to release his or her rights and interests, as surviving spouse or otherwise, in the estate of the other, * * * or whereby they agree to divide property between them, although void and of no effect at common law is valid and enforceable in equity, * * * ." 26 Am. Jur., sec. 318, p. 914.

"The acts of a party to a separation agreement in accepting and retaining benefits thereunder after acquiring knowledge of facts constituting a ground for annulling it precludes him or her from attacking its validity or having it set aside or recovering property disposed of under it, it being held that the principles of both estoppel and ratification are applicable." 42 C. J. S., sec. 604, p. 191.

The majority view in many jurisdictions is, since the passage of statutes enlarging the rights and powers of married women, a postnuptial release by a husband to his wife of an interest in her property on her death is held to be valid, if it is fair and equitable, and supported by an adequate consideration. See Annotation, 49 A. L. R. 116, which cites cases from the courts of more than half of the states of the Union in support of this rule.

"It is now well-settled law, with the exception of New Hampshire, and possibly North Carolina, in both the Unit-

ed States and England, that agreements for separation are valid and enforceable so far as property rights therein contracted for are concerned. The early English cases were *contra,* but these have long since been overruled." Annotation, 12 L. R. A., N. S. 848.

"Husband and wife had right, without violating any principle of public policy, to enter into separation agreement, which was free of fraud and duress, for equitable disposition of their property one to the other." *Estate of Wise,* 64 Pac. 2d 594 (99 Colo. 562). See, also, *Briggs v. Chamberlin,* 47 Colo. 382, 107 Pac. 1082, 135 Am. St. Rep. 223.

"It must be borne in mind, however, that the general rules above given apply in the main to simple separation agreements containing executory provisions. There is an essential difference between such an agreement and a separation settlement providing for a division of property. The former may be abrogated by a subsequent reconciliation and cohabitation; the latter is not." Lindey, Separation Agreements, 75.

In *Daniels v. Benedict,* 8th Cir., 97 Fed. 367, Circuit Judge Sanborn held: "Subsequent cohabitation does not abrogate an agreement of separation between husband and wife, unless such is the intention. Where an agreement expressly provided that it should remain in force although the parties should again come together and live as husband and wife, occasional visits and cohabitation cannot be considered as establishing such an intention."

It is argued that the general rule is that, when the parties become reconciled and again live together, the effect is to annul the agreement. Annotation, 40 A. L. R. 1227 and two Nebraska cases are cited in support thereof. However, the limitations to this rule are set out at length in the same annotation, because courts cannot make or unmake contracts, but they can only determine the effect of express or implied agreements made by the parties themselves. When the parties themselves plainly show by their acts that they are still bound by their agreement, the resumption of the marriage relation will not operate to rescind a part of the

agreement based on an independent consideration. See *Edwardson v. Edwardson,* 229 Mich. 66, 201 N. W. 223.

It is said in 17 Am. Jur., sec. 735, p. 552: "Such reconciliation and resumption, it is held, do not warrant the court in deeming the contract avoided any further, if at all, than its terms, taken in connection with the situation and conduct of the parties, indicate their intention to avoid it." In support of this statement they cite the case of *Hagerty v. Union Guardian Trust Co.,* 85 A. L. R. 417 (258 Mich. 133, 242 N. W. 211), wherein it is said: "An agreement between husband and wife upon their separation which, after listing all property owned by them jointly or individually, provided for a specific division thereof by conveyances between them, and that the share received by the wife should be in full settlement and release of all claims against her husband, is not avoided by the mere fact of reconciliation and resumption of cohabitation." See, also, *Bulke v. Bulke,* 173 Ala. 138, 55 So. 490; *In re Singer's Estate* (233 Pa. St. 55, 81 Atl. 898), Ann. Cas. 1913A, 1326, citing many English and American authorities; *Kohler v. Kohler,* 316 Ill. 33, 146 N. E. 476.

"Certain provisions of a contract of separation, or of instruments executed in pursuance thereof, such as provisions for a settlement or fixing the property rights of the parties, may expressly or impliedly show the intention of the parties that the rights and obligations created and fixed thereby shall continue irrespective of a reconciliation, and, where such is the case, these provisions are not avoided by a subsequent reconciliation." 42 C. J. S., sec. 601, p. 186.

"In jurisdictions where husband and wife may freely contract with each other, they may, of course, enter into a valid property settlement as between themselves independent of the question of separation. In such a case the agreement partakes of the nature of an ordinary settlement to end controversies, and may be given effect as such. It has been held that where the primary purpose of the agreement is to settle property rights, its validity is not impaired by the fact that it is entered into with a view to a later separation." Lindey, Separation Agreements, 49.

"Postnuptial agreements, fairly and understandingly made, settling property rights between husband and wife, and binding upon them whether or not an action for divorce may be instituted, are not against public policy and are enforceable." *Perkins v. Perkins*, 154 Kan. 73, 114 Pac. 2d 804.

A case very similar to the instant case, except that here a nephew of the deceased husband attempts to get an interest in the wife's estate, is the case of *Rash v. Bogart*, 226 Ala. 284, 146 So. 814. The issue in this case is whether a postnuptial and property agreement between husband and wife shall be given effect in equity, in bar of the right of the widow, after the husband's death, to dissent from his will, and take dower, homestead, and exemptions of personalty, or otherwise share in his estate. Leroy Rash and Sarah Jane Gentry were married in March, 1920, he being 73 years old and his wife 65 years old. After living together some ten years they separated. About a month after separation, they met in the First National Bank of Stevenson and had an agreement drawn up, which they executed, and Mr. Rash paid the $1,000 therein agreed. Mr. Rash died July 8, 1931. The parties were never divorced. The court held:

"After separation, equity does not look with disfavor on friendly adjustment of property rights between spouses out of court, but, such contracts when supported by valuable consideration, are sustained in equity as other contracts. * * *

"Where, after execution of husband's will providing legacy of $1,000 for wife, wife agreed in valid separation agreement, in consideration of present payment to her of $1,000 in cash, to release all her claims to her husband's estate, payment of $1,000 under agreement *held* to constitute ademption of wife's legacy in husband's will."

It is further argued by the appellant that, as this property settlement in the case at bar contained a provision in which each agreed not to contest a divorce proceeding brought by the other, this provision makes the entire contract void.

But this broad, general statement is also subject to limitations. "Provisions in a separation agreement * * * which relate to a settlement and adjustment of their property rights * * * will not be invalidated by a provision in the agreement as to a divorce where such provision seems to carry within it its own consideration and has no special reference to the consideration for any other provision of the contract. Elimination of such provision will not impair the contract as a whole or in any wise affect any other provision of it." 17 Am. Jur., sec. 727, p. 546.

We will now examine several of our Nebraska cases, and will find that the majority of them are in line with the leading authorities from other jurisdictions.

"A contract between husband and wife, made after and in consequence of severance of the marital relation and permanent separation, and providing for a division of property, and containing mutual releases of rights and obligations relative thereto, will be respected by the courts as presumably fair and valid, and a just and equitable adjustment of the matters of which it treats. But the courts will scrutinize such transactions closely, without too much regard for formal rules of pleading and procedure, and see to it that no unconscionable advantage is taken through fraud or intimidation, or even by reason of ignorance, passion or improvidence." *Hiett v. Hiett,* 74 Neb. 96, 103 N. W. 1051.

"Where a husband and his wife are permanently separated, and the latter has legal grounds for a divorce, they may agree upon a settlement of their property rights, and provide by contract for the support and maintenance of the wife, and if the provisions are fair and reasonable the agreement may be enforced by the courts." *Amspoker v. Amspoker,* 99 Neb. 122, 155 N. W. 602.

"A valid postnuptial contract between husband and wife, which provides that each relinquishes all rights to the property of the other and releases and waives all right of each to inherit from the other, if observed by both until the death of one of them, will debar the survivor from receiving

from the estate of the other the articles of personal property and allowance which the statute provides for the surviving spouse." *In re Estate of Lauderback,* 106 Neb. 461, 184 N. W. 128.

Three quotations from a late Nebraska case are helpful, as follows:

"We said as early as *Furrow v. Athey,* 21 Neb. 671, 33 N. W. 208: 'A deed of conveyance of real estate, executed by the husband directly to the wife, in the absence of fraud, and when neither the rights of creditors nor subsequent purchasers intervene, will convey to her such real estate without the intervention of a third party as trustee.' The circumstances in the case at bar disclose nothing but good faith. The rights of creditors and subsequent purchasers or innocent parties are not involved. The language of the contract constitutes a grant each to the other *in præsenti.*"

"An heir stands in privity with an ancestor, and an estoppel enforceable against the ancestor is likewise enforceable as against the heir. 21 C. J. 1182."

"It was made, we must assume from the evidence, to promote peace and harmony between the parties and their respective children, and was without disadvantage to any of the parties." *Jorgensen v. Crandell,* 134 Neb. 33, 277 N. W. 785.

For many years in Nebraska it has been considered approved practice for counsel to carefully analyze all of the property interests of a husband and wife who were anticipating a separation, and to secure the consent of each to a property settlement in which the rights of each were carefully protected and safeguarded. If later on a divorce was granted to either party, such property settlement was submitted to the trial court, and if upon careful examination the court found that the same constituted a fair and just division of their property interests, our Nebraska courts have in the past invariably approved such settlements. This always has the advantage of removing what in some cases becomes a bitter contest over their property holdings and their respective rights therein.

In a case where two very elderly people are married, each having children by former marriages, it is often found that their diverse property interests, and the possibility of their children being jeopardized in their respective inheritances, result in unpleasant discussions and family quarrels. To avoid this, such a husband and wife often find that their way out of such an unpleasant situation can be met by a well-drawn property settlement, under the terms of which they sign deeds to each other, supported by valid consideration, which deeds are recorded, and thus dispose of all family arguments as to their respective property interests. Such a valid agreement, based upon adequate consideration, should not be lightly set aside by the court because the old parties may temporarily live together a while, followed by a final separation for several years before their death.

This has been the custom and rule in Nebraska for many years, and until the case of *Smith v. Johnson,* 144 Neb. 769, 14 N. W. 2d 424, such agreement has always been given due weight and consideration by our courts. In that very recent case, such an agreement is held to be invalid on the ground that, while section 30-105, R. S. 1943, says that the right of a married man or woman to inherit a part or all of the estate of which his or her spouse was seized of an estate of inheritance at any time during marriage may be barred by a conveyance executed by such husband or wife while a resident of the state, yet the next section, 30-106, which is concerned with the limitations of an antenuptial contract, happens to be silent in respect to a postnuptial contract. The writer of this dissent is convinced that this is a very small peg upon which to hang a decision which overturns an established rule and unjustly deprives the heirs of deceased people of rights which their ancestors thought had been legally settled by the former decisions of this court.

In the case at bar, the two children of Mrs. Henderson were obviously not parties to the postnuptial property settlement which their mother made in good faith, and was it not legal, valid and binding, and supported by an ample consideration of $600, which their mother paid in cash?

Setting aside this contract of their mother invades the rights of her heirs, and deprives them of one-quarter of the inheritance they had in their mother's estate.

The trial court found generally in favor of the defendants, and that the plaintiff, Clifton Focht, nephew of Alonzo J. Henderson, is not the owner of any part of, or interest of any character in, the real estate he seeks to partition, and therefore quieted the title of said real estate in the defendants, John Wakefield, son, and Annie Thompson, daughter, of Mary J. Henderson.

I have reached the conclusion that such decree and judgment is amply sustained by the record and the law, and should have been affirmed. In my opinion, the law should have been announced to be as follows:

(1) In a postnuptial property settlement, where deeds have been exchanged and a valuable consideration paid, it would be inequitable to permit a devisee of one of the parties to assert marital rights in said property so conveyed;

(2) Where there has been a reconciliation for a few months after making such property settlement, such resumption does not warrant the court in deeming the contract avoided, any further than its terms taken in connection with the situation and conduct of the parties indicate their intention to avoid it; and

(3) Provisions in a postnuptial separation agreement for the transfer of property by deed, upon payment of full consideration therefor, will not be invalidated by a provision not to contest any divorce action which might be brought, where the elimination of this provision which is void as against public policy will not impair the provision relating to the transfer of property by deeds which had been promptly carried out and performed.

FEDERAL FARM MORTGAGE CORPORATION, APPELLEE, V. ANTON GANSER ET AL., DEFENDANTS: IMPLEADED WITH WILLIAM A. EHLERS, APPELLANT.

17 N. W. 2d 613

FILED FEBRUARY 9, 1945. No. 31856.

1. **Appeal and Error.** An appealable interest exists when a judgment or decree so affects the party or privy to the record that he would derive a substantial benefit from its modification or reversal.
2. ———. An order of the court confirming or refusing to confirm a sale constitutes a final and appealable order.
3. ———. Section 25-1912, R. S. 1943, provides, in substance, that, in appealing from a final order of the district court, such appeal is perfected if notice of appeal has been filed with the clerk of the district court within three months from the date the final order was rendered, and the docket fee has been deposited in the office of the clerk of the district court.
4. **Mortgages.** The taking of a statutory stay of sale at the time or after a decree is entered, granting foreclosure of a mortgage and appointing a receiver, waives all previous errors which may have occurred in appointing a receiver, as well as in granting the foreclosure.
5. ———. Where a party fails to appeal from a final order of the district court within the time required by law, he cannot question the proceedings as they relate to such order made, vacating a sale and ordering a resale, or for failure to confirm sale.
6. ———. Where there is no irregularity or taint in the proceedings, confirmation of a sale will not be set aside, on appeal, unless the bid is so low as to produce the clear conviction of unconscionableness, and the inadequacy of the bid as such must be pleaded.
7. ———: RECEIVERS. Where a receiver collects certain rents and profits from mortgaged real estate, and receivership is continued until further order of the court, and no order is made distributing the rents and profits collected by the receiver, there is no final order on such matters affecting the rights of the title holder to such real estate for review in the supreme court.

APPEAL from the district court for Madison county: FAY H. POLLOCK, JUDGE. *Affirmed.*

William A. Ehlers, pro se.

Frederick M. Deutsch, Howard A. Dwyer, Lewis W. Bicknell and *William W. Graham, contra.*

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

MESSMORE, J.

This is an action to foreclose a real estate mortgage and for the appointment of a receiver pending proceedings.

Plaintiff's petition filed January 15, 1943, for foreclosure of a mortgage, is regular in form. Defendant William A. Ehlers (appellant) claims to be the title holder by sheriff's deed issued subsequent to appellee's mortgage. The petition alleges abandonment of the mortgaged real estate by defendants Ganser, and that defendants Osborn are in possession; that the real estate is insufficient to discharge the mortgage debt, and, in order to conserve the value, prevent waste and deterioration, a receiver should be appointed. The amount of indebtedness is alleged to be $2,782.71, with interest at 5 per cent per annum. Appellee prays for an accounting, that the mortgage lien be declared a paramount lien, that appellant be directed to pay the indebtedness, and, in default of such payment within 20 days from entry of the decree, the real estate be ordered sold and the purchaser put in possession.

Appellant was duly served with summons in the foreclosure proceedings and with notice of the application for appointment of a receiver. He defaulted in both instances. On January 30, 1943, a receiver was appointed. On February 17, 1943, a decree in foreclosure was entered. February 19, 1943, appellant filed a request for stay of execution. December 27, 1943, the mortgaged real estate was sold to appellee for the sum of $2,998.90, the full amount due, with interest and costs. On April 15, 1943, the receiver filed an application for discharge. Application for the appointment of a successor-receiver was filed on the same day, and hearing thereon set for April 24, 1943. Appellant received notice of this hearing, filed no pleadings thereto and made no appearance. On April 24 the successor-receiver was appointed. January 8, 1944, the receiver filed a report showing receipts of $704.82, and disbursements of $30, premiums on bond, said amounts being retained by the receiver.

On the same day appellee filed a motion for leave to reduce its bid, alleging that on November 22, 1943, an order of sale was issued, pursuant to which notice was published fixing December 27, 1943, as the date of sale; that a copy of sheriff's notice of sale was not furnished local counsel of appellee until December 20, 1943; that under date of December 21, 1943, appellee was advised by its local counsel of the date of sale; that, by reason of the holiday season, meeting of the Nebraska State Bar Association and an influenza epidemic, no instructions with respect to bidding upon such sale were furnished local counsel, and on December 27, 1943, and for several days prior and subsequent thereto local counsel was absent from Madison county, and relied on instructions from appellee concerning the bidding. In the absence of such instructions, the secretary of local counsel directed the sheriff to place the bid, as heretofore set out. The motion further alleges that in truth and in fact there had been an assignment of the lease upon the mortgaged premises, and appellee received $31.29, parity payment for 1942, and a receiver had been appointed whose report has now been filed, reflecting a balance of $674.82, exclusive of allowance for attorney's fees and receiver's fees, which the record discloses was $35 and $65, respectively; further that the real estate is not worth the amount of the encumbrance thereon and that such bid was made through inadvertence and mistake, with the intention of merely bidding the ultimate net amount of the loan and decree, and that the amount of the bid should be reduced by the sum of any such credits that would arise from the receivership and parity payments, or, in the alternative, a new sale be ordered.

On January 14, 1944, appellant filed a motion to confirm the sale and for distribution, alleging that he is the legal title holder to the land and has the sole right of redemption, is fully satisfied with the terms of the sale, is entitled to protection of the court of his interest and to an order directing the receiver to pay him the gross amount of all rents and profits collected, without deduction for fees and

expenses, and objects to appellee's motion for leave to reduce its bid, or, in the alternative, a resale be ordered.

We deem it unnecessary to set forth the testimony of the secretary of appellee's local counsel which corroborates the allegations of appellee's motion for leave to reduce its bid, or, in the alternative, a resale be ordered, and that in making the bid it did not occur to the secretary that there would be credits to apply on the mortgage indebtedness, the receiver not having made a report.

January 15, 1944, the court entered an order vacating and setting aside the sale and granting a new sale by sustaining appellee's motion for such purpose, and denying the appellant's motion for confirmation of the sale. The receivership was continued until further order of the court.

A new sale was held February 28, 1944. Appellee bid in the mortgaged real estate as the highest bidder for the amount of $2,117.43. March 1, 1944, appellant filed objections to the confirmation of this sale, alleging that the prior sale was in all respects correct, legal and proper, as decreed by the court February 17, 1943, and appellee's motion does not state a valid and legal ground for setting aside the first sale and ordering a resale. March 18, 1944, the second sale was confirmed, and appellant's objections were overruled. May 24, 1944, appellant gave notice of appeal.

The appellant contends that the court erred in overruling his motion to confirm the sale of December 27, 1943, and order distribution. Appellant did not appeal from the court's order, entered January 15, 1944.

"An appealable interest exists when the judgment or decree so affects a party or privy to the record that he would derive a substantial benefit from its modification or reversal." *Penn Mutual Life Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659, 71 N. W. 279; 2 Ency. of Pleading & Practice, 161.

"Although the act of the court in giving or withholding its confirmation is discretionary, its decision involves the merits of the case and requires such an examination of all the facts as can only be made fairly on full hearing on ap-

peal." 2 Am. Jur., sec. 108, p. 914. Thus, the order of a court confirming or refusing to confirm a sale constitutes a final order.

Section 25-1902, R. S. 1943, provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a 'final order' which may be vacated, modified or reversed, as provided in this chapter."

Under section 25-1902, *supra,* if a substantial right of the appellant is affected, he may appeal from the final order which divests him of his special right. His contention, that to appeal from the order setting aside the sale of December 27, 1943, and ordering a resale applies only to bidders, is without merit under section 25-1902, R. S. 1943, and paragraph 1 of the syllabus in the case of *Penn Mutual Life Ins. Co. v. Creighton Theatre Bldg. Co., supra.*

Section 25-1912, R. S. 1943, provides, in substance, that, in appealing from a final order of the district court, such appeal is perfected if notice of appeal has been filed with the clerk of the district court within three months from the date the final order was rendered, and the docket fee has been deposited in the office of the clerk of the district court, as provided by law. There was no motion for a new trial filed in the instant case with reference to the final order of the court affecting the first sale. It was not until May 24, 1944, that appellant gave notice of appeal after his objections to the confirmation of the second sale, held February 28, 1944, were overruled.

It is therefore clear that the appellant did not, within the time required by law, appeal from the final order of the court, made January 15, 1944. He is not now in a position to question the proceedings as the same relate to the order of the court affecting the first sale, ordering a new sale and appointing a receiver. However, had the appellant perfected his appeal from the January 15, 1944, order of the court, he would not be in a position to object to the appointing of

the receiver, for the reason, as heretofore set out, his request for statutory stay was filed after the appointment of the receiver.

"The taking of a stay of sale at the time or after a decree is entered, granting foreclosure of a mortgage and appointing a receiver, waives all previous errors which may have occurred in appointing a receiver, as well as in granting the foreclosure." *Lackey v. Yekel,* 113 Neb. 382, 203 N. W. 542. See, also, *Ecklund v. Willis,* 42 Neb. 737, 60 N. W. 1026; *Theisen v. Peterson,* 114 Neb. 150, 206 N. W. 768; *Bowman v. Caldwell,* 135 Neb. 554, 283 N. W. 194; *Ohio Nat. Life Ins. Co. v. Baxter,* 139 Neb. 648, 298 N. W. 530.

There remains for consideration the contention of the appellant that the district court erred in confirming the sale of February 28, 1944, to the appellee upon its reduced bid. The order of confirmation was entered March 18, 1944. This is the only final order from which an appeal has been perfected. The objections to confirmation, filed March 1, 1944, by the appellant, is premised on the denial of confirmation to this appellant of the first sale, and sustaining appellee's motion to set aside the first sale, and granting a resale, in that no legal ground was stated by the appellee for setting aside said sale and ordering a resale; that the first sale should have been confirmed; that the resale of the real estate on the 28th of February, 1944, is based on a void and illegal order of the court and should be vacated and set aside. The motion then recites that the appellee bid the sum of $2,998.90 at the sale held December 27, 1943, and at the second sale bid $2,117.43, or $881.47 less than its former bid, and, as a consequence, "it will be unjust and inquitable" to allow the appellee to reduce or lower its own bid in such manner, and that the effect will be to unjustly deprive the appellant of the sum of $881.47, which properly belongs to him. The order of confirmation overrules the appellant's objection, which is, in substance, heretofore given, and recites that the sale of February 28, 1944, was conducted in all respects according to law, and that the mortgaged real estate sold for its fair and reasonable value un-

der the terms and conditions of the sale; that the real estate would not sell for a greater value upon a resale, and confirmed the sale.

An examination of the appellant's objections to confirmation discloses that he did not premise his objections on the regularity of the proceedings of the second sale. Appellant refers to the proceedings as they relate to the court's order affecting the first sale. He attacks the inadequacy of the amount bid in the second sale, on the premise that it is $881.47 less, and this is based upon the theory that the rents and profits collected by the receiver equitably belong to this appellant as title holder. In other words, he, as title holder, is entitled to the rents and profits derived from the land. He does not raise inadequacy of price, for which the sale was confirmed, being so low as to produce the clear conviction of unconscionableness, and, in fact, does not attack the regularity of the proceedings of the second sale except as heretofore stated, which issues have been adjudicated by the appellant's failure to appeal from the overruling of his motion to confirm the first sale and the sustaining of appellee's motion for resale.

This court has held on many occasions: "Where there is no irregularity or taint in the proceedings, confirmation will not be set aside on appeal unless the bid is so low as to produce a clear conviction of unconscionableness." *Metropolitan Life Ins. Co. v. Suverkrubbe,* 135 Neb. 865, 284 N. W. 342. See, also, *Federal Farm Mtg. Corporation v. Bostrom,* 136 Neb. 180, 285 N. W. 490.

We conclude that the judgment of the district court confirming the sale of February 28, 1944, entered on March 18, 1944, should be and is hereby affirmed. The record discloses that the assets, such as rents and profits remaining in the hands of the receiver have not been distributed, and the receivership has been continued until further order of the court. Therefore, there is no order of the court in the record distributing these assets to either appellant or appellee. We cannot determine in this action the rights of the respective parties to the assets remaining in the hands of the re-

ceiver. There has been no final order on such matter, and until there is and it is properly brought to this court there is nothing to determine with respect to it.

AFFIRMED.

LEO JOSEPH O'BRIEN, A MINOR, BY LEO O'BRIEN, SR., HIS FATHER AND NEXT FRIEND, APPELLANT, V. RAYMOND BARNARD ET AL., APPELLEES.

17 N. W. 2d 611

FILED FEBRUARY 9, 1945. No. 31861.

Workmen's Compensation. Evidence in the instant case examined and *held* insufficient to prove by a preponderance thereof that the defendant, within the meaning and contemplation of section 48-116, R. S. 1943, set up a scheme, artifice or device, to defeat the provisions of the workmen's compensation law, and that the defendant was, in fact, the employer of the plaintiff.

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

Ray M. Higgins and *Chambers, Holland & Locke,* for appellant.

W. P. Lauritsen, John F. McCarthy and *Gaines & Shoemaker, contra.*

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

MESSMORE, J.

This is a compensation case. Plaintiff was granted an award below for injuries received in an accident arising out of and in the course of his employment. The injuries, extent thereof and disability resulting therefrom, and the amount of the award are not for review here. This appeal presents the question as to whether or not the district court erred in dismissing the defendant Larsen from the case by holding that no liability attached to him, and that he was not the employer of the plaintiff and did not, within the

meaning and contemplation of section 48-116, R. S. 1943, create and carry into operation a scheme, artifice or device which enabled him to execute work without being responsible to the plaintiff and by doing so he was, in fact and for all purposes, the plaintiff's employer.

The record discloses that Charles F. Larsen was engaged in the bulk gasoline business at Grand Island, Nebraska, by contract with Phillips Petroleum Company. He dealt in its products exclusively as its representative in a specified territory. On April 30, 1940, he leased a service station for a period of five years, with an option to renew the lease, and he was to furnish all equipment necessary to operate the station. The record does not show in what manner Larsen operated the station or that he did so. It does show that it was under the operation of other individuals before defendant Barnard leased it. Until such time the business did not progress, and Larsen suggested to Barnard, who had been an employee of his for approximately five years, that he take over the station and operate it in the same manner as the station was being operated where Barnard was then employed. Barnard was skeptical as to whether or not he could successfully operate the station and make a living, because it had been neglected and run-down, and he did not have the money to make the investment. Larsen agreed to set him up in business and furnish him the money with which to purchase a stock of merchandise. So it was orally agreed that Barnard should take over the station and the business.

Pursuant to the oral agreement, a written agreement was entered into between the parties on January 23, 1942, the effect of which was to place Barnard in the business, and he agreed to pay Larsen $1,000, to be paid at the rate of one-half cent per gallon of all gasoline delivered to the filling station until the amount was paid, with interest due. This agreement is, in effect, a note, and, according to Barnard's testimony, has been paid in full and was about half paid at the time of plaintiff's accident on January 27, 1943. The rent was fixed at one cent per gallon, and whenever a

load of gasoline was delivered such amount was charged against Barnard. The station was known as "Ray's Phillips '66'." The advertising was for the sale of Phillips products. The uniforms worn were the same as those worn at Phillips stations generally, and as suggested by its representatives and Larsen. All gasoline and Phillips products handled by Larsen and sold at the station were purchased from him. The price of gasoline was set through the bulk plant, and Barnard was directed to sell such commodity at a certain specified price per gallon; the Phillips company suggested the prices on all of their other products handled, and price sheets were furnished. The company was very specific about its service and made suggestions as to how to go about it to render the proper service. Barnard was in possession of the station, and it was under his control as long as he was handling the merchandise sold by Larsen, and if anything went wrong with the business Larsen was always available as counselor to look after his own interests. The plaintiff was employed by Barnard on January 19, 1943, to work at the station after school and on Saturdays for the sum of $5 per week. Larsen was not present at the time of the employment, and plaintiff did not know him but knew of him.

Plaintiff contends that under the provisions of section 48-116, R. S. 1943, Larsen, by artifice, scheme or device, set Barnard up in business for the purpose of having an outlet for, and increased sales of, the products he handled; that to do this he advanced the money to purchase merchandise; that he owned the lease, controlled the sales of all merchandise handled by Barnard, even to the extent that, should Larsen change from Phillips products to any other, Barnard was obliged to buy from him or quit business; furthermore, that Larsen provided for the advertisement used, suggested the uniforms to be worn; that, in a consideration of all such matters, the direct responsibility for the business was Larsen's and he, in fact, was the owner of it and the employer of the plaintiff.

The burden of proof by a preponderance of the evidence

is on the plaintiff to prove Larsen liable, as contended for by the plaintiff. It is quite apparent that Larsen subleased the station to Barnard, the latter to pay Larsen for money advanced and a fixed rent. Larsen did not control, supervise or give any directions with reference to the management of the station or of the business. He did not share in the profits or make any suggestions affecting the business. He did not employ the plaintiff, designate the hours of work or the wages to be paid, or direct, supervise or control in any manner the plaintiff's employment, the course thereof or the duties to be performed; nor could he discharge the plaintiff.

It is true, this court, in speaking of what is now section 48-116, R. S. 1943, has said that such statutory provision did not necessarily imply fraud or evil design. *Sherlock v. Sherlock,* 112 Neb. 797, 201 N. W. 645; *Hiestand v. Ristau,* 135 Neb. 881, 284 N. W. 756. However, this does not dispense with the requirement that the plaintiff must show by a preponderance of the evidence that defendant Larsen violated the statutory provision. This the plaintiff has failed to do.

Our attention has been directed to section 4290, 1940 Supplement to Mason's Compiled Statutes of Minnesota for 1927, as being analogous to section 48-116, R. S. 1943, except that the Minnesota statute uses the term, "fraudulent scheme, artifice or device * * * ." In conjunction therewith, our attention is called to the case of *Washel v. Tankar Gas, Inc.*, 211 Minn. 403, 2 N. W. 2d 43, as being directly in point with the instant case. We are not in accord with this view. The Minnesota court said in the body of the opinion: "There is much in the lease indicating that the lessor was much interested in the business of the filling station leased, and to that end supervised, directed and counseled the lessee." There is no such evidence in the instant case. Tankar Gas, Inc., handled gasoline and petroleum products, wholesale and retail; it leased 16 stations and operated six more as owner. The court stated that the corporation supervised the leased stations much the same

as the six stations which it operated itself. While there is some evidence in the instant case that Larsen leased certain stations and likewise operated stations, it is not shown by the evidence very clearly what stations he leased or operated, except that he leased the station involved in this action, and the record fails to show that the station leased, operated and controlled by Barnard was operated in the same manner as any station owned, leased or operated by Larsen.

We are driven to the conclusion that the plaintiff failed to carry the burden of proof as required by law. He failed to show a violation of section 48-116, R. S. 1943, and failed to show that the relationship of employer and employee existed between Larsen and the plaintiff.

AFFIRMED.

THEODORE A. FRYE ET AL., APPELLEES, V. ARTHUR SIBBITT ET AL., APPELLANTS.
17 N. W. 2d 617

FILED FEBRUARY 9, 1945. No. 31835.

1. **Easements.** An "easement appurtenant" belongs exclusively to the land to which it is appurtenant and such an easement passes with the land to which it is appurtenant.
2. ———. An "easement" is the right in the owner of a parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner.
3. **Licenses.** A "profit à prendre" is the right exercised by one person in the soil of another accompanied by participation in the profits of the soil thereof. It does not embrace money to be paid for a use but only a profit to be obtained out of the produce of the land or out of some physical severance.
4. **Easements:** DESCENT AND DISTRIBUTION. Where by the terms of an indenture a perpetual easement is granted to the owner of a dominant tenement, his heirs, successors and assigns, over a servient tenement charging the owner of the dominant tenement, his heirs, successors and assigns, with annual payments to the owner of the servient tenement, his heirs, successors and assigns, there is a right of severance or division of the right to receive

annual payments from the title to the servient tenement. Such right may pass by inheritance or conveyance.

5. **Liens**: ACTIONS. The proper action for recovery of annual payments under the indenture is one to establish and enforce a lien against the lands described as the dominant tenement.
6. ———: PARTIES. The proper parties to an action to establish and enforce the lien are those who hold title to the servient tenement at the time of default of annual payment if there has been no division or severance, and in case there has, then those who have succeeded to the right by reason of division or severance.
7. **Easements.** Where by the terms of an indenture it is clear that benefits flowing from a dominant tenement to a servient tenement belong to the servient tenement in its entirety such intention is controlling notwithstanding the easement of the dominant tenement affects directly and adversely only a portion of the servient tenement.
8. **States.** Action to reform a deed of conveyance of real estate to the state of Nebraska is properly maintainable under authority of section 24-319, R. S. 1943.
9. **Limitation of Actions.** The five-year limitation, or the limitation of section 25-205, R. S. 1943, is applicable to the several causes of action which are the basis of the action herein.

APPEAL from the district court for Grant county: WILLIAM F. SPIKES, JUDGE. *Affirmed in part and reversed in part, with directions.*

Johnson & Johnson, Suhr & Pierce and *Perry, Van Pelt & Marti,* for appellants.

Dryden & Jensen, contra.

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

YEAGER, J.

This action as originally instituted was by petition in equity wherein Theodore A. Frye and John Haney were plaintiffs against Arthur Sibbitt and Edna Billings, administrators of the estate of John P. Sibbitt, deceased, and Arthur Sibbitt, Edna Billings, Almeda Sibbitt and Ola Gertrude Sibbitt, defendants. After the commencement of the action one of the plaintiffs died, also after the commencement of

the action the defendants, Almeda Sibbitt, Arthur Sibbitt and Ola Gertrude Sibbitt died. As to the deceased plaintiff and the deceased defendants the action was revived, and the action proceeded with a properly substituted plaintiff and properly substituted defendants. The defendants are appellants here and the plaintiffs are appellees.

The declaration of the petition is on nine causes of action all growing out of an indenture dated and recorded October 17, 1916, whereby John Haney and Lizzie M. Haney, his wife, predecessors in interest of the plaintiffs, granted to John P. Sibbitt, Almeda Sibbitt, Arthur C. Sibbitt and Ola Gertrude Sibbitt, a perpetual easement for the flow of water onto real estate belonging to John Haney, and described in the indenture, from land belonging to the Sibbitts and also described in the indenture. The four Sibbitts named were the predecessors in interest of the present defendants.

By the indenture it was contemplated that there had been constructed a ditch from the Sibbitt lands to the Haney lands which should be maintained from the date of the indenture henceforth for the flow of water onto the Haney lands. The consideration of the indenture flowing to Haney was a maximum payment of $625 per year. This maximum was subject to reduction by the cutting of hay. In order to bring about a reduction of payment below $625 Haney was required to make every reasonable effort to cut and stack as much hay as possible. For every ton of hay cut and stacked up to 125 tons in any year a credit of $5 per ton was allowable against the $625. There appears to have been an enclosure within what was called a meadow fence. Hay cut within this enclosure alone was to be considered in reduction of the annual maximum payment. It was provided further that each year in October the parties should meet in Hyannis, Nebraska, and there estimate and settle upon the amount due from the Sibbitts to Haney. The plan for settlement is set forth in the indenture. Its details do not require statement here. In the indenture it was provided that the Sibbitt lands should be known as the dominant and that those of Haney should be the servi-

ent estate. In the indenture the intention as to the estates or interests conveyed was twice declared as follows: "WHEREAS, the parties hereto are desirous of entering into an agreement which will be binding upon them and upon their heirs, assigns and successors, and upon all of the real estate hereinbefore described, * * * ; * * * IT IS FURTHER AGREED, and the intent of this indenture is that the obligations hereby imposed upon the parties hereto shall also attach, and they are hereby attached, to the estates aforesaid from this date forth in perpetuum."

The land which was owned by Haney and was the subject of the indenture was sold and transferred by warranty deed by Haney and his wife to Theodore A. Frye on October 27, 1919. This was followed on February 13, 1933, by an assignment of the rights under the easement indenture by the grantors to the grantees in the deed. On May 5, 1931, Frye sold a portion of the land to the State of Nebraska, Game and Parks Commission. It appears that the land so sold was 345 acres, or all but seven acres of that portion of the acreage which was described in the indenture of 1916 as being within the pasture area fence.

The payments provided for by the indenture were made regularly to and including the year 1930. Although demand was made in 1931 no payment was made for that year or for any year thereafter.

On August 22, 1936, Theodore A. Frye and Kleo Frye, his wife, executed an instrument, the purport of which was to assign to John Haney a one-half interest in the easement of October 17, 1916. The assignment was recorded August 28, 1936. It was the intent of the parties that by the assignment John Haney should acquire a half interest in the payments flowing from the dominant to the servient estate.

This action was commenced on July 3, 1940, by the then purported owners of the interest of the servient estate in the easement. The nine causes of action are for the years 1931 to 1939 inclusive. Each is for $625 with interest. The theory of plaintiffs is that the annual amounts from the due date thereof became an equitable lien upon the domi-

nant estate. In effect, the action is for an accounting of the various amounts and for foreclosure of the lien or liens.

A trial was had to the court which resulted in a decree finding that there was due on the nine causes of action $8,049.16. A lien was decreed for this amount and strict foreclosure was allowed. It was from this decree that the defendants have appealed.

The defendants have assigned seven errors as grounds for reversal. They are: (1) The court erred in overruling the demurrers of the defendants; (2) the court erred in holding the rights and obligations under the easement contract of October, 1916, divisible or severable; (3) the court erred in awarding plaintiffs a lien against defendants' real estate; (4) the court erred in not applying a five-year statute of limitations; (5) the court erred in finding that there was not an easement; (6) the court erred in determining the amount due plaintiffs from defendants as a first lien against defendants' real estate; and (7) the court erred in not applying the doctrine of laches.

The demurrers which are the basis of the first assignment were predicated on the proposition that the petition did not state a cause or causes of action. The determination depends upon the question of whether or not there was stated a right of recovery in consequence of failure to pay on the part of defendants in conformity with the provisions of the indenture. Neither the legal capacity to sue nor the propriety of the joinder of the parties plaintiff is presented by this assignment. In this is involved a determination of, first, the question of whether or not the petition declares a right of recovery and, second, whether or not the remedy sought is available to the plaintiffs. This latter must be resolved in favor of plaintiffs since they have pleaded their case on the sole theory that they are owners of the rights flowing to the servient estate and as such owners are entitled to the adjudication of lien against the dominant estate as they are denominated in the indenture and in consequence seek accounting and foreclosure. The question of whether or not this is true is not apparent on the face of the pe-

tition. The declaration of the petition therefore must be taken as true against the demurrer. The petition does not in any sense seek the enforcement of a personal obligation.

In an approach to a determination of the question of whether or not the petition declares a right of recovery it becomes necessary to ascertain the character or quality of the right which plaintiffs seek to enforce in this action, that is of deferred payments or benefits flowing to the grantor of an easement or his successors and assigns. The decisions are not agreed on the nomenclature.

The Massachusetts courts call it "equitable servitude." In *Everett Factories & Terminal Corporation v. Oldetyme Distillers Corporation,* 300 Mass. 499, 15 N. E. 2d 829, 118 A. L. R. 965, a case presenting a situation similar to the one presented here, it was said: "It follows that the obligation to make annual payments as provided in the original deed is imposed as an equitable servitude on the premises and appurtenant rights granted by such deed to which the defendant has succeeded. This obligation, therefore, may be enforced in equity against the defendant to the extent that the performance of the duty of making the annual payments may be charged upon these premises and appurtenant rights. But it cannot, by reason of equitable servitude, be enforced as a personal obligation of the defendant."

The New York courts call it a "covenant." In *Neponsit Property Owners' Assn. v. Emigrant Industrial Savings Bank,* 278 N. Y. 248, 15 N. E. 2d 793, 118 A. L. R. 973, 118 A. L. R. 982, annotation, a case also similar to the case at bar, it was said: "Looking at the problem presented in this case from the same point of view and stressing the intent and substantial effect of the covenant rather than its form, it seems clear that the covenant may properly be said to touch and concern the land of the defendant and its burden should run with the land."

The appellants in their presentation contend that the right which appellees seek to assert is an "easement appurtenant" to the real estate described as the servient tenement and that in this action it should be so treated. The appel-

lees appear to be unwilling to attach to their claimed right a name. They insist that whether it be called easement contract, covenant real, equitable servitude, profit à prendre, or go nameless is a matter of no consequence so far as the right of recovery is concerned. The trial court in the following words found that it was not an easement: "It is not an easement at all. It is more in the nature of a rental."

The significance of appellants' contention that an "easement appurtenant" is involved is that under the authorities on which they rely there could be no separation or division of the right of recovery from the lands to which the easement attached. In other words as applied to this case the owner of the land would have the sole right to maintain action under the indenture, whereas it is unquestioned and unquestionable that one of the plaintiffs is not a party to the title to the land and appellants contend that neither plaintiff is party to more than a few acres of the land actually involved.

It can hardly be doubted that if the obligation to make payments under this indenture to the owner of the servient tenement falls within the true meaning of the term "an easement appurtenant" it would pass by deed of conveyance to the land and the holder of the title alone could maintain action under the indenture. In *Agnew v. City of Pawnee City*, 79 Neb. 603, 113 N. W. 236, it was said: "An easement will pass by a deed or grant of conveyance, even if the word 'appurtenance,' or a similar expression, is not used in the instrument, if it is apparent to an ordinary observer, and naturally and necessarily belonged to the premises." In *Smith v. Garbe*, 86 Neb. 91, 124 N. W. 921, it was said: "An easement appurtenant to land will pass by a conveyance, although the words 'with the appurtenances' are not used." These two statements were quoted with approval in *Neilson v. Leach*, 140 Neb. 764, 1 N. W. 2d 822.

We however cannot agree that this is an easement appurtenant or any other kind or character of true easement.

In Black's Law Dictionary (3d ed.) p. 636, an easement is defined as follows: "A right in the owner of one parcel

of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner." Other definitions of easement are to be found in this dictionary, in texts on real property and in the decisions of various courts and in some respects they differ, but in all of them there is one common and essential element. They all contemplate that before an easement may exist there must be *a right in land.* The right even to take of the land or its produce does not rise to the dignity of a true easement. Such a right is termed and defined as a "profit à prendre."

Black's Law Dictionary (3d ed.) p. 1440, defines and explains "profit à prendre" as follows: "A right exercised by one man in the soil of another, accompanied with participation in the profits of the soil thereof. * * * *Gadow v. Hunholtz,* 160 Wis. 293, 151 N. W. 810, 811, Ann. Cas. 1917D, 91. The term includes the right to take soil, gravel, minerals, and the like from another's land; *Munsey v. Mills & Garritty,* 115 Tex. 469, 283 S. W. 754, * * * . Profits à prendre differ from easements, in that the former are rights of profit and the latter are mere rights of convenience without profit. * * * See *Payne v. Sheets,* 75 Vt. 335, 55 A. 656; *Black v. Elkhorn Min. Co.,* (C. C.) 49 F. 549; *Bingham v. Salene,* 15 Or. 208, 14 P. 523, 3 Am. St. Rep. 152; *Pierce v. Keator,* 70 N. Y. 422, 26 Am. Rep. 612.

The term profit as used in the definitions quoted and the cases cited does not embrace money to be paid for a use but only a profit to be obtained out of the produce of the land or out of some physical severance.

It appears clearly from these definitions and these cases that the only substantial distinction between "profit à prendre" and the situation created by the indenture here is that in the former the profit flowing to land has a tangible measurement whereas in the latter the measurement is intangible or in money.

In this light we observe no compelling reason why they should receive different treatment when we come to consider the question of whether or not they are severable or divisible from the land of their original attachment.

It has been held that where there is a profit à prendre which consists in a right to take a profit from land it is treated as an estate and may pass by inheritance or conveyance. See *Engel v. Ayer*, 85 Me. 448, 27 Atl. 352; *Ring v. Walker*, 87 Me. 550, 33 Atl. 174. We conclude that the reasons supporting this holding are sound and, as already indicated, that the same rule should apply here. We hold, therefore, that the rights of the servient tenement were severable and divisible from the tenement and were the subject of conveyance.

It follows necessarily and of course, then, that the owner or owners of the right to profit secured to the servient tenement by the indenture and flowing from the dominant tenement had the right, as his or their interests appeared, to maintain action for recovery of the profit.

The question of whether or not the court erred in awarding a lien against the dominant tenement is dependent upon the question of whether or not the profit contemplated was a charge against the real estate and not a personal obligation. There can be no question that by the language of the indenture the parties intended that it should be a charge against the real estate. The indenture is specific and conclusive in that regard.

On this question in *Everett Factories & Terminal Corporation v. Oldetyme Distillers Corporation, supra,* it was said: "It follows that the obligation to make annual payments as provided in the original deed is imposed as an equitable servitude on the premises and appurtenant rights granted by such deed to which the defendant has succeeded. This obligation, therefore, may be enforced in equity against the defendant to the extent that the performance of the duty of making the annual payments may be charged upon these premises and appurtenant rights. But it cannot, by reason of equitable servitude, be enforced as a personal obligation of the defendant."

In *Neponsit Property Owners' Assn. v. Emigrant Industrial Savings Bank, supra,* it was said: "Looking at the problem presented in this case from the same point of view

and stressing the intent and substantial effect of the covenant rather than its form, it seems clear that the covenant may properly be said to touch and concern the land of the defendant and its burden should run with the land."

In accordance with the declared intention of the parties and purport and effect of these decisions we hold that whatever rights plaintiffs had were enforceable as a lien against the dominant tenement.

The area of the servient tenement as denominated in the indenture is not definitely ascertainable from the record. One witness indicates that it contained 1,135 acres. Approximately 352 acres were directly affected by the flow of water from the dominant tenement. Approximately 345 acres of this were sold to the State of Nebraska, Game and Parks Commission, as has been pointed out, on May 5, 1931. Appellants contend that the right to enforce the obligation of the dominant tenement, if any existed, thereafter belonged to the land thus directly affected to the exclusion of all of the other land described as the servient tenement, or to the state of Nebraska.

We cannot agree with the appellants' attempted limitation of land to which the right of recovery attaches. By the terms of the indenture the right is extended to all of the land described as the servient estate. There is nothing which limits it to the area directly affected by the flow of water. The only significance of a separate designation of the area affected by flow of water is that the contemplated effort to reduce the amount of annual payments was limited to this area.

The intention of the parties as disclosed by the indenture cannot be ignored. This requires us to hold that the payments for the easement belong to the lands in their entirety described in the indenture as the servient estate. It follows that the owner or owners of the servient estate or their assigns, as their interests appeared at the time or times when payments became due, had a right of action therefor.

Having concluded that the state of Nebraska was not the

sole party entitled to action it becomes necessary to determine who were proper parties plaintiff with regard to the several causes of action.

Under the evidence in this case, for the period covered by the nine causes of action, Theodore A. Frye held the title to the lands in question with the exception of approximately 345 acres, the title to which stood without reservation in the name of State of Nebraska, Game and Parks Commission, from May 5, 1931, to June 10, 1940, when by decree of court the deed was reformed so as to reserve to Theodore A. Frye and Kleo Frye, husband and wife, their heirs, executors and assigns, all right, title and interest in and to the sums due under the indenture herein.

The appellants contend that the court was without jurisdiction to reform the deed to the state of Nebraska and that notwithstanding the attempted reformation the state of Nebraska became and still is the owner of the directly affected lands. They contend that authority has never been granted by the legislature for the prosecution of any such action against the state.

If such authority exists it must be found in the following from section 24-319, R. S. 1943, granting the right to bring action against the state: " * * * all cases where the State of Nebraska shall have a lien or any other interest, apparent or real, upon or in any real estate in said state, wherein any party may desire to have said lien or interest of the state fixed and determined or foreclosed and cut off; * * * ."

Statutes authorizing suits against the state are to be strictly construed. In *Anstine v. State* 137 Neb. 148, 288 N. W. 525, this court quoted with approval the following from 59 C. J., sec. 460, p. 303: " * * * it is usually said that statutes authorizing suit against the state are to be strictly construed, since they are in derogation of the state's sovereignty. Consequently, it is generally essential that the consent of the state to be sued be given expressly or by clear implication, * * * ." It appears that plaintiffs' action under the requirement of this rule is authorized by this statute. The state did have an interest, apparent or real,

upon and in real estate which plaintiffs by their action were seeking to have fixed, determined and cut off. Nothing in the record appearing to the contrary, we must assume that the court had jurisdiction and no appeal having been taken, the decree in that action must be accepted as final and conclusive upon the issues determined. Further, we do not observe that the rights of appellants or their predecessors in interest were in any wise prejudiced by the decree in that action.

In the light of this reasoning it becomes necessary to hold that the transactions involving sale of a part of the land to the state of Nebraska and the action to reform the deed to conform to the intention of the parties were effective for the purposes declared in the decree. It follows then that the parties plaintiff being the owners and holders of the entire interest they were proper parties plaintiff.

Next we come to appellants' assertion that the court erred in awarding plaintiff a lien against defendants' real estate.

The effect of the findings hereinbefore made is to say that the nine causes of action pleaded were proper causes of action by plaintiffs against the defendants. This is subject, however, to our finding and holding with regard to the effect of the appropriate statute of limitations. We hold here that on causes of action, where right of recovery was proved, instituted in time, plaintiffs were entitled to a lien upon the real estate of defendants described in the indenture.

The appellants urge that the five-year statute of limitations is applicable to an action for recovery of payments becoming due and payable under this indenture. The court applied the ten-year limitation or the one applicable to actions for foreclosure of real estate mortgages and for recovery of title and possession of real estate, or section 25-202, R. S. 1943, which is in part as follows: "An action for the recovery of the title or possession of lands, tenements or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of

action shall have accrued; * * * ." Appellants, on the other hand, contend that the limitation of section 25-205, R. S. 1943, as follows, is applicable: "An action upon a specialty, or any agreement, contract or promise in writing, or foreign judgment, can only be brought within five years."

We are constrained to hold that the limitation of the latter and not the former section is applicable here. In *Tibbetts v. Morris,* 42 Ia. 120, the court was called upon to determine the applicability of statutory provisions similar to those under consideration here. In the opinion in that case it was said: "This is not an action for the recovery of real property, but to recover for the use and occupation of real estate. * * * Where an independent action is instituted, simply for the purpose of recovering for the use and occupation, the action falls under the general statute of limitations, which, it is not denied, is five years."

This precise question has not previously been before this court but in other analogous situations it has been held that section 25-205, *supra,* applied. It applies in an action for breach of covenant of warranty in a deed (*Campbell v. Gallentine,* 115 Neb. 789, 215 N. W. 111), and for action on a covenant against encumbrances (*Bellamy v. Chambers,* 50 Neb. 146, 69 N. W. 770; *Johnson v. Hesser,* 61 Neb. 631, 85 N. W. 894).

It appears that there is another and convincing reason why the limitation of mortgages is not applicable when that statute is analyzed in the light of other limitation provisions of our statutes. Article 2, chapter 25 of the Code of Civil Procedure, appearing in R. S. 1943, pertaining to limitations of actions, contains 20 sections, 12 of which prescribe the limitation of particular actions. One provides the limitation of all actions not specified in the other 12. It would appear, therefore, that it was the legislative intent that a cause of action would not be controlled by any of the specific limitation sections unless it came clearly within the descriptive terms of the section. If this be true it cannot be contended that these causes of action fall within the descriptive language of section 25-202, *supra.* Appellees claim

only an "equitable lien" growing out of an agreement to pay for use and occupancy under a perpetual easement. This reasoning causes the limitation of section 25-205, *supra,* to be applicable.

By the terms of the indenture, separate causes of action came into being after the month of October of each year. It follows therefore that since action was not commenced until July 3, 1940, that all causes of action accruing more than five years before that date are barred. Plaintiffs have only their causes of action for the years from 1935 to 1939, inclusive.

It is contended substantially by appellees that they were unable to commence action until after the decree reforming the deed to the state of Nebraska. This contention is without merit. No authority is cited and we have found none, the purport and effect of which would justify a holding that the time involved in the correction of a mutual mistake made by the parties to that action would toll the statute of limitations as to the causes of action which are the subject of this action.

As to the sixth assignment it becomes apparent that the court erred in adjudging a lien against the real estate of defendants on the first four causes of action. On them the decree should have been in favor of defendants. On the fifth, sixth, seventh, eighth and ninth the decree in favor of plaintiffs was proper if the evidence was sufficient to sustain the finding of the decree.

Neither the decree nor the bill of exceptions makes clear what computation was used in arriving at the amounts due on these several causes of action but the briefs indicate that the court allowed $625 each for the fifth, sixth and seventh causes of action, $425 for the eighth and $400 for the ninth, with interest on each at the rate of six per cent per annum to date of the decree. Analysis supports this indication.

The weight of the evidence supports the conclusion that no hay was available for cutting and stacking in the years 1935, 1936 and 1937. The evidence supports a further conclusion that not more than 40 tons could have been cut and stacked in 1938 and not more than 45 in 1939.

Appellants adduced evidence in support of a contention that inability to cut and stack hay for the five years was occasioned by other causes than flow of water onto the servient estate contemplated by the indenture. This evidence was undoubtedly proper and if it had been of sufficient weight would have been *pro tanto* a defense. However, from an examination of the record we are convinced that plaintiffs have sustained the burden of proof on these five causes of action.

In the light of the determination of the other questions, the question of laches requires no separate consideration. We deem it to be without merit.

It is therefore the opinion of this court that the decree should be and is reversed and dismissed as to the first, second, third and fourth causes of action and affirmed as to the fifth, sixth, seventh, eighth and ninth. The cause is remanded to the district court with directions to enter decree in conformity herewith.

In case appellants shall fail to pay the amount found due on the said five causes of action with interest thereon within 20 days from the date of entry of the decree directed, satisfaction thereof shall be had in the manner and form as provided by the original decree.

AFFIRMED IN PART AND REVERSED IN PART, WITH DIRECTIONS.

CAROLINE BRATRSOVSKY, APPELLEE, V. REGINA NESTOR ET AL., APPELLANTS.

17 N. W. 2d 669

FILED FEBRUARY 16, 1945. No. 31851.

1. **Fraudulent Conveyances.** Property which is exempt by law from liability for the owner's debts is not susceptible of a fraudulent alienation.
2. ———. In an action by the vendee of exempt property to quiet his title as against judgment creditors of the vendor, fraud is an immaterial issue.

3. ———. A wife who, by conveyance from her husband, acquires property exempt as the homestead of the family, takes the title unencumbered by judgments against the husband, although the purpose of such conveyance may have been to defraud creditors of the latter.
4. ———. The question of fraudulent intent is to be considered as of the time when the conveyance is made, and with reference to the particular conveyance alleged to have been fraudulent as against creditors.
5. ———. When the alleged fraudulent conveyance involves the statutory homestead, the value of the property becomes an element to be determined, and that value is to be determined as of the time the conveyance is made.

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

Samuel L. Winters, for appellants.

Coufal & Shaw, contra.

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

SIMMONS, C. J.

In this action plaintiff seeks a decree quieting title to certain lands and an injunction against the defendants' satisfying a judgment by the sale of the lands. Defendants are judgment creditors of plaintiff's husband and the sheriffs of Saunders and Butler counties. The judgment creditors hereinafter will be referred to as the defendants. Defendants sought a decree that the land belonged to plaintiff's husband, and to have their judgment satisfied by its sale. The trial court found and decreed for the plaintiff. Defendants appeal. We affirm the judgment of the trial court.

This litigation arises as a result of the following factual situations.

In 1931 plaintiff's husband, as surety, signed a note in the principal amount of $700, payable to one John Kaveney. In 1936 the note was renewed and made payable to Nora Kaveney, devisee of John, and upon her death ownership to the note passed to defendants Nestor and Rice.

In 1915 plaintiff's husband acquired title by purchase to

80 acres of farm land in Butler county and 40 acres of land in Saunders county. The tracts were not contiguous. The land was then charged with a lien of $4,000, which in 1935 was represented by a mortgage in that principal amount, executed upon the Butler county land to secure the payment of that lien. The Butler county land has been the statutory homestead of the plaintiff at all times mentioned herein. The husband owned no other land. In 1930 and 1931 plaintiff's husband became indebted to one Cihacek in excess of $1,000 for money loaned, an obligation represented by a promissory note which was renewed from time to time. Interest became delinquent on these several obligations and taxes were accrued and delinquent on the land.

On June 9, 1938, the defendant Rice and her husband called upon the plaintiff's husband and demanded payment of the Kaveney obligation. He was unable to pay. The husband and plaintiff immediately called upon an attorney, related their difficulties and the Rice demand, and the husband was advised to give his property to his wife.

On June 10, 1938, plaintiff and her husband went to the attorney, executed a note for $1,500 to Cihacek, representing the amount of his debt, and also executed a mortgage to secure the same upon the two pieces of land. This mortgage was filed for record in Saunders county, June 10, 1938, and in Butler county, June 11, 1938. The husband on the same day executed and delivered a quitclaim deed of the land to his wife, in "consideration of $1.00, love and affection * * * Subject to two real estate mortgages now of record." This deed also was filed for record June 10, 1938, in Saunders county, and June 11, 1938, in Butler county.

Thereafter, the defendants Nestor and Rice placed the Kaveney note in judgment on November 8, 1940, caused an execution to be issued and levied against the Butler county land on October 30, 1943, and on November 4, 1943, caused execution to be issued and levied against the Saunders county land.

Plaintiff then, alleging ownership of the land, brought this action seeking a decree quieting title in her, and en-

joining the defendants from selling the land to satisfy their judgment. The two mortgagees intervened and sought a decree determining the validity and liens of their mortgages.

Defendants, by answer and cross-petition, sought a decree that the conveyance from plaintiff's husband to plaintiff was fraudulent; that the conveyance was colorable only; that the husband was the real owner of the property; that they be decreed to have a lien upon the land to satisfy their judgment; and that the property be sold by court order or under execution to satisfy the same. The defendants also claimed that the two mortgages were colorable and prayed that they be declared null and void.

The trial court made specific findings of fact and law. The correctness of only a part of the findings are challenged on this appeal. The trial court found that the two mortgages were valid and subsisting liens on the real estate; that the plaintiff and her husband had a statutory homestead in the Butler county land, and a $2,000 homestead exemption therein; that the mortgages and tax liens on the Butler county land on June 10, 1938, were in excess of $4,375, to which was to be added the homestead exemption of $2,000; and that the mortgage and tax liens on the Saunders county land were in excess of $1,600 on the same date. The above findings are not challenged on this appeal.

The trial court also found that the fair market value of the Butler county land on June 10, 1938, was $4,375, and that of the Saunders county land was $1,200; that the equity in the lands on June 10, 1938, was of no monetary value; that the conveyance did not operate to hinder, delay or defraud creditors; that the conveyance by the husband to the plaintiff in 1938 was not in fraud of the defendants or any other creditor; that the defendants suffered no injury by the conveyance; and that at the time the defendants' judgment was obtained, the husband, judgment debtor, did not have any interest in the land save the right of inheritance and the homestead right.

Defendants' contention is that the conveyance of June, 1938, was colorable only and that the husband was and is

the equitable owner of the property. There is no question but that the husband conveyed this property to his wife, on the advice of counsel that it was legal for him to do so, as "the best way to save a little bit of something for ourselves." There is likewise no question but that the conveyance was made because the defendants were pressing for the payment of the note. There also is no question but that the conveyance was made and intended to be an absolute and unconditional transfer of the title and beneficial interest. The parties testify that it was a gift; that there was no understanding that plaintiff was to hold the land for her husband, and no understanding that she would at any time convey it back to him or at his direction. The land was hers. There are no facts or circumstances shown that negative this testimony. Not to be overlooked in this connection is the fact that the instruments showing ownership in the wife were made a matter of public record immediately following their execution. The evidence shows that at the same time the deed was executed, plaintiff's husband also conveyed his farm stock, machinery, etc., to his wife. This bill of sale also was filed in the county clerk's office on June 11, 1938. Thereafter, the plaintiff and her husband continued to live on the farm and to work together to earn a living there. The bank account was in plaintiff's name, although the husband on occasion, for taxes, etc., checked against it; when they borrowed money at the bank, the wife signed first, the husband with her. The husband paid no rent to the wife, and none was asked. It was not even discussed. There likewise was no accounting made of the proceeds of the farm.

Defendants argue that this shows that the husband remained the owner of the property. We do not think so. The evidence shows that the husband and wife were living on the land, working together and using the products of the land and their labor for the expenses of the farm and for the normal home and family purposes. These acts are as consistent with ownership by the wife as ownership by the husband.

We agree with the conclusion of the trial court that the land belongs to the wife, unless there inheres in the conveyance a fatal defect because of the intent which the parties had when the conveyance was made, or because of its value being above the husband's exemptions.

The rule in this state has always been that "Property which is exempt by law from liability for the owner's debts is not susceptible of a fraudulent alienation." *Derby v. Weyrich,* 8 Neb. 174. In the body of that opinion, this court quoted with approval the following statement: " 'Property which is exempt by a positive statute from liability for the owner's debts is not susceptible of a fraudulent alienation, and consequently is not within the statute. The creditors cannot be said to be creditors as to that particular property so as to make a transfer of it matter of concern to them. The debtor as to that property may be considered as without creditors, and he has the right to dispose of it as though he had no creditors. * * * .' "

The rule further is that "In an action by the vendee of exempt property to quiet his title as against judgment creditors of the vendor, fraud is an immaterial issue." *Smith v. Neufeld,* 61 Neb. 699, 85 N. W. 898. Also, "A wife, who by mesne conveyance from her husband acquires property exempt as the homestead of the family, takes the title thereof unincumbered by judgments against the husband, although the purpose of such conveyance may have been to defraud creditors of the latter." *Mundt v. Hagedorn,* 49 Neb. 409, 68 N. W. 610.

These rules have been repeatedly followed. See *Bloedorn v. Jewell,* 34 Neb. 649, 52 N. W. 367; *Munson v. Carter,* 40 Neb. 417, 58 N. W. 931; *Roberts v. Robinson,* 49 Neb. 717, 68 N. W. 1035; *Bank of Bladen v. David,* 53 Neb. 608, 74 N. W. 42; and *Plummer, Perry & Co. v. Rohman,* 61 Neb. 61, 84 N. W. 600, wherein this court said: "The husband could, of course, convey his homestead to his wife, and it would be immaterial whether his purpose was or was not to defraud his creditors."

We come then to defendants' contention that the trial

court erred in determining the value of the land, and that its value was in excess of the homestead exemption and admitted liens. Plaintiff offered one witness as to value. Defendants offered the husband of defendant Rice as a witness as to value. The trial court refused to permit him to testify as to the value. An offer then was made and an objection sustained. It then was stipulated that defendant Nestor's husband would, if permitted, testify, as would and did Mr. Rice. Subsequently, the trial court reversed his ruling and considered the offered testimony as in evidence.

Plaintiff's witness was a disinterested expert. He was a farmer, secretary of the Butler County Farm Loan Association operating in Butler, Seward and Saunders counties in connection with Federal farm loans, and trained in the making of appraisals to determine value, productivity and quality of soils. He had made approximately 700 appraisals in Butler and surrounding counties. He had sold lands owned by the Federal Land Bank and others. He examined the two tracts involved as to the nature of the soil and productive quality. He testified that of the 80-acre tract, 15 acres were "very fine sandy loam," not very productive and should not be cultivated for crops; that there were 15 acres classed as silt loam, better than the fine sand loam, but quite sandy and not a good productive soil; that the remaining 50 acres were "very good, a high type fertility soil" and "quite productive." He also examined the 40 acres and found them to be largely "fine sandy loam," some blow sand and some gravel. This evidence as to quality was supported by a soil survey as made by the United States Department of Agriculture. The defendants offered no evidence questioning this testimony as to quality and productivity. This witness gave it as his opinion that as of June 10, 1938, the 40 acres of Saunders county land were of the fair market value of $30 per acre; that of the Butler county land, the 50 acres of best quality had a fair market value as of June 10, 1938, of $65 per acre, the 15 acres of intermediate quality land had a value of $40 per acre, and the 15 acres of poorer quality land $34 (sic) per acre, totaling $4,375.

Defendants' witness, husband of defendant Rice, testified as to foundation that he was a farmer, residing in Nance county; that his wife owned land a quarter of a mile from the plaintiff's "place" (without distinguishing which of the two pieces he referred to); that he had "been there," referring to "the Bratrsovsky farm"; that he knew the land right close to it and "that land" and his wife's land compared "probably about like and like"; and (accepting the offer as in evidence) that he knew the value of farm lands in that locality and that the fair market value of the plaintiff's land as of June, 1938, was $75 per acre. Mr. Nestor then was called as a witness and it was stipulated that he would testify as had Mr. Rice as to foundation and value. We reach the same conclusion as did the trial court as to the value of the land as of June, 1938.

The fact that 40 acres of this land were not contiguous to the 80 acres in which the homestead was claimed does not alter the situation. The mortgage to Cihacek covered both tracts and exceeded the value of the 40-acre tract. The plaintiff's husband would have had the right to have the 40 acres sold first to satisfy the lien thereon and removing so far as possible the lien against the 80 acres in which they had a homestead exemption. See *Smith v. Neufeld, supra; Meyer v. Platt,* 137 Neb. 714, 291 N. W. 86. The trial court so found in determining the full amount of the Cihacek mortgage to be a lien on the 40 acres. The defendants do not here complain of that finding.

Defendants called plaintiff as their witness and offered to prove by her that she had entered into a contract to sell the Butler county land at $125 per acre with possession to be given March 1, 1944. The trial court sustained an objection to this offer and defendants assign that as error. This offer and assignment do not relate to the 40 acres in Saunders county.

It is obvious that the sale price of this land in 1944, no other date being fixed in the offer, is too remote to have any controlling influence in the determination of the value of the land as of June, 1938. However, premising their argu-

ment on the contention that the transfer was colorable only and that the husband remained in fact the beneficial owner of the property, defendants argue that value of the land should be determined as of the time of the trial, and that accordingly, this evidence was admissible and controlling. Concluding, as we have, that the defendants' premise is not correct, we necessarily find that their contention based thereon is without merit.

We have held: "The question of fraudulent intent is to be considered as of the time when the conveyance is made, and with reference to the particular conveyance alleged to have been fraudulent as against creditors." *Tanner v. Frink,* 103 Neb. 817, 174 N. W. 417. See *Butke v. Nachschoen,* 133 Neb. 366, 275 N. W. 318; *Farmers Elevator Co. v. Peck,* 134 Neb. 305, 278 N. W. 499.

This being a homestead, whether or not it was susceptible of a fraudulent alienation depends upon its value. Obviously, value being an element, that value must be determined as of the time the conveyance was made. This court has many times followed that rule. Probably the case most directly in point is that of *Bank of Bladen v. David,* 53 Neb. 608, 74 N. W. 42. There a conveyance of the homestead was made from husband to wife. Plaintiff at the time of the conveyance was a creditor of the husband. After the conveyance to the wife, the land was abandoned as the homestead. Plaintiff put its debt in judgment and sought by creditor's bill to subject the land to payment of the judgment against the husband. Plaintiff contended that the consideration for the conveyance was not sufficient to sustain it against the claims of creditors. We held that even if that be so, it was not liable to the payment of plaintiff's judgment. We further held that the land being a homestead and, after deducting the indebtedness secured by mortgage thereon, its actual value at the time of its conveyance being less than $2,000, it was exempt from levy and sale for the satisfaction of the husband's debts, and that the creditor was not injured by the transfer and had no grievance even if the transfer was without consideration and made

to defraud creditors. The creditor further contended that when the land lost its homestead character, it became liable for the satisfaction of the judgment, i. e., in the wife's ownership, the land later acquired a value that was not exempt. We said that a sufficient answer to that contention was that the land was not then the property of the judgment debtor; that the conveyance was valid when made, it was not vitiated by the abandonment of the land as a homestead, it remained a valid conveyance which "Even Jove himself could not change".

The failure of the trial court to admit the offered evidence was not prejudicial to the defendants.

We conclude that the conveyance of this land to the plaintiff was legal and valid when made, and that the plaintiff is the owner of the land, and that it is not subject to sale to satisfy the judgment of the defendants.

The judgment of the trial court is affirmed.

AFFIRMED.

ANNA M. LONG, APPELLEE, V. RAILWAY MAIL ASSOCIATION, APPELLANT.

17 N. W. 2d 675

FILED FEBRUARY 16, 1945. No. 31651.

1. **Insurance.** An accident insurance policy, providing for the payment of a stipulated sum for accidental death where such death is "from violent and accidental means alone, resulting directly, independently and exclusively of all other causes," and providing also that "There shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect or bodily infirmity is a contributing cause of death," means that recovery may be had when the accident is the active, efficient and precipitating cause which set in motion the agencies that resulted in the death without the intervention of any other independent force, even though existing infirmities and diseases of the insured may be necessary conditions to the result.
2. ———: TRIAL. Where the evidence is conflicting as to whether an accident or existing disease caused the death of the insured

within the meaning of the foregoing rule, it is a question of fact to be determined by a jury.

3. ———. A contributing cause of death from a medical standpoint is not necessarily the active, efficient and precipitating cause from a legal standpoint.
4. **Evidence.** Whether the death of an insured resulting from a cerebral thrombosis and a coronary occlusion was caused by an infection growing out of cuts and lacerations received in an accident, or was attributable to existing disease and infirmity, is a proper subject of medical opinion.
5. **Witnesses:** APPEAL AND ERROR. Where an expert witness gives an opinion based upon facts established by the record upon a matter recognized as a proper subject of expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain a verdict.
6. **Insurance.** If a disease, while existing, be but a condition and an accident the active, efficient and precipitating cause, the accident will be deemed the cause of death within the meaning of the policy and the agencies set in motion by the accident will be treated as effects or passive allies of the accident in bringing about the death.
7. **Appeal and Error.** Where the court's instructions to the jury are erroneous and the evidence is insufficient to sustain a verdict under the instructions given, although it is sufficient to sustain a verdict under proper instructions, a new trial is required.
8. **Case Disapproved.** *Russell v. Glens Falls Indemnity Co.*, 134 Neb. 631, 279 N. W. 287, in so far as it conflicts with this opinion, is disapproved.

APPEAL from the district court for Douglas county: WILLIS G. SEARS, JUDGE. Opinion on motion for rehearing of case reported in 143 Neb. 949, 12 N. W. 2d 113. *Former opinion and judgment vacated and cause reversed for new trial.*

Rosewater, Mecham, Shackelford & Stoehr, for appellant.

George M. Tunison and *Edward F. Leary, contra.*

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

CARTER, J.

This is an action to recover death benefits on an accident insurance contract issued by the defendant to the deceased

husband of the plaintiff. From a verdict and judgment in favor of the plaintiff the defendant appeals.

The beneficiary certificate provides for the payment of disability benefits "If the member named in this Certificate shall receive bodily injuries during the continuance of this Certificate through external, violent and accidental means * * * which shall wholly and continuously disable him * * * ." It also provides that "If death shall result from such injuries alone * * * , the Association will pay $4,000 * * * to Anna M. Long, his wife." The certificate further provides that "The Certificate, the Charter, or Articles of Incorporation, the Constitution and Laws of this Association, * * * shall constitute a part of the Agreement * * * ." The constitution of the association provides in part: "Accidental death and accidental injuries are defined to be either sudden, violent death, or accidental injuries, from violent and accidental means alone, resulting directly, independently and exclusively of all other causes, and not the result of the member's own vicious, intemperate, or unlawful conduct, and producing visible marks of injury or violence on or within the body of the member. There shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect or bodily infirmity is a contributing cause of death or injury, * * * ."

On or about July 20, 1939, the insured went fishing in the Platte river and while wading barefooted in the handling of his fishing lines, he became entangled in some barbed wire and sustained severe cuts and lacerations on both legs below the knees. Insured returned home the next morning and was ordered to bed by his physician. A streptococcus infection rapidly developed. After several days' treatment the infection appeared to subside and the wounds began to heal. On the morning of August 10, 1939, the insured was able to call at his physician's office for the first time after the accident. During the afternoon of the same day insured was stricken with coronary and cerebral thrombosis and died on August 15, 1939. The evidence shows that insured's arteries of the brain and heart were in an

advanced stage of arteriosclerosis and that he was diabetic. An autopsy disclosed that the main artery on the right side of the brain was occluded by a blood clot and the coronary arteries of the heart completely occluded in three places. Scars resulting from previous occlusions were evident.

Plaintiff contends that the insured died of an arterial occlusion resulting from streptococcus infection received through the barbed wire lacerations. The defendant contends that the death did not result wholly from the infection from the lacerations on the legs and that disease, defect, or bodily infirmity was a contributing cause within the meaning of the insuring provisions of the insurance contract. This was the issue the parties sought to have determined.

It is not questioned that the insured suffered an accident while fishing in the Platte river and that as a result thereof he suffered cuts and lacerations on his legs below the knees. It cannot be questioned that an infection developed which required medical attention and that it was apparently under control when insured was stricken with paralysis on August 10, 1939.

Neither is it disputed in the evidence that the insured had been afflicted with diabetes for several years prior to the accident and that persons afflicted with this disease are more susceptible to infection than persons in normal health. The evidence further shows that the insured immediately prior to his death was suffering from arteriosclerosis in an advanced stage, that he had suffered a cerebral thrombosis and a coronary occlusion, that evidences existed of previous coronary occlusions and a loss of heart muscle consistency in the walls of one section of the heart. A definite necrotic condition existed in sections of both the heart and brain of the insured. Leukocytes were found in the areas of the brain, coronary arteries and legs of the insured at the points damaged as hereinbefore described. It is not disputed that the cuts and lacerations on the legs of the insured would not have resulted in his death except for the presence of the diseased conditions of insured's heart, brain

and arteries. Under such a situation, do the recited provisions of the insurance contract permit a recovery?

The factual question remaining, if any exists at all, is whether the infection of defendant's legs resulting from the cuts and lacerations could accelerate the existing diseased conditions and thereby bring about the death of the insured, and, if this be possible, whether such infection did in fact produce such a result? Before discussing this question it is necessary to determine whether the existing diseased conditions, admittedly present, of themselves preclude a recovery under the provisions of this policy.

While a contract of insurance should be construed and applied as written, any construction which would defeat the purposes of accident insurance must be avoided. Likewise, an interpretation which would have the effect of converting accident into life insurance would be just as destructive of the public good. A literal construction of the quoted language of the present insurance contract would almost without exception require a decision for the insurer for it is seldom, if ever, that one cause is solely responsible for death from a medical standpoint. There is and must be distinguishing features between legal and medical causes of death and the fact that an existing disease or condition may appear to have been the immediate cause of death in point of time does not necessarily mean that it was the primary proximate or precipitating cause within the meaning of the insurance contract. The question to be decided is, consequently, what was the cause of death from the legal standpoint; the cause which the parties contemplated when the insurance contract was entered into?

There is little doubt that the insured would not have died from the effects of the cuts and lacerations on his legs but for the existing diseased condition of his brain, heart and coronary arteries. All of the expert medical testimony is to that effect. Before the accident he had the general appearance of a healthy man of his age, did the things which a healthy man would do and apparently had no knowledge of any physical disability other than his diabetic condition,

although a careful physical examination would probably have revealed it. He had carried the insurance since 1918 and the insurer had accepted the premiums, knowing that he was reaching an age when in the normal course of events arteriosclerosis and other disabilities usual to age would be expected to develop. Certainly, it was not within the contemplation of the contracting parties that the mere existence of disease or conditions which often develop in men of his age should invalidate the terms of the contract. We quite agree that if the evidence is conclusive that the existing disease or condition was the sole cause of death, or that the purported accident was the result of the existing disease or condition, no recovery can be had. If the disease or condition grows out of the accident and results in death or disability to the insured, liability exists because the accident and not the disease or condition is the precipitating and motivating cause of the death. But where, as here, it is difficult to determine whether the accident or preexisting disease or condition was the motivating or precipitating cause of death, it necessarily becomes a question of fact for a jury. We are obliged to say therefore that the existence of disease or conditions incompatible with good health do not of themselves defeat a recovery under the language of the contract before us.

It must be conceded at the outset that the insurance company produced the evidence of medical experts which, if believed, would sustain a finding of nonliability. Testimony was adduced to the effect that infections have nothing to do with arteriosclerosis or the development of arterial thrombosis or coronary occlusions. Of course, if this evidence was undisputed, or believed by the jury in case of conflict, the insurer would be entitled to judgment.

The record shows, however, that members of the medical profession as well as the text writers on the subject, are not in agreement that infections can play no part in the progressive development of such existing diseases and conditions. One of the insurer's expert witnesses concedes this difference of opinion and authority. Dr. R. W. Bliss

testified that but for the infection of the legs, the demise of the insured would not have occurred when it did. The effect of his testimony is that the infection accelerated the arteriosclerosis and the resulting thrombosis and occlusion. Dr. F. W. Niehaus also testified that infection could accelerate the progress of arteriosclerosis and the coronary conditions resulting in a coronary occlusion. The expert evidence on this question is clearly in conflict and, paradoxical as it may seem, it becomes a question for the jury to decide.

The insurance company contends that the evidence is insufficient to sustain a finding for the plaintiff because there is a want of evidence to show that the injury to the legs of the insured and the infection resulting therefrom actually caused the death of the insured within the hereinbefore cited provisions of the policy. A discussion of this question requires a review of the evidence adduced on that point.

In this connection, Dr. Niehaus testified: "Well, this man had hardening of the arteries and undoubtedly hastened by his diabetes; and he had an infection of his legs, and clots were formed in the coronary arteries, and I am sure that this formation of these clots were very definitely hastened by the presence of this infection. * * * Infection would increase the cardiac output; would increase the load on the heart, and we would certainly not subject those patients to infection if there was any way out of it. * * * In my opinion, the infection of his legs was the precipitating (cause) of the thrombosis of the coronary arteries and cerebral vessels." In addition to the foregoing Dr. Niehaus testified that the insured suffered a streptococcus infection in his legs following his accident in the river and that the infection invaded the blood stream.

Dr. Bliss testified in part as follows: "But infection in any part of the body, in any man, particularly if that man is diabetic and if he has arteriosclerosis, if his vessels are not good, any infection would so lower the resistance as to increase the severity of any diabetic type, and this in turn increases very definitely the atheromatous process in the

vessels, in the vessels of the brain or anywhere. * * * I would say it easily may have been a very definite factor in this process, in this infection. It may very easily have been, in my opinion, a factor to which I have testified. * * * It is my opinion that his infection - - - it is highly probable that if this man had not been hurt, had not been scratched, had not had a secondary infection, that even although he had diabetes, even though he was arterially sclerotic, it is my opinion, it is highly probable that his death would not have occurred at the time it did, but for that infection; that is my feeling."

Dr. Charles Baker testified in part as follows: "Well, it is my opinion that had this accident not have occurred, he might have lived longer. * * * Ordinarily infections increase the load on the heart. * * * Inflammation, in my opinion, can speed up atherosclerosis. * * * Well, the man had several things that caused his death. The part that the infection played in this at the time he died, I think, was minor, but previous to that the infection may have played its role previous to his death."

We think this evidence is sufficient to go to the jury on the question whether the insured's death was caused by the accident within the meaning of the insurance contract. Certainly, the positive evidence of Dr. Niehaus that the infection arising as a result of the accident was the precipitating cause of death, generally though not positively supported by the testimony of Drs. Bliss and Baker, raises a fact question which the jury, and not this court, must determine.

We do not think that the expert evidence, to the effect that the death of the insured would not have occurred at the time it did but for the infection resulting from the accident, is a controlling factor, although it seems to be in some jurisdictions. See *Fidelity & Casualty Co. v. Meyer*, 106 Ark. 91, 152 S. W. 995; *Benefit Assn. of Ry. Employees v. Armbruster*, 224 Ala. 302, 140 So. 356. The accident must be the active, efficient cause which sets in motion the agencies that result in death without the intervention of

any other independent force in order to be regarded as sole cause of death within the meaning of the insurance contract. The fact that the physical infirmity of the victim may be a necessary condition to the result does not deprive the injury of its distinction as the sole producing cause. In such cases existing disease and conditions do not rise to the dignity of concurring causes, but are more accurately defined as the passive allies of the agencies set in motion by the accidental injury. *Driskell v. United States Health & Accident Ins. Co.*, 117 Mo. App. 362, 93 S. W. 880; *Equitable Life Assurance Society v. Gratiot*, 45 Wyo. 1, 14 Pac. 2d 438; *Wheeler v. Fidelity & Casualty Co.*, 298 Mo. 619, 251 S. W. 924; *Wolfangel v. Prudential Ins. Co.*, 209 Minn. 439, 296 N. W. 576.

In *Continental Casualty Co. v. Lloyd*, 165 Ind. 52, 73 N. E. 824, appears this pertinent language: "It (the jury) had the right to find that the accidental fall was the cause that put his life in jeopardy, because it incited the fatal energy of the tumor, which was at least dormant, and would have remained so for an indefinite period, and, perhaps, until death from some other cause would have supervened. The tumor had impaired the resisting strength of the artery, but had not effected immediate danger to life. It was proper under the evidence for the jury to view the impairment as a condition, and not as a cause, and to find that the fall was the originating, efficient, direct and proximate cause of death; that is, that the fall set in motion a force that progressed upon present existing conditions in natural, usual sequence to effect the fatal result. * * * Who knows that the artery would not have been ruptured by the fall if it had been in a normal condition? Or who can tell that the insured would not have died from some other cause if the fall had not animated and accelerated the energy of the tumor. * * * From these considerations it seems clear that the jury, in its search for the proximate cause of death, had the right to conclude that even though the fall would not have produced death but for the impaired artery, the tumor at most was a remote, and not a proximate, efficient

cause." See, also, *Prudential Ins. Co. of America v. Carlson,* 126 Fed. 2d 607; *Railway Mail Assn. v. Schrader,* 107 Ind. App. 235, 19 N. E. 2d 887.

The evidence produced by the plaintiff is to the effect that the diabetic condition did not contribute to the insured's death in any way other than that it made his system more suspectible to infection. The sclerotic condition of the arteries leading to the brain and those supplying the muscles of the heart were not diseases or infirmities in the ordinary speech of man,—they were conditions more or less common to aging persons which weaken resistance and cause such persons to be more susceptible to injury. They ordinarily do not evidence impending death, in fact the person involved is usually totally oblivious of their existence. They are ordinarily more or less dormant and often incapable of becoming seriously harmful except through the intervention of some other causative force. There is evidence that such was the case in the cause at bar. In *Silverstein v. Metropolitan Life Ins. Co.,* 254 N. Y. 81, 171 N. E. 914, the court aptly said: "The infinite interplay of causes makes it impossible to segregate any single cause as operative at any time and place to the exclusion of all others, if cause is to be viewed as a concept of science or philosophy * * * . The courts have set their faces against a view so doctrinaire, an estimate of intention so headed toward futility. 'We are to follow the chain of causation so far, and so far only, as the parties meant that we should follow it. "The causes within their contemplation are the only causes that concern us." ' "

We cannot overlook the difference between the motivating, precipitating and efficient cause on the one hand and a condition or remote cause on the other, as recognized in law. The cause of death from a medical standpoint is not necessarily a motivating, precipitating or efficient cause from a legal standpoint. Where the evidence thereon is in conflict, the question is for the jury. *Continental Casualty Co. v. Lloyd, supra; Western Travelers' Accident Assn. v. Munson,* 73 Neb. 858, 103 N. W. 688; *Sweeney v. Midwest*

Life Ins. Co., 129 Neb. 521, 262 N. W. 47. These matters are proper subjects of medical opinion. *United States Casualty Co. v. Thrush*, 21 Ohio App. 129, 152 N. E. 796. An examination of the latter opinion will show facts very similar to the one at bar, which were submitted to the jury largely on the conflicting testimony of medical experts.

The opinion of a medical expert as to a cause of death is admissible on the theory that the subject matter is not one of common knowledge or experience and that such expert, by training and experience, is better acquainted therewith and more competent to reach an intelligent conclusion. *Horst v. Lewis*, 71 Neb. 370, 103 N. W. 460; *City of South Omaha v. Sutliffe*, 72 Neb. 746, 101 N. W. 997. Where such an opinion is based upon facts supported by the evidence, it is sufficient to take the case to the jury. *McNaught v. New York Life Ins. Co.*, 143 Neb. 220, 12 N. W. 2d 108. While it is true that the medical experts do not agree on the cause of death, it is for the jury and not the court to determine from all the evidence, including that of the experts, under proper instructions, whether the accident was the cause of death within the meaning of the policy. *Lickleider v. Iowa State Traveling Men's Assn.*, 184 Ia. 423, 166 N. W. 363.

We think our former decisions generally support the views herein expressed. In *Modern Woodmen Accident Assn. v. Shryock*, 54 Neb. 250, 74 N. W. 607, we said: "Whether the injury in this case was the proximate cause of the death of Mr. Shryock was purely a question of fact, for it involved the determination upon evidence of the relations between alleged causes and effects and nothing more. It cannot be said that the evidence was so clearly in support of one theory that no reasonable man, fairly exercising his judgment, could have refused his assent thereto." This correctly states the rule if the term "proximate cause" is treated as the legal cause and not the medical or scientific cause in accordance with the discussion we have heretofore had on those questions.

In *Ward v. Aetna Life Ins. Co.*, 82 Neb. 499, 118 N. W.

70, we said: "Great stress is placed by defendant upon the use of the word 'solely'; and it is urged that the effect of its use is to preclude a recovery if any other disorder manifests itself and causes or contributes to the cause of death. If the word 'solely' is left out of the sentence, the logical meaning of the clause is not changed. It is still required that death should result from the injury, and this excludes the idea of other independent or cooperating causes. Starting with a bodily injury all morbid changes in the exercise of vital functions or the texture of the bodily organs which result from or are induced by such injury should be regarded as the effect thereof, and not as independent causes. When death results from any such morbid change so resulting from or induced by such injury, the injury, and not the morbid change induced by it, is the cause of death. Beginning with a primary cause, conditions induced by such cause are effects thereof, and every condition so induced must be considered in relation therteo as an effect, and not as a cause."

In *Moon v. Order of United Commercial Travelers*, 96 Neb. 65, 146 N. W. 1037, we said: "It is also contended by the defendant that the death was in consequence of disease, and that it was caused wholly or in part by bodily infirmity, and that the injury received was not the proximate, sole and only cause of the death. This would seem to bring us to the question whether the beneficiary of an elderly person who dies because of the injury received through an accident can recover anything if the organs of the body are affected by the age of the assured. When the membership is created it must be known that the member will grow old if he lives, and that the organs of his body, including the heart, lungs and kidneys, are likely to be affected in time, and that the assured will be unable to resist in his old age the force of an accident which he might have successfully resisted at an earlier period. * * * For anything that appears in the evidence, the deceased might have lived many years but for the accident. We are of the opinion that the fall was the proximate cause of his death, and that the in-

jury sustained is within the conditions of membership as set out in the certificate."

We think the correct rule is: An accident insurance policy, providing for the payment of stipulated sums for accidental injury or death of the assured, where such injury or death is "from violent and accidental means alone, resulting directly, independently and exclusively of all other causes" and also providing that "There shall be no liability whatever unless death or disability results wholly from the injury, nor when any disease, defect or bodily infirmity is a contributing cause of death or injury," means that recovery may be had when the accident is the active, efficient and precipitating cause which set in motion the agencies which resulted in the injury or death without the intervention of any other independent force, even though existing infirmities of the insured may be necessary conditions to the result. When the cause of death involves the determination upon conflicting evidence of the relations between alleged causes and effects, it becomes a question of fact for a jury.

The defendant asserts that instructions two and three given by the court were erroneous. We think they were. The court in these instructions told the jury that "If further, prior physical conditions or disease with which he was afflicted in any manner contributed to the sum total of the causes that led to his death" and "The burden of establishing that the death was caused solely and entirely without the help of other prior causes by the accident itself, without in any manner hastened by other prior diseased conditions" was on the plaintiff. The quoted portions of these instructions do not correctly state the rule when the language used is given its ordinary and usual meaning. Of course, a parallel, concurrent cause contributing to death or injury which is disconnected from the injury sustained by accident will prevent recovery under the policy in suit. But the fact that a disease or condition may contribute to death or injury from the medical standpoint will not exclude recovery where the accident was the moving, exciting or precipitating cause. Legally, the latter is the cause of

the death or injury, the former being a passive ally of the latter in bringing about the final result. The instructions are erroneous in not clearly stating these distinctions to the jury.

The evidence will not support a verdict for the plaintiff under the instructions given. All of the evidence adduced as to the cause of death is to the effect that death would not have resulted from the accident but for the infirmities with which the insured was afflicted at the time the accident occurred. The instructions were to the effect that if such was found to be the fact no recovery could be had. Clearly, the verdict is contrary to the evidence when viewed in the light of the instructions given by the court. There being no evidence to sustain the verdict under the instructions given, it must be presumed that the verdict was the result of passion and prejudice. This has the effect of vitiating the verdict in its entirety and requires a new trial of the case under proper instructions. *Hawe v. Higgins*, 89 Neb. 575, 131 N. W. 937.

The present case seems to have been submitted to the jury largely on the rules announced in *Russell v. Glens Falls Indemnity Co.*, 134 Neb. 631, 279 N. W. 287. We do not think this case accurately announces the applicable rule. The opinion in that case fails to distinguish between an existing disease which is independent and co-operative in bringing about the death or disability and with a disease or infirmity which is activated and precipitated by the accident itself, even though without such existing infirmity or disease the death or disability would not have occurred. To the extent that it conflicts with this opinion on that point, the opinion in the *Russell* case is disapproved.

We conclude that the verdict and judgment must be set aside because of errors in the instructions. While the instructions were more favorable to the defendant than defendant was entitled to, the evidence will not support the verdict on the theory on which it was submitted. The judgment is therefore reversed and the cause remanded for a new trial in accordance with the rules announced herein.

Our former opinion in this case, appearing in 143 Neb. 949, 12 N. W. 2d 113, is vacated and set aside.

REVERSED.

WENKE, J., dissenting.

I disagree with the opinion now adopted by the majority of the court for reasons sufficiently stated in the original opinion, reported in 143 Neb. 949, 12 N. W. 2d 113, and for the following additional reason:

In her petition appellee alleged that, "The death of said Chester R. Long resulted wholly and alone from the sudden, violent and accidental injuries aforesaid and directly and independently of all other causes resulted in his death."

In accordance therewith the trial court instructed as follows:

"Before the plaintiff can recover in this suit, she must establish by a preponderance of the evidence relating thereto that Mr. Long's death was occasioned and brought about by the barbed wire lacerations referred to and by physical changes that came to Mr. Long's body solely from the barbed wire lacerations and those alone."

"The burden of establishing that the death was caused solely and entirely without the help of other prior causes by the accident itself, without in any manner hastened by other prior diseased conditions, by a preponderance of the evidence relating thereto, is on the plaintiff."

The majority opinion states: "The evidence will not support a verdict for the plaintiff under the instructions given."

In this situation the rule announced in *Bohmont v. Moore,* 141 Neb. 91, 2 N. W. 2d 599, is applicable and the parties are bound thereby. This rule is stated as follows: " * * * where a certain theory on any issue is relied upon by the parties to the trial as the proper one, it will be adhered to on appeal whether it is correct or not. *Behle v. Loup River Public Power District,* 138 Neb. 566, 293 N. W. 413; *U. S. Tire Dealers Mutual Corporation v. Laune,* 139 Neb. 26, 296 N. W. 333."

MESSMORE, J., concurs in this dissent.

STATE EX REL. NELSON ET AL., RELATORS AND APPELLEES, V. DAN B. BUTLER, MAYOR, ET AL., RESPONDENTS AND APPELLANTS: IMPLEADED WITH DON B. WOODYARD ET AL., RESPONDENTS AND APPELLANTS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS UNION, LOCAL UNION NO. B-763, INTERVENER AND APPELLEE, RUTH K. JOOS ET AL., INTERVENERS AND APPELLANTS, CLARENCE J. CALABRIA, INTERVENER AND APPELLANT.

17 N. W. 2d 683

FILED FEBRUARY 16, 1945. Nos. 31815, 31822, 31827, 31842.

1. **Statutes.** It is the general rule that initiative and referendum provisions are applicable only to acts which are legislative in character, and are not applicable to those dealing with executive or administrative matters.
2. **Municipal Corporations.** The crucial test for determining that which is legislative and that which is executive or administrative is whether the resolution or ordinance of a city council is one making a law or one executing a law already in existence.
3. **Eminent Domain.** Eminent domain is the right or power to take private property for public use. It is a sovereign power belonging to the state which may be exercised either directly by the legislature or through the medium of municipalities or other appropriate agencies in the public interest, but it is always subject to control and regulation by the state and is a matter of statewide concern.
4. ———. The power of eminent domain may be delegated by the legislature, but because it is a sovereign power the legislature cannot divest itself of the power or deprive itself of the right to repossess or reclaim its primary prerogative to exercise the power as it sees fit within the limitations contained in the Constitution.
5. **Municipal Corporations.** When the legislature has enacted a statute delegating the power of eminent domain to municipal corporations, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield thereto, except in so far as the statute itself preserves for cities of a class like or similar powers already delegated to them by the legislature and adopted as a part of their home rule charters.
6. **Eminent Domain.** Since the power of eminent domain is an attribute of sovereignty and inherent in the state, only those agencies to whom the legislature has delegated the power can exercise the right and it must be exercised only on the occasion, in the mode or manner, and by the agency prescribed by the legislature.

7. ———. The power to exercise the right of eminent domain must be exercised or delegated by the legislature, and if it is delegated to a municipal corporation upon a contingency that the existent statute shall become operative when the governing body of the city shall determine by resolution or otherwise to exercise the power, then such a resolution, if adopted, is executive or administrative in character and not subject to referendum provisions of the city's home rule charter.
8. **Mandamus.** Since mandamus is no longer a prerogative writ, section 25-328, R. S. 1943, justifies intervention in mandamus cases by persons having an interest in the subject matter in litigation of such a direct and immediate character that they will gain or lose by the direct operation and effect of the judgment.
9. **Parties.** Ordinarily, an intervener must take the suit as he finds it, is bound by the previous proceedings in the case, and cannot complain of the form of the action or of informalities or defects in the proceedings between the original parties.
10. ———. An intervener who is not an indispensable party cannot change the position of the original parties or change the nature and form of the action or the issues presented therein.
11. **Constitutional Law.** Constitutional questions will not be decided in a mandamus proceeding unless they are necessary to a determination of the case, and the protection of some substantial right, nor will they be decided before the time the statute becomes operative to affect any rights of the parties who question its constitutionality and a proper case under the statute is presented.

APPEAL from the district court for Douglas county: FRANCIS M. DINEEN, JUDGE. *Affirmed in part and in part reversed, with directions.*

Harold C. Linahan, G. H. Seig, Edward F. Fogarty and *Edward Sklenicka,* for appellants Butler *et al.*

Kennedy, Holland, Delacy & Svoboda, Crofoot, Fraser, Connolly & Stryker, W. W. Wenstrand, David D. Weinberg, Louis T. Carnazzo, Leon, White & Lipp, George B. Boland, Paul Garrotto, Rudolph Tesar, Ellick, Fitzgerald & Smith, Monsky, Grodinsky, Marer & Cohen, Gross & Crawford and *Frank C. Heinisch, contra.*

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

CHAPPELL, J.

This is a mandamus action. Relators are legal voters, qualified electors, and signers of a referendum petition. They filed an application in the district court for Douglas county, Nebraska, on behalf of themselves and all others similarly situated, praying for a writ of mandamus to require the city council of Omaha, Nebraska, to repeal an alleged legislative resolution adopted by it on September 21, 1943, or to check referendum petitions filed September 28, 1943, and if found sufficient submit the same to referendum of the electorate as provided in the home rule charter (R. S. 1943, secs. 14-210 to 14-212). They also prayed for ancillary injunctive relief until after the election. The individual members of the city council and the Peoples Power Commission were made respondents. International Brotherhood of Electrical Workers Union, Local Union No. B-763, for itself and on behalf of all its members, employees of Nebraska Power Company, intervened praying for similar relief. Certain other legal voters and qualified electors, who are preferred stockholders of the Nebraska Power Company, also intervened for themselves and all others similarly situated, praying for like relief. They later filed a supplement to their petition in intervention in which they recognize the rule of law that an intervener must take the case as he finds it, but challenge the constitutionality of the Peoples Power Commission law (sections 14-1501 to 14-1523, R. S. 1943), if it should be determined by the court that its constitutionality may be properly challenged in this action. Clarence J. Calabria, a qualified elector and taxpayer, intervened for himself and on behalf of all others similarly situated, praying that the Peoples Power Commission law, or certain sections thereof, be declared unconstitutional, and that a writ of mandamus be denied.

Appropriate answers and replies were filed and when the issues were complete the case proceeded to trial. The various pleadings were voluminous and we do not deem it necessary to recite them. Thereafter the trial court entered its decree finding generally for relators, also for the interven-

ing Union and preferred stockholders in so far as they prayed for the same relief as relators, and awarded a peremptory writ of mandamus. However, it was found by the trial court that the questioned constitutionality of the Peoples Power Commission law was not germane to the issues, or an issue which could properly be decided in the case, and dismissed the supplemental petition in intervention of the preferred stockholders and Calabria's petition in intervention which raised that question. The decree also enjoined the city and the Peoples Power Commission from proceeding further until an election was held as ordered or until this cause was finally determined. Motions for new trial were overruled; whereupon respondents appealed separately, and the interveners, preferred stockholders and Calabria, cross-appealed. By stipulation of the parties there was filed in this court but one full transcript and bill of exceptions. The appeals and cross-appeals were argued and submitted together and this opinion disposes of all of them.

Numerous lengthy briefs were filed by the parties. Many interesting and important legal questions are ably presented therein. However, under the issues presented, we find it necessary to discuss but two of them. The first is, whether the resolution of the city council is legislative in character and subject to referendum; and the second, whether the constitutional questions raised only by interveners are germane to the issues and presented in such manner as will properly permit this court to decide them in this action. We find that the trial court erroneously decided the first question, but correctly decided the second.

Although we are of the opinion that only questions of law are presented for decision, we deem it necessary for clarity to first recite certain pertinent facts about which there is no dispute. The legislature of 1943 passed an eminent domain statute, commonly known as L. B. 204 (R. S. 1943, secs. 14-1501 to 14-1523), but legislatively named the "Peoples Power Commission Law." The governing body of the metropolitan city, defined in the act as the city council, after the statute could become operative as a law, adopt-

ed the resolution involved. The resolution itself recites in substance the act in so far as it is relevant, and we do not deem it necessary to set forth its provisions.

The resolution provided as follows:

"City of Omaha

"Council Chamber

"Omaha, Nebr., September 14, 1943

"Whereas, the legislature of the State of Nebraska at its regular session held in the year 1943 enacted a bill known as Legislative Bill Number 204, and the Governor of the State approved the same on May the 26th, 1943; and

"Whereas, said Bill became operative as law of this State on the 29th day of August, 1943; and

"Whereas, said Legislative Bill provides for, creates and tenders to each city of the metropolitan class within the State of Nebraska a power commission when it has been determined by the Governing Body of the metropolitan city, by resolution or otherwise, that an electric plant or an electric light and power plant located or operating within or partly within and partly without such city (if the main part of such plant be within such city), should be erected, constructed, purchased or acquired and appropriated by an exercise of the power of eminent domain, and the mayor of such city, with the approval of the governing body of such city, shall appoint six persons who, with the mayor ex officio, shall be members of such power commission; and

"Whereas, the City of Omaha, is a city of the metropolitan class within the State of Nebraska; and

"Whereas, said Legislative Bill Number 204 in Section 13 thereof provides the mode of procedure in event an electric plant or an electric light and power plant shall be acquired by an exercise of the power of eminent domain and the provisions of said section requires that before any such plant can be acquired or appropriated by an exercise of the power of eminent domain the question and proposition shall first be submitted to the electors of such city and approved by them; and

"Whereas, said Legislative Bill Number 204 in Section

16 thereof requires that before any such electric light plant or electric light power plant be acquired by purchase at a negotiated price, the price, together with the terms and conditions of the contract of purchase shall be submitted to the electors of such city and approved by them;

"Now, Therefore, Be It Resolved by the City Council of the City of Omaha that it is hereby determined that an electric light and power plant located and operating within or partly within and partly without such city (if the main part thereof be within such city) should be erected, constructed, purchased or acquired and appropriated by an exercise of the power of eminent domain.

"(Signed) Richard W. Jepsen
"By Dan B. Butler
"Adopted September 21, 1943
"Dan B. Butler, Mayor and President, City Council.
"Attest: M. J. Dineen, Jr.,
"City Clerk
"(City Seal)"

Following this action the Mayor, with the approval of the governing body of the city, appointed six persons to serve, with the Mayor ex officio, as members of the "Peoples Power Commission of Omaha, Nebraska." The Governor also appointed two others to serve as members thereof from contiguous counties in the metropolitan area. They took oath, gave bond, organized, elected a chairman, and are ready to proceed as the "People's Power Commission."

On September 28, 1943, there were filed and presented to the city council referendum petitions, which for the purposes of this case, it is conceded contained sufficient legal signatures, protesting against the passing of the resolution, petitioning its reconsideration and repeal, or if it be not repealed that the city council should proceed to submit the resolution to the voters of the city of Omaha at a special election called for that purpose or at a general city election as provided by the home rule charter. At or about the same time appropriate demand was made upon the city council in writing and otherwise for such action, all of

which the council refused to do or perform for the reason, among others, that the resolution was executive or administrative in character. This mandamus suit resulted.

It will be well at the outset to call attention to the fact that the resolution of the city council is the measure sought to be referred to the electorate, and the Peoples Power Commission Law is not directly but incidentally involved for the sole purpose of giving construction to the resolution. We find that the answer to the question of whether the resolution is subject to referendum depends entirely upon whether it is legislative or only executive and administrative in character. In this connection there is an applicable rule of law that referendum provisions apply only to legislative matters and not to those which are executive or administrative. In *Read v. City of Scottsbluff*, 139 Neb. 418, 297 N. W. 669, this court approved a statement appearing in 122 A. L. R. 769, Annotation, that, "It is the general rule that initiative and referendum provisions are applicable only to acts which are legislative in character, and are not applicable to those dealing with administrative or executive matters." See, also, *Schroeder v. Zehrung*, 108 Neb. 573, 188 N. W. 237. Accurately speaking, an ordinance is the proper designation for legislative action by a city council, but the form or name, whether called a resolution, or an ordinance, does not change the essential nature of the real step taken. If legislative, the law ordinarily contemplates that the referendum may be invoked. However, it is usually held applicable to all ordinances and resolutions which constitute an exercise of legislative power as distinguished from mere executive or administrative action. 1 McQuillin, Municipal Corporations (2d ed.) sec. 366, p. 1000; 43 C. J., sec. 952, p. 585; 37 Am. Jur., sec. 209, p. 845.

Section 25-2156, R. S. 1943, provides that, "The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. * * * ." It is obvious therefore that if the action taken by the resolution was not legislative

in character then the law does not specifically enjoin a duty upon the council to submit it to referendum of the electorate, and a writ of mandamus cannot be awarded.

An examination of the Peoples Power Commission law discloses that it is a complete legislative act, of state-wide concern. Its primary purpose is to provide a means, mode and manner of procedure whereby cities of the metropolitan class and certain areas contiguous thereto may erect, construct, purchase, or acquire and appropriate existing public utility properties for public use by eminent domain. As an existent general law it tenders or makes available enlarged powers of eminent domain to metropolitan cities if the governing body thereof decides by resolution or otherwise to undertake the use of such delegated powers, which are to be exercised without any restriction or limitation under the city charter of home rule cities. However, the act specifically provides that it is not exclusive of other like or similar powers and methods or manner of procedure already conferred by law.

As was recently stated in *May v. City of Kearney, ante*, p. 475, 17 N. W. 2d 448, "A discussion of this subject necessitates an understanding of the nature of the power of eminent domain. It is an attribute of sovereignty, inherent in a sovereign state whether or not reference is made to it in the Constitution of the state. In other words, the power of a sovereign state to take property, or to authorize its taking for a public use, rests upon necessity because there can be no effective government without it. The power exists independent of the Constitution, the provision of the Constitution with reference thereto being a limitation on the exercise of the power, and in no sense of the words a grant of power. * * * The language of the Constitution presupposes the existence of the power outside the Constitution and simply limits the right to use it. No procedure is prescribed in the Constitution for its exercise, but it imposes certain limits to which the state itself must conform. Within these limits the state, acting through the department or agency authorized to exert the legislative power,

may proceed at will, and the extent, method and necessity of exercising the power to take private property for public use may not be interfered with by either of the other departments of government. *Garrison v. City of New York*, 88 U. S. 196." It must be recognized that the power of eminent domain may be delegated by the legislature but because it is a sovereign power the legislature cannot divest itself of the power or deprive itself of the right to repossess or reclaim its primary prerogative to exercise the power as it sees fit within the limitations contained in the Constitution. 1 Lewis, Eminent Domain (3d ed.) sec. 374, p. 683.

In *Nagle v. City of Grand Island*, 144 Neb. 67, 12 N. W. 2d 540, it was said: "Eminent domain is the right or power to take private property for a public use. It belongs to the state and it may be exercised either directly by the legislature or through the medium of corporate bodies, which includes municipalities, * * * to whom it sees fit to delegate such power in the public's interest. While this power may be delegated, it belongs to the state and subject to its control and regulation and is a matter of state (wide) concern." In effect that case holds that when the legislature has enacted a statute delegating the power of eminent domain to municipal corporations, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield thereto. Logically to make the rule applicable to the case at bar we add the words, "except in so far as the statute itself preserves for cities of a class like or similar powers already delegated to them by the legislature and adopted as a part of their home rule charters."

It has also been held that since the power of eminent domain is an attribute of sovereignty and inherent in the state, only those agencies to whom the legislature has delegated the power can exercise such right and it must be exercised only on the occasion, in the mode or manner, and by the agency prescribed by the legislature. *Nelson v. Harlan County*, 2 Neb. (Unof.) 537, 89 N. W. 458; *Georgen v. De-*

partment of Public Works, 123 Neb. 648, 243 N. W. 886; *St. Louis Connecting R. Co. v. Blumberg,* 325 Ill. 387, 156 N. E. 298; *Cincinnati v. Vester,* 281 U. S. 439, 50 S. Ct. 360. In *In re Appraisement of Omaha Gas Plant,* 102 Neb. 782, 169 N. W. 725, it was said: "The power to exercise the right of eminent domain must be exercised by, or conferred by, the legislature, and when it is granted to a municipal corporation, * * * that body must determine how far it will make use of the power thus conferred. This is an *executive or administrative act.*" (Italics supplied.)

In *Read v. City of Scottsbluff, supra,* this court adopted and approved a rule stated in *Monahan v. Funk,* 137 Or. 580, 3 Pac. 2d 778 that, "The crucial test, for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or one executing a law already in existence; * * * ." Measured by this test the resolution involved could not be legislative in character, otherwise it would improperly delegate the legislative powers of the legislature to the city council of the city of Omaha. A like situation but from a different approach was presented in *Lennox v. Housing Authority of City of Omaha,* 137 Neb. 582, 290 N. W. 451, wherein it was said: "The contention is advanced that the legislation delegates legislative powers to the city council of the city of Omaha and to the Housing Authority of the city of Omaha, contrary to section 1, art. II, and section 1, art. III of the Nebraska Constitution. The part of the legislation to which plaintiffs specifically refer is that part of section 3, ch. 29, Laws 1935, which says in part: 'When it has been determined by the governing body of any metropolitan city, by ordinance in the exercise of its discretion, that it is expedient to create a housing authority, the mayor of such city, with the approval of the governing body of the city shall appoint five persons who shall constitute the housing authority.' This does not delegate legislative authority to the governing body of the city. It merely provides the contingency upon the happening of which the enacted legislation becomes operative. Under many statutes, the future

contingent event upon which the operation of the law depends is the favorable result of a popular election. The providing of such contingencies upon which the law might properly be limited to take effect does not constitute a delegation of legislative power. The applicable rule is: The legislature cannot delegate its powers to make a law, but it can make a law to become operative on the happening of a certain contingency or on an ascertainment of a fact upon which the law intends to make its own action depend. *State v. Frear,* 142 Wis. 320, 125 N. W. 961; *State v. Sullivan,* 67 Minn. 379, 69 N. W. 1094; *Edwards v. Housing Authority of City of Muncie,* 19 N. E. (2d) (Ind.) 741; *Housing Authority of County of Los Angeles v. Dockweiler,* 94 Pac. (2d) (Cal.) 794."

In this connection it has been authoritatively stated: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law; the first cannot be done, to the latter no valid objection can be made." 16 C. J. S., sec. 133, p. 341. See, also, *Cincinnati W. & Z. R. Co. v. Commissioners of Clinton County,* 1 Ohio St. 77; *Field v. Clark,* 143 U. S. 649, 12 S. Ct. 495; *Williams v. Evans,* 139 Minn. 32, 165 N. W. 495.

The governing body of the city of Omaha by its resolution did not make a law but thereby acted in an executive or administrative capacity as an instrumentality of the state to make operative the provisions of a state law already existing. In other words, their resolution simply placed in effect a contingency, the event upon which the future operation of the statute, already complete and existent, depended. The city council was powerless to amend, change or contravene the provisions of the law and without authority to delegate to the electorate of the city of Omaha the performance of an act which they alone as an agency were delegated to perform in a certain mode or manner as provided by the statute. To hold otherwise would wrongfully permit the electorate of the city of Oma-

ha to invalidate a general legislative eminent domain statute of our sovereign state and legislate for and on behalf of the state. *Adams v. City of Omaha,* 101 Neb. 690, 164 N. W. 714; *Marquis v. Polk County Telephone Co.,* 100 Neb. 140, 158 N. W. 927; *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton County, supra; Hyde v. Wilde,* 51 Cal. App. 82, 196 Pac. 118; *Neils v. City of Seattle,* 185 Wash. 269, 53 Pac. 2d 848; *Riedman v. Brison,* 217 Cal. 383, 18 Pac. 2d 947.

Referring to the second question presented, there are two compelling reasons why this court may not properly pass upon the constitutional questions. First, they are not germane to the issues or presented in such manner as will properly permit the court to decide them in this action; and second, the act claimed to be unconstitutional is not being or about to be applied to the disadvantage or injury of interveners or of any other person.

The issues joined between relators and respondents do not raise any question of the constitutionality of the Peoples Power Commission law. They both rely upon its validity. It does not appear as an issue either in the application for the writ, the alternative writ, or the answer of respondents thereto. The questions are raised only by intervention. The performance of the alleged duty which it is sought to compel does not depend upon the constitutionality of the "Peoples Power Commission Law", but depends solely upon whether the resolution was legislative in character, thereby bringing to power the referendum provisions of the home rule charter.

Since mandamus is no longer a prerogative writ we have recognized that the statute, section 25-328, R. S. 1943, justifies intervention in mandamus cases by persons having an interest in the subject matter in litigation of such a direct and immediate character that they will gain or lose by the direct operation and effect of the judgment. *First Nat. Bank v. Lancaster,* 54 Neb. 467, 74 N. W. 858; *State ex rel. Randall v. Hall,* 125 Neb. 236, 249 N. W. 756. However, it is also the rule that, "Ordinarily, an intervener must take

the suit as he finds it, and is bound by the previous proceedings in the case, and cannot complain of the form of the action, or of informalities or defects in the proceedings between the original parties." *Drainage District v. Kirkpatrick-Pettis Co.*, 140 Neb. 530, 300 N. W. 582. Interveners are ordinarily entitled to present only issues, as distinguished from facts, which sustain or oppose the respective contentions of the relators and the respondents. 5 Bancroft, Code Practice and Remedies, sec. 3900, p. 5172; *Wright v. Jordan,* 192 Cal. 704, 221 Pac. 915. An intervener who is not an indispensable party cannot change the position of the original parties, or change the nature and form of the action or the issues presented therein. 2 Bancroft, Code Practice and Remedies, sec. 775, p. 1139; *Smithberger v. Banning,* 130 Neb. 354, 265 N. W. 10; or introduce new and foreign issues into the action as joined by the original parties, a rule which obtains in the great majority of jurisdictions. *Twin City Milk Producers Assn. v. Oase,* 199 Minn. 124, 271 N. W. 253. An intervener cannot widen the scope of the issues (*First Nat. Bank v. Lancaster, supra*) ; or broaden the scope or function of mandamus proceedings (38 C. J., sec. 560, p. 857; 4 Bancroft, Code Pleading, Practice and Remedies, sec. 3900, p. 3008) ; or raise questions which might be the subject of litigation but which are extraneous to the controlling question to be decided in the case. *Cleveland Ry. Co. v. Village of North Olmstead,* 130 Ohio St. 144, 198 N. E. 41.

Finally, it will be remembered that nothing had been done by the governing body of the city except to pass the resolution and appoint a power commission. Thus no provision of the Peoples Power Commission law has as yet become operative to affect any right of any person, injuriously or otherwise, and its provisions may never do so except by favorable vote of the electorate of the city of Omaha, the very right claimed by relators in this section. There is thereby presented at most abstract or hypothetical constitutional questions which do not arise from existing facts or rights, and courts will not ordinarily pass upon them. 34

Am. Jur., sec. 81, p. 870; *Cincinnati v. Vester, supra.* In many similar cases we have held that this court will not anticipate a question of constitutional law in advance of the necessity of deciding it, and will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *In re Application of City of Sidney,* 144 Neb. 6, 12 N. W. 2d 104. "As a general rule, the constitutionality of a statute will be passed on only if, and to the extent that, it is directly and necessarily involved in a justiciable controversy and is essential to the protection of the rights of the parties concerned." 16 C. J. S., sec. 94, p. 207. " 'The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it.' (*California v. San Pablo & Tulare R. R. Co.,* 149 U. S. 308, 314.)" *Headley v. City of Rochester,* 272 N. Y. 197, 5 N. E. 2d 198.

It is firmly established as the universal rule that a person "may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right, and, of course, it is prerequisite that he establish in himself the claimed right which is alleged to be infringed." 16 C. J. S., sec. 76, p. 162. We have held that, "A party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights and interests are not invaded or affected by its provisions." *State v. Brandt,* 83 Neb. 656, 120 N. W. 196. Also, "A litigant who is not shown to have been prejudiced by the enforcement of an act of the legislature is not in position to assail such act on the ground of its being unconstitutional." *Cram v. Chicago, B. & Q. Ry. Co.,* 85 Neb. 586, 123 N. W. 1045. See, also, *State ex rel. Herbert v. Anderson,* 122 Neb. 738, 241 N. W. 545. " * * * one may not urge the unconstitutionality of a statute who is not harmfully affected by the particular feature of the statute alleged to be in conflict

with the constitution." 16 C. J. S., sec. 76, p. 161. It was aptly said in *Headley v. City of Rochester, supra,* quoting from *Lehon v. City of Atlanta,* 242 U. S. 53, 37 S. Ct. 70, "One cannot invoke to defeat a law an apprehension of what might be done under it and, which if done, might not receive judicial approval." As stated in 38 C. J., sec. 681, p. 921, "Of course in no event will the constitutional question be decided (in a mandamus proceeding) unless it is necessary to a determination of the case and the protection of some substantial right; nor will it be decided before the time when the statute is to take effect has arrived and a proper case under the statute is presented."

For the reasons heretofore stated, we decide that the trial court did not err in finding and deciding that the constitutional questions were issues which could not properly be decided in this action and that the supplemental petition in intervention of the preferred stockholders and the petition in intervention of Calabria raising those questions should be dismissed. However, we decide that the trial court erred in finding that the resolution was legislative in character and in granting a peremptory writ of mandamus, together with ancillary injunctive relief as prayed by relators, by intervener International Brotherhood of Electrical Workers Union, Local Union No. B-763, and by interveners preferred stockholders. Therefore, the judgment of the trial court is affirmed in part, and in part reversed with directions to enter judgment in conformity with this opinion. The interveners shall be taxed with all the costs of their own respective interventions in accordance with section 25-329, R. S. 1943, but all other costs shall be taxed to relators.

AFFIRMED IN PART AND IN PART
REVERSED, WITH DIRECTIONS.

ROY STINEHAGEN, APPELLANT, V. NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLEE.

17 N. W. 2d 674

FILED FEBRUARY 16, 1945. No. 31873.

Escape. Under the provisions of section 28-736, R. S. 1943, a sentence committing a person to the penitentiary, even though it might be reversed on appeal or set aside on habeas corpus, would, nevertheless, be effective to sustain a conviction for breaking custody and escaping therefrom while confined under it.

APPEAL from the district court for Lancaster county: RALPH P. WILSON, JUDGE. *Affirmed.*

Roy Stinehagen, pro se.

Walter R. Johnson, Attorney General, H. Emerson Kokjer and *Carl H. Peterson, contra.*

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

WENKE, J.

This habeas corpus proceeding was instituted in the district court for Lancaster county by the relator, Roy Stinehagen, against Neil Olson, Warden of the Nebraska State Penitentiary, as respondent, to obtain relator's release. From an order denying the writ and dismissing his petition, the relator has appealed.

Relator was originally sentenced to the penitentiary from Custer county for a period of three years on an insufficient fund check charge. He raises several reasons why this commitment was void. They are not material here for he was discharged from this commitment on October 2, 1943.

However, on September 5, 1939, while he was serving this sentence he took leave from the penitentiary without the consent of the authorities in charge. He was later, on August 1, 1941, apprehended at Phoenix, Arizona, and returned to the penitentiary. After his return information was filed in the district court for Lancaster county on October 30, 1941, charging the relator with unlawfully and feloniously breaking custody and escaping from the Nebras-

ka penitentiary on September 5, 1939, while confined therein upon conviction of a felony.

In this proceeding counsel was appointed for the relator, plea of not guilty was entered and trial to a jury was had and he was found guilty. After the overruling of his motion for new trial the relator was sentenced to two years, same to commence upon completion of his former sentence. No appeal was perfected and it is under this sentence that the relator now serves.

The proceedings under the charge of breaking custody were in all things regular and unless the relator can in this proceeding raise the question of the former commitment being void as a basis for his release, the petition does not state facts sufficient to justify the issuance of a writ.

Section 28-736, R. S. 1943, under which the relator was charged with unlawfully breaking custody, provides in part as follows: "If any person confined in any penitentiary, * * * or any penitentiary trusty or any person in legal custody or confined in any jail, either awaiting trial in any felony complaint lodged against him, or upon conviction for a felony, shall break such custody and escape therefrom, or attempt to do so, he shall upon conviction be punished by confinement in the penitentiary * * * ."

Under the provisions of this statute his sentence from Custer county committing him to the penitentiary for three years, even though it might have been reversed on appeal or set aside on habeas corpus, was, nevertheless, effective until so reversed or set aside to sustain his conviction of breaking custody and escaping from the penitentiary while confined under it.

Under a similar statute, the Pennsylvania court held the rule to be as follows: "Even if prisoner's sentence for robbery might be reversed on appeal or set aside on habeas corpus for defects of substance leading up to his plea of guilty, it would be effective until so reversed or set aside, and breaking or escaping from the penitentiary while confined under sentence would be a crime punishable under statute * * * ." *Commonwealth ex rel. Banky v. Ashe,* 16

Atl. 2d 668 (142 Pa. Super. 396). To the same effect, see *Commonwealth ex rel. Penland v. Ashe*, 142 Pa. Super. 403, 17 Atl. 2d 224; *State v. Lewis*, 19 Kan. 260, 27 Am. Rep. 113; *Jones v. State*, 158 Miss. 366, 130 So. 506.

The sentence of imprisonment imposed upon the relator for breaking custody and escaping from the penitentiary precludes his discharge from confinement and the judgment of the lower court is affirmed.

AFFIRMED.

DAVE MARTIN, JR., APPELLANT, V. KATHERINE MARTIN, APPELLEE.

17 N. W. 2d 625

FILED FEBRUARY 16, 1945. No. 31882.

1. **Divorce.** In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage, their earning ability, the duration of, and the conduct of each during, the marriage, their station in life, the circumstances and necessities of each, as well as their health and physical condition, and whether the property was accumulated before or after the marriage, and from all of such elements the court, in allowing or refusing to allow permanent alimony, will determine the rights of the respective parties and all other matters pertaining to the case.
2. ———. Generally, we do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time.

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

Mothersead & Wright, for appellant.

W. H. Kirwin and *Morrow & Miller, contra.*

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

WENKE, J.

This is a divorce action commenced in the district court for Scotts Bluff county by Dave Martin, Jr.

The plaintiff appeals from the decree entered July 13, 1944, awarding the defendant, Katherine Martin, an absolute divorce on the grounds of extreme cruelty; the custody of the two minor daughters, Helen, aged 18 years, and Jeanette, aged 10 years; the residence in Scottsbluff, described as lot 6, block 3, Sunset addition to Scottsbluff, subject to encumbrances; certain personal property, primarily consisting of household furnishings and personal effects as more fully described in the decree; and alimony in the sum of $125 per month for the support of herself and minor daughter, Jeanette, same to commence on July 15, 1944, and payable the 15th of each succeeding month until further order of the court.

Custody of the two minor boys, Victor, aged 16 years, and Reuben, aged 15 years, was awarded to the plaintiff, together with all other property owned by the parties not specifically awarded to the defendant.

Two questions are presented by the appeal: First, whether the evidence is sufficient to sustain the decree of absolute divorce in favor of the defendant on her cross-petition; and second, whether the amount and manner of payment of alimony, under the facts and circumstances of the case, are reasonable.

As to the first proposition we have carefully examined the record and do not think it would serve any useful purpose, either to the profession, parties or the public, to set it out in detail or at length. Suffice is to say that the evidence of quarreling, use of profane language, physical violence and conduct of the plaintiff is sufficient to lead us to the same conclusion as that reached by the trial court.

These parties were married on December 28, 1924, and have a family of four children, two boys and two girls. After they were married they lived for some years on the farm and then moved to Scottsbluff where he worked as a plumber and carpenter. They started with very little and their income was modest. However, they are apparently an industrious and economical family for by 1941 they had their home in Scottsbluff subject to some encumbrance,

their household furnishings and a car. In 1941 they returned to farming. The plaintiff continued to work at his vocation during the slack season of this and the following year. This farming venture seems to have been very profitable. In 1942 they bought a farm, fixed it up and moved onto it. This farm they operated in 1942, 1943 and were continuing to operate it in 1944 at the time of trial. The whole family worked on the farm and as a result of their efforts the parties at the time of the trial had accumulated property reasonably worth between $15,000 and $16,000 over and above all debts and encumbrances, plus the 1944 growing crops.

Of this property the house, which had a reasonable equity over and above encumbrances of between $2,200 and $2,-300, was awarded to defendant together with certain personal property described in the decree. In determining whether the additional allowance of $125 per month until further order of the court is reasonable, we apply the rule as stated in *Hild v. Hild,* 135 Neb. 896, 284 N. W. 730: "In determining the question of alimony or division of property as between the parties, the court, in exercising its sound discretion, will consider the respective ages of the parties to the marriage, their earning ability, the duration of, and the conduct of each during, the marriage, their station in life, the circumstances and necessities of each, as well as their health and physical condition, and whether the property was accumulated before or after the marriage, and from all of such elements the court, in allowing or refusing to allow permanent alimony, will determine the rights of the respective parties and all other matters pertaining to the case." And further, where an absolute divorce has been granted, we think that generally the principle announced in *McGechie v. McGechie,* 43 Neb. 523, 61 N. W. 692, is applicable. This rule is stated as follows: "We do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time. (*Small v. Small,* 28 Neb., 843; *Cochran v. Cochran,* 42 Neb., 612.)"

Applying these principles to the facts in this case, we find that the payment of $125 per month until further order of the court is unreasonable; that a reasonable allowance, in addition to the house and personal property as awarded her in the decree, is the sum of $5,550 payable $75 per month commencing July 15, 1944, and the additional sum of $25 per month for the care and support of the minor daughter, Jeanette, whose custody she has been awarded. The allowance for the care and support of the minor daughter is to commence on July 15, 1944, and continue until she reaches the age of 21 years or until further order of the court.

Costs of this appeal, including an attorney's fee of $100 allowed appellee in this court, are taxed to the appellant.

As modified, the decree of the lower court is affirmed.

AFFIRMED AS MODIFIED.

ORAL RORERTS, PLAINTIFF IN ERROR, V. STATE OF NEBRASKA, DEFENDANT IN ERROR.

17 N. W. 2d 666

FILED FEBRUARY 23, 1945. No. 31865.

1. **Criminal Law.** An objection that a preliminary hearing in a criminal case has not been had is waived unless the defendant raises that question before he enters a plea of not guilty in the district court.
2. ———. A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of section 11, art. I of our Constitution.
3. ———. In the absence of statute, a person accused of an offense is not entitled as of right to representation by counsel upon his preliminary examination.
4. ———. Section 29-1803, R. S. 1943, requiring the court in certain cases to assign counsel to an accused person, who has not the ability to procure counsel, by its terms does not extend to the preliminary hearing.
5. **Constitutional Law.** The fact that the examining magistrate did not, on his own motion, provide counsel for the accused at the preliminary hearing is not a denial of due process of law.

6. ———. The constitutional guaranties of right to counsel found in section 11, art. I of the Constitution of Nebraska, and Article VI of the Amendments to the Constitution of the United States, do not extend to the preliminary hearing before a magistrate.
7. **Criminal Law.** The general rule is that a plea of guilty to a criminal offense on arraignment before a committing magistrate is admissible against accused as a confession on the trial for the offense charged.
8. ———. It is highly improper for the prosecuting attorney in a criminal case to declare to the jury his personal belief in defendant's guilt, unless such belief is given as a deduction from the evidence.

ERROR to the district court for Lancaster county: JOHN L. POLK, JUDGE. *Affirmed.*

L. R. Doyle, for plaintiff in error.

Walter R. Johnson, Attorney General, H. Emerson Kokjer and *John H. Comstock, contra.*

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

SIMMONS, C. J.

Defendant was charged with and convicted of the crime of sodomy. He appeals. We affirm the decision of the trial court.

Defendant's principal assignment of error arises as the result of the following situation, as shown by the evidence. Late one evening, two police officers came upon the defendant and another man, then engaged in the commission of the offense charged. The two men were taken to the police station that night.

On the following day, defendant was taken before the municipal court for a preliminary hearing, pleaded guilty to the charge of sodomy, and was bound over to the district court. Thereafter, an information charging the offense was filed in the district court; the defendant, being present in court with his counsel, was arraigned, the information was read to him, and he entered a plea of not guilty, without in any way questioning the proceedings at the preliminary hearing.

Defendant argues that he was denied counsel at his preliminary hearing, in violation of section 11, art. I of the Constitution of Nebraska, and of Article VI of the Amendments to the Constitution of the United States. He raises the matter for the first time in his assignments of error and argument here. The objection raises the question as to the validity of the preliminary examination. The evidence of defendant, upon which this contention is based, was offered to explain his plea of guilty at the preliminary hearing, and was to the effect that when the information was read to him, he misunderstood the charge; that he thought it involved a charge of violating a parole; that he did not intend to plead guilty to a charge of sodomy; and that he was not guilty of that offense. His testimony as to a request for counsel is that "When I was booked and I asked to get in touch with an attorney or my folks, they wouldn't let me get in touch with nobody." There is no testimony that he asked for an attorney or raised the question of counsel otherwise when he appeared before the court at the preliminary hearing.

Section 29-1812, R. S. 1943, provides: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar or the general issue." Under this section, we have repeatedly held that the objection that the defendant in a criminal case has not had a preliminary examination is waived unless raised before he enters a plea of not guilty. *Dinsmore v. State*, 61 Neb. 418, 85 N. W. 445; *Reinoehl v. State*, 62 Neb. 619, 87 N. W. 355; *Greenough v. State*, 136 Neb. 20, 284 N. W. 740. Section 29-1607, R. S. 1943, provides that "No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, * * * unless such person shall waive his right to such examination; * * * ." Under this provision we have held that it is too late after verdict to raise the objection that a preliminary examination has not been had, and that such objection must be raised, before going to trial, by motion

to quash or by plea in abatement. *Meyers v. State,* 104 Neb. 356, 177 N. W. 177. Certainly, if the preliminary hearing as an entirety may be waived, then one step in that hearing may likewise be waived.

But, this decision need not rest on the procedural point alone. It is clear the preliminary hearing before the magistrate is not a criminal prosecution or trial within the meaning of section 11, art. I of our Constitution. It is in no sense a trial of the person accused. Its purpose is to ascertain whether or not a crime has been committed, and whether or not there is probable cause to believe the accused committed it. *Latimer v. State,* 55 Neb. 609, 76 N. W. 207; *Van Buren v. State,* 65 Neb. 223, 91 N. W. 201; *Adams v. State,* 138 Neb. 613, 294 N. W. 396; R. S. 1943, sec. 29-506.

The rule is that in the absence of a statute a person accused of an offense is not entitled as of right to representation by counsel upon his preliminary examination. 16 C. J., sec. 579, p. 324; 22 C. J. S., sec. 339, p. 498; *Blanks v. State,* 30 Ala. App. 519, 8 So. 2d 450. Section 29-1803, R. S. 1943, requiring the court to assign counsel to an accused person in certain cases, who has not the ability to procure counsel, by its terms does not extend to the preliminary hearing.

The sixth amendment to the Federal Constitution applies only to trials of criminal prosecutions in federal courts. *Gaines v. Washington,* 277 U. S. 81, 48 S. Ct. 468; *Johnson v. Zerbst,* 304 U. S. 458, 58 S. Ct. 1019; *Betts v. Brady,* 316 U. S. 455, 62 S. Ct. 1252; *Perkins v. Sheriff of Calcasieu Parish,* 23 F. 2d 892. In federal courts, the provisions of the sixth amendment distinctly mean a criminal prosecution against a person who is accused, and who is to be tried by a petit jury. *Counselman v. Hitchcock,* 142 U. S. 547, 563, 12 S. Ct. 195. Also, in federal court, the preliminary hearing is not a trial within the meaning of the Constitution, and there is no invasion of constitutional rights if the accused is not represented by counsel at such a hearing. *Burall v. Johnston,* 53 F. Supp. 126.

The due process clause of the fourteenth amendment to the Constitution of the United States does not incorporate, as such, the specific guaranty of counsel found in the sixth amendment. *Betts v. Brady, supra.* The fact that the examining magistrate did not, on his own motion, provide counsel for the accused at the preliminary hearing certainly is not a denial of due process of law.

It necessarily follows that the constitutional guaranties of right to counsel, which defendant invokes, do not extend to the preliminary hearing before a magistrate.

During his opening statement to the jury, the county attorney told the jury that defendant "begged the police not to take him to jail because he was out on parole for the same thing." Defendant objected that the statement was prejudicial and moved for a mistrial. The court denied the motion.

The state offered the evidence of the arresting officer. He testified that at the time of the arrest, the defendant asked to talk to one of the officers alone. He was asked what, if anything, the defendant said to him and he to the defendant at the time of the arrest. To that question objection was made and overruled. The officer then, in response to the question "Just tell the jury," testified that "Mr. Roberts begged me not to take them in. He said it would go awfully hard with him. And I asked him why, and he said he was out on parole. I asked him what he had been sent up for, and he said sodomy. And I said 'What do you mean,—sodomy?' And he said 'Just what we were doing here when you came up.' "

Defendant contends that the county attorney committed error in making the quoted statement in his opening remarks to the jury, and that the court erred in not sustaining his motion for a mistrial. Coupled with this is the assignment that the trial court erred in permitting the police officer to give the quoted testimony as to the conversation. In connection with this latter assignment, it is noted that while defendant objected to the foundation question, he did not, by motion, or otherwise, object to the answer, ask that it be stricken, or that the jury be instructed not to consider

it, nor did he move for a mistrial. The evidence referred to in the opening statement and in the testimony of the officer amounted to an admission or confession of guilt of the crime of sodomy, strengthened by the statement that he, defendant, knew what the crime was, for he was out on parole for a similar offense. The statement by defendant was self-inspired, voluntarily and freely made. It was obviously admissible as a confession. The trial court did not err in his rulings relating thereto.

The state offered in evidence the page of the municipal court records showing the arraignment and plea of guilty. Defendant objected to its admission. The trial court overruled the objection, admitted the exhibit in evidence, and it was read to the jury. The defendant then moved for a mistrial, which motion the trial court overruled.

Defendant assigns this as error, basing his argument on the proposition that the plea was made after he had been denied a right to, and the advice of, counsel at the preliminary hearing. The question of right to counsel has been determined adverse to defendant's contention. In *Adams v. State, supra,* we discussed the question of pleas before an examining magistrate, and quoted with approval the following: " * * * 'The general rule is that a plea of guilty to a criminal offense on arraignment before a committing magistrate is admissible against accused as a confession, on the trial of the indictment for the offense.' " We think that evidence as to the plea was properly admitted as a confession.

During the closing argument, the county attorney told the jury that he would dismiss the case if he did not think there was evidence to sustain a conviction. Defendant objected to that and moved for a mistrial, which motion the trial court overruled.

Although not included in his assignments of error, defendant in argument contends that this constituted prejudicial error. Defendant says that this amounted to an expression of opinion as to guilt or innocence. The rule is: "It is highly improper for the prosecuting attorney in a

criminal case to declare to the jury his personal belief in defendant's guilt, unless such belief is given as a deduction from the evidence." *Balis v. State,* 137 Neb. 835, 291 N. W. 477. See, also, *Reed v. State,* 66 Neb. 184, 92 N. W. 321; *Olsen v. State,* 113 Neb. 69, 201 N. W. 969. Here, the county attorney expressed his belief that the evidence was sufficient to sustain a conviction. We do not find prejudicial error in the remark made.

We have examined the entire cause and consider that no substantial miscarriage of justice has actually occurred. R. S. 1943, sec. 29-2308.

The judgment of the district court is affirmed.

AFFIRMED.

BEN NOVAK ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, APPELLEE.

17 N. W. 2d 882

FILED FEBRUARY 23, 1945. No. 31892.

1. **Taxation.** All property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued and assessed at its actual value. R. S. 1943, sec. 77-201. "Actual value" means value in the market in the ordinary course of trade. R. S. 1943, sec. 77-112.
2. ———. The assessment of property for the purpose of taxation as ultimately fixed by the board of equalization is final, except upon appeal to the district court, and should not be disturbed on such appeal unless it appears from clear and convincing proof that it is erroneous.

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

Joseph B. Fradenburg, for appellants.

Kelso A. Morgan and *Joseph D. Houston, contra.*

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

MESSMORE, J.

June 14, 1944, plaintiffs filed complaint to the assessment for taxation for the year 1944 upon property located at 2019-2025 Farnam street, Omaha, before the board of equalization of Douglas county, Nebraska, alleging that such assessment was too high. The county assessor assessed the land at $15,000, and the improvements at $9,000, total $24,000. Plaintiffs requested a reduction on the land to $9,000, and on the improvements to $5,000. Complaint was also filed to assessment of property, located at 2036 Farnam street, plaintiffs requesting a reduction on the improvements from $6,000 to $4,200. The complaints were dismissed. An appeal was taken to the district court. The petition filed therein reiterated the allegations of the complaints. The answer was a general denial. On trial in the district court, plaintiffs' appeals were dismissed as to both causes of action; motion for a new trial was filed and overruled, and plaintiffs appeal.

Section 77-201, R. S. 1943, 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" means value in the market in the ordinary course of trade. R. S. 1943, sec. 77-112. The issue presented is the actual value of the two properties involved. The errors relied upon for reversal are that the decree is not sustained by the evidence and by the law.

The record discloses that the property at 2019-2025 Farnam street was purchased by the plaintiffs through a real estate agency at its solicitation in July, 1942, for $20,000, such being the best obtainable price after 13 months' endeavor on the agency's part to dispose of the property. The land and improvements are described in detail, and there is little discrepancy in the descriptions given by the parties. Defendant's evidence, given by two experienced real estate dealers, now employed in the county assessor's office, whose duties are to inspect and appraise property for assessment, is based on their opinion of the location of the building, the

time, kind and type of construction, the rental value, business activity in that part of the city and the value of the land upon which the building stands in the business district. From their examination of and acquaintance with the property, they fixed the actual value at $34,000 or $35,000. While there are other elements in the evidence in connection with the property, we deem it unnecessary to relate this evidence.

With reference to the property designated as 2036 Farnam street, from the record we conclude that the plaintiffs' contention for a reduction on the improvements is without merit and needs no discussion.

Plaintiffs rely on the purchase price as constituting the actual value and cite authority from foreign jurisdictions and texts, to the effect that purchase price constitutes the fair market value of property. It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes, and many other matters relevant to the actual value of property appear in the record and must be considered in connection with the purchase price to determine the actual value.

"The assessment of property for the purpose of taxation as ultimately fixed by the board of equalization is final, except upon appeal to the district court, and should not be disturbed on such appeal unless it appears from clear and convincing proof that it is erroneous." *First Nat. Bank of Blue Hill v. Webster County*, 77 Neb. 815, 113 N. W. 190.

We conclude that the decree of the district court was correct in dismissing the plaintiffs' appeals.

AFFIRMED.

DOROTHY WENDT, IN HER OWN RIGHT AND AS THE NEXT FRIEND OF THE FOLLOWING NAMED MINORS: MARGIE WENDT ET AL, APPELLANTS, V. IMA ELMING JONES ET AL., APPELLEES.

17 N. W. 2d 887

FILED FEBRUARY 23, 1945. No. 31868.

Mortgages. If a decree of foreclosure is obtained during the lifetime of the mortgagor, an order of sale, sale, and confirmation thereof, after his death without revivor against his heirs or representatives, are voidable only and not subject to collateral attack.

APPEAL from the district court for Wayne county: FAY H. POLLOCK, JUDGE. *Affirmed.*

A. R. Oleson, for appellants.

H. E. Siman, contra.

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

CHAPPELL, J.

Plaintiff, in her own right and as next friend of certain minors, brought this action to quiet title to farm lands in Wayne county, Nebraska, and for an accounting of rents. The facts are simple and not disputed. Mortgagee of the lands filed foreclosure proceedings and obtained a decree of foreclosure during the lifetime of the mortgagor. Stay was taken, moratorium obtained, and an application for relief under the Frazier-Lemke Act was filed in the Federal court but ultimately dismissed. The mortgagor died after decree of foreclosure but before order of sale, sale, or confirmation thereof. Application was duly made after the mortgagor's death to reinstate the case in the district court and revive the same in the name of the surviving heirs of the mortgagor. The plaintiffs, who were all minors at that time, were surviving children of the mortgagor. An order of reinstatement and revivor was entered and upon application a guardian *ad litem* was appointed for the minors, who entered his appearance as such and pleaded for them. However, no notice of the proceedings to revive was ever per-

sonally served upon the minors. Nevertheless order of sale was entered, sale had to the mortgagee, and judicial confirmation obtained. Thereafter the sheriff issued a deed to the mortgagee, who transferred the land to defendants Louis Krei and Edna Mae Krei.

No direct attack was ever made to avoid the order of sale, sale, or confirmation, for want of revivor, nor was an appeal taken therefrom. Such proceedings, without perfected revivor, and the sheriff's deed resulting, together with the transfer above set forth, are now attacked collaterally in this proceeding, which the trial court, after a hearing, dismissed and ordered distribution of the moratorium rents and funds still remaining. The defendant mortgagee was never served with summons and, upon motion of plaintiff, was dismissed from the case by the trial court. The only question presented to the trial court, and to this court upon appeal, is whether the failure to serve notice of revivor upon the minors, after decree of foreclosure had been entered in the case before the death of the mortgagor, made the order of sale, sale, confirmation, and deeds resulting therefrom void and subject to attack in this collateral proceeding, or whether such proceedings were merely voidable and not subject to collateral attack. This court has heretofore decided that such proceedings are voidable only and cannot be impeached collaterally.

The facts in *Omaha Nat. Bank v. Ferguson*, 99 Neb. 131, 155 N. W. 220, were similar in many respects to the case at bar. In that opinion the court stated: "The question of law to be determined is: Did the fact that Charles Childs died after the entry of the decree in the foreclosure suit, and that no order of revivor was entered prior to the issuance of the order of sale and proceedings had thereunder, render such proceedings null and void?" In answer to the question proposed it was found that the proceedings were voidable and not void, consequently the court held that, "It is the settled law of this state that an order of sale, a sale, and a confirmation of the sale, made after the death of a party to a foreclosure suit, subsequent to the decree, are

impervious to collateral attack. *Jennings v. Simpson,* 12 Neb. 558, and *McCormick v. Paddock,* 20 Neb. 486, reaffirmed." In the opinion the court distinguished *Vogt v. Daily,* 70 Neb. 812, 98 N. W. 31, and *Street v. Smith,* 75 Neb. 434, 106 N. W. 472, but adhered to the rule announced in *Wardrobe v. Leonard,* 78 Neb. 531, 111 N. W. 134.

The same question was discussed at length in *Childs v. Ferguson,* 8 Cir., 181 Fed. 795, a Nebraska case similar in many respects to the one at bar. Several cases from this jurisdiction and others are discussed at length in the opinion. The case is followed and quoted from with approval in *Omaha Nat. Bank v. Ferguson, supra.* The syllabus in the latter case, as above quoted, was taken almost verbatim from the opinion in the *Childs* case.

In a recent opinion of this court, *Vybiral v. Schildhauer,* 144 Neb. 114, 12 N. W. 2d 660, we also discussed the question again. In that case the plaintiff died after decree but before confirmation and there was no revivor. However, direct attack for that reason was made upon the proceedings by objections to confirmation in the district court and by appeal to this court, as distinguished from collateral attack. Therein we found that it was error for the trial court to overrule such a proper objection and enter an order of confirmation when the action had not been revived in the name of a proper plaintiff. On the other hand, the opinion cites with approval *Omaha Nat. Bank v. Ferguson, supra,* and quotes with approval from *Childs v. Ferguson, supra,* in observing that the applicable law would be otherwise had the attack been made by collateral proceedings as in the case at bar.

Plaintiff has not cited any authority holding that a different rule would apply if there are minor heirs surviving the mortgagor. As a matter of fact, *Whiting v. Bank of the United States,* 13 Pet. 6, 10 L. Ed. 33, an opinion by Mr. Justice Story, holds otherwise. Authorities relied upon by plaintiff are cases in which the trial court had no jurisdiction to enter the original judgment against minors who were indispensable parties to the pending action. No such

question is presented here. The trial court having jurisdiction to do so entered its valid and enforceable decree of foreclosure before the death of the mortgagor. In this connection it was said in *Childs v. Ferguson, supra*: "When a mortgagor dies after he has appeared, answered, presented his evidence and arguments, and the court has decided his case and ordered a sale of the mortgaged property to satisfy the liens the mortgages evidence, those who acquire his property by his death take it subject to that decision and to those liens." The court then held in effect that the power of the court to sell the real estate to satisfy the lien upon it, which was finally adjudicated on the merits by the decision of the court, was within its jurisdiction and if that power is exercised without any revivor against the heirs or representatives of the deceased mortgagor the sale and confirmation thereof are voidable only and not subject to collateral attack. See, also, 42 C. J., sec. 1863, p. 225; 37 Am. Jur., sec. 792, p. 193; *Whiting v. Bank of the United States, supra.*

We conclude for the reasons heretofore stated that the judgment of the trial court was correct, and it is affirmed.

AFFIRMED.

IN RE ESTATE OF MERTON E. HOUSE.
FRED C. WARNEMUNDE, CLAIMANT, APPELLEE, V. W. ROLLIN SMITH, ADMINISTRATOR WITH THE WILL ANNEXED, OBJECTOR, APPELLANT.
17 N. W. 2d 883

FILED MARCH 2, 1945. No. 31811.

1. **Appeal and Error.** Alleged misconduct of counsel in argument to jury cannot be properly shown by affidavit, and to preserve such error the statements must be taken by the official court reporter at the trial, together with the objections made thereto and the court's ruling thereon.
2. ———. One may not complain of the misconduct of counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chances of a favorable verdict.

3. **Evidence.** If the testimony for or against an issue is largely circumstantial, or enshrouded in doubt or ambiguity, then any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and proper for the consideration of the jury.
4. **Trial.** An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, unless the omitted facts are conclusively established.
5. ———. Where such instruction is complete in itself, the error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to a recovery by such party.

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

Frank M. Johnson, for appellant.

Cook & Cook, contra.

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

PAINE, J.

This action is an appeal by the administrator with will annexed from the allowance of a claim filed against the estate of Merton E. House, deceased. The claim was based on a promissory note for $213.50, dated October 14, 1929, and by an error was due January 14, 1929, said note bearing a purported endorsement, "6-2-38 cr by ck = $13.32." The county court allowed the claim, after a hearing upon the objections, and the administrator appealed to the district court.

The case was tried to a jury in the district court. The verdict was for $200.18, as the trial court instructed the jury if the finding was for the claimant not to figure the interest. The district judge thereupon computed the interest and entered a judgment for claimant in the sum of $492.94, with interest at 10 per cent. See *Calnon v. Fidelity-Phenix Fire Ins. Co.,* 114 Neb. 194, 206 N. W. 765.

The motion for a new trial set out 14 assignments of er-

ror. Three of these assignments relate to a charge that the attorney for claimant in his opening statement informed the jury of the results of the trial in the lower court. Affidavits were filed by claimant's attorney, who denied making the statement. Counter-affidavits were filed.

To properly preserve such an error, the statement must be taken down by the court reporter, with objections as made and the court's ruling thereon. See *Rose v. Gisi,* 139 Neb. 593, 298 N. W. 333; *Bolar v. Williams,* 14 Neb. 386, 15 N. W. 716.

The administrator claims that the trial court erred in not declaring a mistrial because of such statement. However, the record does not show a demand for a mistrial, but shows simply an objection. One may not complain of misconduct of adverse counsel if, with knowledge of such misconduct, he does not ask for a mistrial, but consents to take the chances of a favorable verdict. See *Long v. Crystal Refrigerator Co.,* 134 Neb. 44, 277 N. W. 830; *Dunn v. Omaha & C. B. Street Ry. Co.,* 139 Neb. 765, 298 N. W. 741; *Hopka v. Forbes,* 142 Or. 684, 21 Pac. 2d 218.

The promissory note upon which this claim is founded would have been long barred by the statute of limitations unless the credit of a payment of $13.32, appearing as an endorsement, is supported by a preponderance of the evidence.

It appears that Dr. House carried a fire insurance policy through the office of the claimant in this case, and that the annual premiums due thereon were $13.32.

Exhibit B, to which the objection as irrelevant and immaterial was overruled by the court, is an "Extension Endorsement," No. 35179, of the Union Fire Insurance Company, of Lincoln, Nebraska, showing that policy No. 257207, issued to Dr. M. E. House, is continued in force from June 5, 1937, to June 5, 1938, and that the annual premium is $13.32, which may be paid by paying $10.66 in advance and $2.66 at the end of the year. This receipt is dated June 5, 1937, and signed by F. C. Warnemunde, Jr., as authorized representative.

Exhibit C, received over the same objections, is the Extension Endorsement No. 39221, continuing the policy in force from June 5, 1938, to June 5, 1939, and is also signed by F. C. Warnemunde, Jr., as authorized representative.

Exhibit H is the ledger sheet of the account of Dr. House in the Lexington State Bank, and shows that a check was charged against his account on June 2, 1938, in the sum of $13.32, this being the exact amount of the premium due upon this insurance policy. Said exhibit H also shows a charge against this account on June 16, 1938, in the sum of $10.66.

The deposition of F. C. Warnemunde, Jr., was taken at Fort Lewis, Washington, where he was in military service. He testified that from June, 1936, to December, 1940, he was in the insurance business at Lexington, Nebraska, in the same office with his father, but they were not in partnership; that Dr. House carried insurance policies with his father, but seldom paid when the policies were issued. As to the endorsement on the note, he answered as follows: "I went to the office of Dr. M. E. House to make a collection on the note and he wrote out a check for $13.32 and said that was the amount of the premium—I said the premium had been paid and I wanted a payment on the note. He said to apply his check of $13.32 on the note."

The assignments of error charge that the trial court committed error in excluding exhibit A, being an unsigned office copy of the insurance policy of Dr. House, furnished from the Lincoln office, also in excluding exhibit D, the receipt given by F. C. Warnemunde, Jr., on July 7, 1937, for $13.32 insurance premium, and exhibits E and F, being extension endorsement for premium from June 5, 1939, to June 5, 1940, and bank check of $13.32 given by Dr. House on June 10, 1939, in payment thereof, and exhibit G, being receipted statement for such check given by claimant.

In our opinion, exhibits A, D, and G were properly excluded, for no sufficient foundation was laid for their admission. However, it was error for the trial court to exclude exhibits E and F, which gave the form of the receipt,

the time and the manner as well as the amount of the check given by Dr. House for the payment of the annual premium on this same policy in the year immediately following the transaction in question.

This court has said: "If the testimony for and against the account stated had been largely circumstantial, or enshrouded in doubt, or ambiguous, then the introduction of collateral facts or circumstances might have been permissible; * * * ." *Landis & Schick v. Watts*, 84 Neb. 671, 121 N. W. 980.

In 1 Elliott, Evidence, sec. 144, p. 199, it is said: "As a general proposition, therefore, it may be said that any evidence that tends in any reasonable degree to establish the probability or improbability of a fact in issue, no matter how slight its weight may be, is relevant. * * * It is not necessary, however, that it should in itself bear directly upon the point in issue, for if it is but a link in the chain of evidence tending to prove the issue by reasonable inference it may nevertheless be relevant. Indeed, evidence which tends to make the testimony of witnesses probable or improbable may sometimes be competent."

The appellant makes a vigorous attack on instruction No. 5, which reads as follows:

"The Jury are instructed that the burden of proof is upon the Claimant, F. C. Warnemunde in this action and before he can recover at all, it is incumbent upon him to prove by a preponderance of the evidence the following propositions to wit:

"No. 1. That the claimant, F. C. Warnemunde, is the owner and holder of a promissory note, and entitled to recover from the Estate of Merton E. House, the principal and interest due on said note, less any payments that have been made on the same.

"No. 2 That said note is dated October 14, 1929, given for $213.50, bearing interest at 8% semi-annually from date until, due, and ten per cent until maturity.

and all of the above and foregoing propositions by a pre-

"If the Claimant F. C. Warnemunde has established each

ponderance of the evidence, then your verdict should be for him for whatever amount he has established by a preponderance of the evidence; if the claimant has failed to establish*ed* the above and foregoing propositions by a preponderance of the evidence, then your verdict should be for the Estate of Merton E. House, Deceased."

This instruction No. 5 is a complete instruction, and is prejudicially erroneous in not setting forth all of the facts which the plaintiff must prove by a preponderance of the evidence, for this instruction assumes that the payment was made, as shown, on the note; whereas, the serious question at issue in the case is whether the check given by Dr. House was to be a payment of the insurance premium annually due at that time, or was a partial payment of the same amount to be applied on the note.

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

"Where such instruction is complete in itself, the error therein is not cured by the giving of other instructions which correctly state the law or the facts essential to a recovery by such party." *Sanders v. Chicago, B. & Q. R. Co.*, 138 Neb. 67, 292 N. W. 35.

Now, as to instruction No. 6, about which complaint is made, we do not believe that it was erroneous because the first part thereof was charged in the negative form if instruction No. 5 had correctly presented the issues. However, in their present form instructions Nos. 5 and 6 are conflicting and misleading, and presented the issues to the jury in a manner prejudicial to the estate.

In our opinion, these several prejudicial errors occurring in the trial of the case require a reversal, and the cause is reversed and remanded for further proceedings.

REVERSED.

COUNTY OF GARDEN, APPELLEE, V. GRACE SCHAAF ET AL., APPELLEES. IMPLEADED WITH BOARD OF EDUCATIONAL LANDS AND FUNDS OF THE STATE OF NEBRASKA, APPELLANT.

17 N. W. 2d 874

FILED MARCH 2, 1945. No. 31844.

1. **Waters and Watercourses.** Special annual assessments, regularly levied for the payment of irrigation district bonds, under the provisions of section 46-140, R. S. 1943, become a lien against the real estate in said district on and after October 1 in the year in which they are made.
2. ———. Under the provisions of section 46-1,101, R. S. 1943, irrigation district bonds and the interest thereon are paid by revenue derived from successive annual assessments upon the real property in such irrigation district. All of such property shall remain liable for such annual assessments until the bonds have been paid.
3. ———. There is no provision in our law which makes the total amount of an outstanding issue of irrigation district bonds a lien upon the land in the district at the time such bonds are issued.

APPEAL from the district court for Garden county: CLAIBOURNE G. PERRY, JUDGE. *Reversed, with directions.*

Walter R. Johnson, Attorney General, H. Emerson Kokjer and *Robert A. Nelson,* for appellant.

R. H. Beatty, M. M. Maupin, Zelma Derry, E. E. Richards and *H. J. Curtis, contra.*

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

PAINE, J.

This is a tax foreclosure brought by Garden county on tax sale certificates purchased at private tax sale. The decree determined the amount due and directed the sale of the property as upon execution, and barred and foreclosed all defendants of all rights against said property or to levy any future assessments against the land in satisfaction of any outstanding bonds or warrants or judgments existing against the same. From this decree the Board of Educa-

tional Lands and Funds of the State of Nebraska appealed to this court.

The petition recites that, the taxes and assessments on certain real estate having become delinquent, said lands were advertised for sale by the county treasurer, offered at public sale, and unsold for want of bidders; that proper return having been made to the county clerk, the county board of plaintiff county, by proper resolution, purchased the same at private tax sale, and brings this action, not only on behalf of itself, but for the benefit of all governmental subdivisions entitled to participate in the distribution of the proceeds of the taxes and special assessments described in said tax certificate.

The Board of Educational Lands and Funds of the State of Nebraska was made one of many defendants. Several pages of the petition described in detail all of the circumstances relating to the issuance and sale of all of the bonds outstanding owned by the defendant Board, and alleged in the eleventh paragraph of said petition that such Board had no lien upon the real estate described therein.

To this petition the Board filed a demurrer, which was overruled. Therefore, the Board filed an answer, to which the plaintiff county filed a reply. Trial was had upon the issues thus joined.

The bill of exceptions shows that the North River Irrigation District, hereinafter called the District, was organized in 1919-1920, and was located along the North Platte river in Garden county. This irrigation district used water which was brought to its ditch through the Lisco ditch for some ten miles, and the North River Irrigation District proper began some eight miles west of Oshkosh and extended some five miles east along the North Platte river.

On April 1, 1920, the district issued $120,000 worth of bonds, which were purchased by the defendant, Board of Educational Lands and Funds, hereinafter called the Board, for the permanent school fund of the state of Nebraska. On June 1, 1922, $20,000 of additional bonds were issued, and purchased by the Board, and the District levied only

small assessments to pay some of the interest due on the bonds, and on July 1, 1930, new refunding bonds were issued for $140,000 principal and $5,000 interest, bearing interest at the rate of 6 per cent. Only a little of the interest was paid on this new bond issue, and when the delinquent interest amounted to $47,277 the whole issue of bonds was again refunded in the principal sum of $192,277, the interest rate being cut to 2 per cent. Interest on these second refunding bonds was paid up to $2,163.77, and at the time of trial in the district court in August, 1943, there was a total of $30,785.53 interest due, and the court entered a decree February 23, 1944, that the total amount due the Board upon the bonds of said District is $224,038.11, with interest at 6 per cent.

The amount found due the plaintiff on its tax sale certificate is $5,255.27, with interest at 7 per cent, together with attorney's fees of 10 per cent of that amount.

The evidence discloses that during the last 15 years no water has been delivered through this ditch to the eastern portion of the district, nor to the western portion for the last eight years, and that in many places the county has filled up the ditch and taken out the bridges over it, and that years ago, the last time any operations were conducted, it cost at least $1,000 a mile to clean out the ditch, and it is estimated that it would take $50,000 to dig out the ditch and put the bridges and flumes in again.

The local banker testified that there has been no *bona fide* sale of lands located under the ditch for 10 or 15 years, and that the only sales have been transfers through foreclosure or execution sales; that the hay meadow land under the ditch will produce half a ton of hay to the acre, and would be worth $20 to $30 an acre, and that there are about 500 acres of such hay land, while the farm land under the ditch is not worth over $15 an acre on the average, and that the assessed valuation on all of the land under the ditch is far above its actual value.

By stipulation of the parties, the foreclosure proceeded upon the first cause of action, and it was agreed that the de-

cision rendered in this case shall apply to the issues joined in the other eight cases, with a total of 78 causes of action; that the 78 tax certificates cover all of the land within the boundaries of the District, with five exceptions of small tracts, amounting to 51.7 acres, upon which the taxes have all been paid. Upon much of this land no taxes at all have been paid since 1920.

The appellant assigned as errors that the decree was contrary to law and the evidence; that the court erred in holding that through this action the county could cancel and annul the assessment of future levies for payment of this bonded indebtedness which were not due at the time of the commencement of this action.

It is stated by the parties to the case at bar that the exact question involved in this case has never been passed upon by our court.

It should first be noted that this action was brought by Garden county under sections 77-2040 and 77-2041, Comp. St. Supp. 1941, and that these two sections were repealed by L. B. No. 38, chapter 176, Laws 1943, p. 614, but that section 19 of said bill provides: "This act shall in no manner affect pending actions founded on or growing out of any statute repealed by this act." Therefore, this case will be disposed of in the same manner as though said sections of the statutes had not been repealed.

It appears that what is now sections 24-319 and 24-321, R. S. 1943, were amended in 1941 to provide how suit might be brought when the Board of Educational Lands and Funds of the state of Nebraska is the owner of any bonds of an irrigation district, and to provide for service of summons. This suit is brought in accordance with such amendments.

The fact that the Board is acting as trustee for the permanent school fund of the state and is the owner of the bonds outstanding places it in no different position than if the bonds were owned by a private purchaser.

The parties stipulated at the trial on August 13, 1943, that there was then past due and unpaid, of the last refunding issue, ten bonds in the face amount of $10,000, and there

was past due interest on all the bonds to the amount of $30,785.53. However, the trial judge entered a finding in the decree rendered on February 23, 1944, that the total amount due to the Board on all of the bonds, both those due and those not yet due on the date of the decree, was the total sum of $224,038.11, with interest thereafter at 6 per cent, and decreed in effect that this constituted a second lien against the land in the district, subject only to the lien of Garden county for general taxes and special assessments. The decree then barred the Board from any attempt to make further levies or assessments against the land in the district for the payment of outstanding bonds.

There is no question as to how the proceeds of a tax foreclosure sale brought by the county should be applied. Sections 77-208 and 77-209, R. S. 1943, provide that general taxes are a first lien on real estate, and special assessments are subject to the lien of the general taxes. In the case of *Douglas County v. Shannon,* 125 Neb. 783, 252 N. W. 199, this court held: "The proceeds of a tax foreclosure sale, brought by the county, should be applied, first, to the payment of costs; second, to the payment in full of all general taxes of the state, county, school district, and other governmental subdivisions (Const. art. VIII, sec. 4), and the remainder, if insufficient to pay all special assessments, shall be prorated equitably upon all special assessments due on said real estate."

The appellant cites the case of *Alexander v. Bailey,* 108 Neb. 717, 189 N. W. 365, which is a suit on district paving bonds, and this court held that the statute contained no provision that such bonds shall be payable only out of the funds realized from assessments, and where such bonds purport on their face to be the general obligations of the city, the city is bound for their payment in the event the lien of the special assessments fails for any reason.

But it is different with an irrigation district organized under the existing laws of this state. Irrigation district bonds are general obligations of the district, payable out of special assessments to be levied upon the property in the

district. When such assessments are regularly levied in accordance with statutory provisions, they become a lien against the specific real property against which they are assessed from and after October 1 in the year in which they are assessed, as provided in section 46-140, R. S. 1943. See *Erickson v. Nine Mile Irrigation District,* 109 Neb. 189, 190 N. W. 573.

The appellant in the case at bar insists that the school funds of this state were in good faith invested in these irrigation district bonds, and since the original purchase of bonds in 1922 no part of the principal investment has ever been paid, and only a small portion of the interest has been paid, in spite of the fact that the interest rate has been voluntarily reduced from 6 per cent per annum to 2 per cent, and that while, through this tax foreclosure, the lien against the property as to levies which have been made prior to the institution of the present action is discharged, the District is liable for the bonded indebtedness, and it is the duty of its officers to continue to make the levies in the future in order to discharge their legal obligations.

It is argued by appellee that the Nebraska supreme court has held that the purchaser under a tax sale foreclosure receives a new title in the nature of an independent grant by the sovereign authority, which title is free from any encumbrances, claims, or equities connected with the prior title, and the title is free from any claim or equity existing against it. *Coffin v. Old Line Life Ins. Co.,* 138 Neb. 857, 295 N. W. 884. See, also, *State ex rel. City of Great Falls v. Jeffries,* 83 Mont. 111, 270 Pac. 638; *Warren v. Blackman,* 62 S. D. 26, 250 N. W. 681.

This is a correct statement of the law. There is a special statute covering irrigation bonds (R. S. 1943, sec. 46-1,-101), which provides: "Such bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district and all the real property of the district shall be and remain liable to be assessed for such payments as herein provided, * * * ." This provision appears to leave no doubt that the property in the

irrigation district remains liable for the payment of assessments to be made in the future.

And, further, we find a definite provision in section 46-190, R. S. 1943, which provides that, even when an irrigation district is discontinued and all of its property is sold, "In case the amount realized from the sale of such district property, together with other money of the district, shall be insufficient for the payment of all the indebtedness of the district, assessments shall continue to be made against the lands included in the district in the manner provided by law for assessments to pay bonds and other indebtedness of irrigation districts, until a sufficient amount is raised to fully pay all obligations of such district."

In an opinion in the Eighth Circuit Court of Appeals, written by Judge Munger, it was held that, after reasonable efforts have been made to collect the first levy on an irrigation district, an additional levy can be made because of the failure of some taxpayers to pay the first levy, and this does not violate constitutional provisions for uniform taxation. *Norris v. Montezuma Valley Irrigation District*, 248 Fed. 369.

The only method by which these irrigation bonds can be paid is by revenue derived from successive annual assessments upon the real property within the district, as specifically provided in section 46-1,101, R. S. 1943. There is no provision in our laws which makes the total amount of such outstanding irrigation bonds a lien upon the land.

"The general rule is that taxes are not a lien unless expressly made so by statute or ordinance; and a statute to create a tax lien must expressly provide for the lien, or the implication must be so plain as to be equivalent to positive language. When liens are expressly created they are not to be enlarged by construction." 3 Cooley, Taxation (4th ed.) sec. 1230, p. 2451.

The decree entered in the district court in the instant case wrongly barred and foreclosed the defendant Board from ever seeking to compel the North River Irrigation District to voluntarily or otherwise attempt to levy or assess

future or further levies and assessments against the land in said district for the payment and satifaction of any outstanding bonds, warrants or judgments against the same, or for any purpose whatsoever save and except maintenance and repairs.

As we have heretofore set out, neither the principal or interest due on these bonds, nor any part thereof, is a lien against the land in the district. Nor does a lien arise until the annual assessment and levy have been duly made in accordance with section 46-140, R. S. 1943.

Plaintiff insists that, as little, if any, of the taxes on the land in this irrigation district have been paid for over 20 years, and as its assessed value is far in excess of its real value, no purchasers can ever be found unless the land can be sold free of the burden of the outstanding bonds, for which reason it will be practically and permanently removed from payment of the actual costs of government.

This court concedes that such a situation, if it should arise in the future, would be serious. However, where the application of the rules of law as appear in our statutes presents a situation which affects the public interests adversely, such a condition is a question for the legislature to either correct or provide a remedy, as it is beyond the function of the court.

For the reasons set out herein, the decree and judgment of the trial court are hereby reversed, and the district court is directed to enter a judgment in accordance herewith.

REVERSED.

GEORGE F. LILLIE, APPELLEE, V. BERTHA ALICE LILLIE, APPELLANT.

17 N. W. 2d 799

FILED MARCH 2, 1945. No. 31901.

Divorce. In allowing permanent alimony the court will consider the respective ages of the parties to the marriage, their earning

ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, whether the property was accumulated before or after the marriage, and any and all other circumstances bearing upon the question.

APPEAL from the district court for Scotts Bluff county: J. LEONARD TEWELL, JUDGE. *Affirmed as modified.*

Mothersead & Wright, for appellant.

W. H. Kirwin and *Neighbors & Danielson, contra.*

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

CARTER, J.

Plaintiff brought suit for a divorce from the defendant on the ground of cruelty. Defendant denied the allegations generally and cross-petitioned for separate maintenance on the ground of extreme cruelty on the part of the plaintiff. The trial court granted plaintiff an absolute divorce and awarded the defendant permanent alimony, the custody of the two minor children and an allowance for their support. From this decree the defendant appeals.

The record shows that the parties were married on February 6, 1926. Two children were born, Joan, age 13, and George, age 9. Plaintiff was 40 years of age at the time of the trial and Bertha Lillie, the defendant, was approximately the same age. Both are in good health. The petition alleges that defendant had an ungovernable temper, frequently cursed the plaintiff, called him vile names, accused him of improper relations with other women generally, threatened to kill herself and the children on numerous occasions, struck and scratched him on many occasions, and on one occasion expressed regret that he had not been killed. The defendant's cross-petition alleges affirmatively that plaintiff became enamored of another woman and repeatedly boasted of having illicit relations with other women, that he struck and abused her on numerous occasions and repeatedly cursed her and used vile and profane lan-

guage before her friends, and sought to estrange the children and the defendant.

We shall make no effort to review the evidence relative to the marital differences of this husband and wife. We content ourselves with the statement that the charges and countercharges, the name calling and physical violence testified to by the parties are so odious and repulsive to common decency that we shall give it no space in this opinion. We find no error in the trial court's finding that the evidence did not justify a decree of separate maintenance for the defendant and that the evidence was sufficient to sustain a decree awarding an absolute divorce for the plaintiff on the grounds of extreme cruelty. The appeal does not involve the custody of the two minor children or the award of $50 a month for child support decreed by the trial court. This leaves for our consideration the correctness of the award of permanent alimony to the defendant.

The evidence shows that the plaintiff and his brother, Wallace Lillie, owned all the stock of the Platte Valley Cement Tile Manufacturing Company. They operated plants at Fremont and Scottsbluff, Nebraska, and, when the business of the corporation required it, plants were established at Kearney, Nebraska, and Boise, Idaho. In 1942 and 1943 the business was very successful through the acquiring of contracts connected with government projects. In 1942 the company made $42,000, which was reduced to $18,000 by the payment of income taxes, and in the forepart of 1943 the evidence indicates a profit of $52,000. The income tax return for 1943 indicates a profit of only $15,092.79 for the whole year. The total net worth of the company is shown to be $76,711.94 on December 31, 1943. On December 31, 1942, the net worth was shown to be $86,924.93. There is evidence in the record that the company lost more than $24,000 during the first three months in 1944. There is other evidence in the record to the effect that the business of this company was slumping and that the large profits received in 1942 and 1943 could not be expected to continue.

Plaintiff and his brother also organized a partnership to

engage in the sand and gravel business. Plaintiff's profit from this business was $1,185.94 in 1943. Additional income of $1,300 is shown in 1943 as being derived from rents. In 1942 and 1943 plaintiff received $9,000 a year as salary from the company. In April, 1944, it was reduced to $4,200 a year. Plaintiff's income tax return indicates a total income of $11,385.94 in 1943. This does not take into consideration any undivided profits in the corporation which were not distributed. On the other hand, the corporation owes some obligations and plaintiff has had to pay off certain debts growing out of the purchase of the outstanding stock of the corporation in 1939. In any event, we are convinced that the plaintiff has a net worth in excess of $35,000. For many years prior to 1939 plaintiff did not earn in excess of $200 a month and most of the time a much lesser amount. The property he now has was acquired long after his marriage to this defendant. The defendant has little or no earning capacity, with little opportunity to improve herself in this respect during the period she is charged with the care and support of the children. There is nothing in the record relative to the conduct of the parties which affects the amount of permanent alimony to be allowed.

In allowing permanent alimony the court will consider the respective ages of the parties to the marriage, their earning ability, the duration of and the conduct of each during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, whether the property was accumulated before or after the marriage, and any and all other circumstances bearing upon the question. *Hild v. Hild,* 135 Neb. 896, 284 N. W. 730; *Martin v. Martin,* decided February 16, 1945, *ante,* p. 655, 17 N. W. 2d 625.

The trial court awarded the defendant the family home in Scottsbluff valued at $6,000 to $6,500, upon which there is a mortgage of $3,800. The furniture in the home was also given to the defendant. The trial court also awarded defendant $7,500 payable at the rate of $125 a month. We

think that this amount is insufficient under the evidence and holdings of this court and that it should be and is increased to $10,000. All other provisions and conditions of the decree are proper and warranted by the evidence. Defendant is awarded $250 attorney's fees for service rendered by counsel in this court.

AFFIRMED AS MODIFIED.

W. F. AUKER, APPELLANT, IMPLEADED WITH DELPHA MERCHANT ET AL., APPELLEES, V. BERTHA HENDRICKSON ET AL., APPELLEES: ARTHUR AUKER ET AL., APPELLANTS.

17 N. W. 2d 878

FILED MARCH 2, 1945. No. 31866.

1. **Trusts.** A "resulting trust" comes into being when a party takes title to real estate with the intention that it shall be for the benefit of the trustee and the *cestui que trust*, or for the benefit of the *cestui que trust* alone.
2. ———. A party for whose benefit a "resulting trust" came into being may maintain action for an accounting and termination of the trust.

APPEAL from the district court for Wayne county: FAY H. POLLOCK, JUDGE. *Reversed, with directions.*

Zacek & Nicholson and *H. E. Siman,* for appellants.

C. H. Hendrickson and *Bertha Hendrickson, pro se,* and *Mark J. Ryan, contra.*

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

YEAGER, J.

Stephen E. Auker, a resident of Wayne county, Nebraska, died in August, 1934, leaving surviving him a widow and nine children. At the time of his death he held title to a 240-acre farm and personal property of the value of about $1,913.28 and in addition, promissory notes of approximately $11,000 owing by seven of the children to the

decedent. The smallest principal amount owing by any of the seven children was $460. The seven are the following: W. F. Auker, Arthur Auker, Clarence Auker, Edward J. Auker, Guy Auker, Hobart Auker and Irvin Auker. The widow was a second wife and the mother of none of his children. By reason of an antenuptial agreement, she was not entitled to share in the disposition of the estate. Although there was a purported will the estate was probated as an intestate estate, apparently by consent of all of the children. The farm was heavily encumbered but the estate was solvent.

Earl E. Merchant was appointed and qualified as administrator of the estate. He filed an original inventory but in this inventory did not include the notes payable to the decedent. Later on these were included in a supplemental inventory. During the process of administration the administrator was permitted to and did expend $1,500 of the funds of the estate to purchase a house and lot in the city of Wayne, Nebraska, for the estate. Still later the administrator obtained a license from the district court to sell the equity in the farm and the house and lot. Sale was made to Delpha Merchant, one of the children, and wife of the administrator, and Bertha Hendrickson, also one of the children, and wife of the attorney for the administrator, for $5,420. These two children were in nowise indebted to the estate. Thereafter, Bertha Hendrickson and Delpha Merchant sold the house and lot for $4,000.

The estate was closed pursuant to final decree entered June 24, 1938. The apparent distribution was made as follows: $460 was credited on the notes of each of the seven children who were indebted to the estate; Bertha Hendrickson and Delpha Merchant were each paid $460; Earl E. Merchant, administrator, received a fee of $500; C. H. Hendrickson, attorney for the administrator, received $500; and the expense of the administration was paid. In truth and fact, nothing was paid out except the administration expense. No fee for either the administrator or his attorney was ever paid. Bertha Hendrickson and Delpha Merchant

retained title to the land and the proceeds of their sale of the house and lot. The notes of the seven as credited were returned to one for the seven.

The action here is by W. F. Auker, Delpha Merchant and Earl H. Merchant, her husband, to declare a trust in Bertha Hendrickson and Delpha Merchant for the benefit of the nine children of Stephen E. Auker of the farm in question; to remove Bertha Hendrickson as trustee and that an accounting be had and indebtedness determined on the notes of the children payable to the decedent or the estate. The action is against Bertha Hendrickson and C. H. Hendrickson, her husband, Arthur Auker, Clarence Auker, Edward J. Auker, Guy Auker, Hobart Auker and Irvin Auker.

In the action the defendants Arthur Auker, Clarence Auker, Edward J. Auker, Guy Auker, Hobart Auker and Irvin Auker filed an answer and cross-petition wherein they allege that the sale of the farm was void. They pray that the sale of the farm be set aside and that title thereto be decreed to be in the estate of Stephen E. Auker, deceased. They further pray that in case the sale shall not be set aside that Delpha Merchant and Bertha Hendrickson be decreed to be trustees for the benefit of the heirs of Stephen E. Auker, deceased, and that on proper accounting they be discharged as trustees and the trust terminated.

The defendants Hendrickson, by answer and cross-petition, allege that all proceedings were regular; that Bertha Hendrickson and Delpha Merchant are the owners of the farm. They ask the appointment of a receiver, an accounting between Bertha Hendrickson and Delpha Merchant and that title to a one-half interest in the farm be quieted in Bertha Hendrickson.

The decree of the district court sustained the answer and cross-petition of the defendants Hendrickson in all respects except that no receiver was appointed. The plaintiff, W. F. Auker, and the defendants Auker have appealed. The assignments of error are numerous.

The first assignment to which attention will be directed is that the sale was void, or at least voidable, under section

30-1118, R. S. 1943. This contention in the light of the evidence presents no great difficulty in its disposition. Had there been an intention at the time the sale was made that Bertha Hendrickson and Delpha Merchant should become the absolute owners of the farm this question would require determination, but the evidence to the contrary is convincing. The evidence indicates plainly that it was the intention to take title for the benefit of the heirs. Conversations related in the evidence between different heirs with Bertha Hendrickson, Delpha Merchant, Earl E. Merchant and C. H. Hendrickson lead preponderantly to that conclusion, as we shall point out.

In the evidence is related the details of an occurrence after the sale when C. H. Hendrickson, at least as the representative of his wife and with her knowledge, if not of the other purchaser, began the preparation of a trust agreement for a declaration and division of interests in the farm among the heirs which agreement was never completed because of a failure to come to a complete understanding. This was not conclusive of anything but it was inconsistent with a claim of absolute ownership in Bertha Hendrickson and Delpha Merchant. There is also documentary evidence strongly tending to refute a claim of absolute ownership. On July 2, 1938, a statement signed by the purchasers was sent to the heirs which contained the following: "However, if any of the boys want the farm within six months or a year, and pay in cash a sufficient amount to equalize the matter, they may do so." In a letter from the administrator to one of the heirs dated July 14, 1938, appears the following: "But while the girls have title to the land we do not consider it as a bonified sale because that is not fair to the rest of the heirs." "The girls then give me the power of attorney to act as their agent. in all manner regarding this property. even to the selling of the same and the distribution of the proceeds." "So as to the final settlement when it comes they will have to rely on my personal honesty and intregity." "the origional loan on the farm was ten thousand five hundred. which I have cut to about ninty five hun-

dred. this reduction each year and the prospects of getting an increase in price in a few years will eventually leave us ecquity in the place." On July 2, 1938, the administrator wrote to the same heir. In that letter appears the following: "Then in order to get it out of court we deeded it to the two girls. they in turn give me power of attorney to act as their agent. and signed an agreement that any time the place is sold that the rest of the heirs shall share and share alike." In a letter bearing date of September 22, 1939, Bertha Hendrickson wrote W. F. Auker. The letter contained the following: "I hope we all live to see the farm sold and get something out of it." In a letter from the administrator to W. F. Auker, dated September 9, 1939, the following appears: " * * * and when we took it out of court to save expences the understanding between Bert Buck Delpha and I was that I was to look after It and make it pay out if possible an if there was a chance to get any thing off of it or for it the boys were to have it, * * * ."

Another step was taken which can be consistent only with an intention to take title for the heirs, or a fraud in the probate of the estate. The house and lot and farm were sold together for $5,420. This was shown by the final account and petition for distribution. This is the amount purported to have been distributed. The purported distribution was as follows:

C. H. Hendrickson, attorney fee	$500.00
E. H. Merchant, administrator's fee	500.00
First National Bank, balance of note	280.00
Art Auker, credit on note	460.00
Bertha Hendrickson, cash	460.00
C. O. Auker, credit on note	460.00
E. J. Auker, credit on note	460.00
Delpha Merchant, cash	460.00
W. F. Auker, credit on note	460.00
Guy Auker, credit on note	460.00
H. M. Auker, credit on note	460.00
Irvin Auker, credit on note	460.00
	$5,420.00

It is clear that neither Bertha Hendrickson nor Delpha Merchant paid in anything on the purchase price, nor did C. H. Hendrickson or Earl H. Merchant actually collect the fees allowed. They in fact, but not by any formal action, released these amounts to their respective wives as credits on the purchase price of the house and lot and the farm. This amounted to receipt out of the $5,420 by Bertha Hendrickson of $960 and a like amount by Delpha Merchant. These amounts added to the $280 reported payable to the First National Bank amounted to $2,200. This total deducted from $5,420 left a balance of $3,220 which has not to date been distributed or in anywise accounted for by the administrator. If there was an absolute sale intended to the sisters then there was $3,220 distributable among all of the nine heirs subject to the right of retainer by the administrator against those indebted to the estate if this amount could be considered a part of the personal estate of the decedent, which we doubt but do not decide. See *Stanton v. Stanton,* 134 Neb. 660, 279 N. W. 336; *Fischer v. Wilhelm,* 139 Neb. 583, 298 N. W. 126; *Nelson v. Janssen,* 144 Neb. 811, 14 N. W. 2d 662. A failure to distribute the $3,220, in case of an absolute purchase, would have amounted to an illegal conversion thereof. It may well be pointed out here that a determination of interests under the doctrine of retainer is not before the court in this action. It has not been made an issue.

We prefer to believe and to hold, and we think the evidence supports the belief and the holding, that an intention on the part of Bertha Hendrickson, Delpha Merchant and Earl E. Merchant to take title to the farm for the benefit of all the heirs and to place them on an equal basis with regard to interest therein existed at the time of the sale of the farm. Any other view would ascribe an intention on the part of the purchasers to become unjustly enriched at the expense of at least a portion of the other heirs.

Having become convinced that at the time the sale was made that Bertha Hendrickson and Delpha Merchant purchased for their benefit as well as of the other heirs it fol-

lows that the title they took was for all the heirs. In other words a "resulting trust" came into being with Bertha Hendrickson and Delpha Merchant as trustees of the farm in Wayne county, Nebraska, for the benefit of all of the children of Stephen E. Auker, deceased. We thus limit the trusteeship to the farm since no party in this proceeding either questions the title that they took to the house and lot or seeks an accounting of any kind or character in connection with their sale thereof.

In the opinion in *Hanson v. Hanson,* 78 Neb. 584, 111 N. W. 368, it is said: "Implied trusts are of two species, one denominated a 'resulting trust,' and the other a 'constructive trust.' In the first class are those trusts which attach to a legal estate acquired by consent of the parties, not in violation of any fiduciary duty or trust relation, for the common benefit of both trustee and *cestui que trust.* This trust arises out of, and is declared in favor of, the intent of the parties creating it. Its inception is in good faith and in furtherance of fair and honest dealing." Aside from what may have been the latterly conceived notion by some party or parties to the transaction, we are convinced that in the first instance the purchasers were motivated by good intentions and a desire to accord fair and honest dealing to their brothers.

In the light of the conclusions thus arrived at the other errors assigned do not require discussion.

The petition and the cross-petition demand that the trustees be required to make an accounting and that Bertha Hendrickson be removed as one of the trustees, and that some other suitable person be designated as a substitute trustee in her stead. In addition the cross-petitioners pray that the trustees be discharged and the trust terminated.

Equity and justice require that the said trustees shall make an accounting of their trusteeship from the date that they took title to the farm.

The decree of the district court is reversed and the cause remanded to the district court with directions to that court to decree that the title to the farm in question sold by Earl

E. Merchant, administrator, was taken by Bertha Hendrickson and Delpha Merchant as trustees for and for the benefit of all the children of Stephen E. Auker, deceased; that Bertha Hendrickson, Delpha Merchant, W. F. Auker, Arthur Auker, Clarence Auker, Edward J. Auker, Guy Auker, Hobart Auker and Irvin Auker, are each the owner of an undivided one-ninth interest in the farm as tenants in common; that the said trustees be required to make an accounting to the district court of their trusteeship from the date of sale; and that on the making of an accounting by the trustees they be discharged and the trust terminated.

REVERSED, WITH DIRECTIONS.

BERNICE M. MCNAUGHT, APPELLEE, V. NEW YORK LIFE INSURANCE COMPANY, APPELLANT.

18 N. W. 2d 56

FILED MARCH 9, 1945. No. 31846.

1. **Evidence.** In an action to recover for death caused by accident, when the causal connection between any bodily injuries and subsequent death is admittedly a highly scientific question, expert medical testimony may be relied upon by the jurors in arriving at their verdict.
2. ———. The opinions of medical experts are not conclusive upon the jury, but are to be weighed like all other evidence.
3. ———. Where an expert witness gives an opinion based upon facts established by the record upon a matter recognized as a proper subject of expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain a verdict.
4. ———. The opinion of a physician or surgeon as to the condition of an injured or diseased person is not rendered incompetent by the fact that it is based upon the history of the case given by the patient to the physician or surgeon on his examination of the patient, when the examination was made for the purpose of the treatment and cure of the patient.
5. **Appeal and Error.** When the attending physician signs a death certificate, and on the trial of the case orally testifies to all the medical facts set out therein by him, its admission in evidence is not prejudicially erroneous.

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

Brown, Crossman, West, Barton & Fitch and *Thomas F. Neighbors,* for appellant.

Floyd E. Wright and *Fred A. Wright, contra.*

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

PAINE, J.

This action was instituted by the widow and beneficiary of the deceased upon a double indemnity agreement attached to a life insurance policy, which provided that, upon the payment of an additional premium, the company would pay $1,000 for the accidental death of her husband. The jury returned a verdict for $1,208.84. Motion for a new trial being overruled, a judgment was entered for the plaintiff in the amount of the verdict, together with attorney's fees in the sum of $400, from which judgment the defendant insurance company appealed.

In the first trial of this same case, the trial court sustained a motion for a directed verdict for the defendant at the close of the plaintiff's evidence, and dismissed the action, which ruling, upon appeal to this court, was reversed in an opinion appearing in 143 Neb. 220, 12 N. W. 2d 108. The present appeal is from the second trial in the district court.

The action was based upon a policy of insurance, which reads in part as follows: "NEW YORK LIFE INSURANCE COMPANY agrees to pay to the Beneficiary under said Policy, in addition to and together with the amount payable under the terms of said Policy upon the death of the Insured, ONE THOUSAND Dollars upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury * * * ; provided, however, that such Double Indemnity shall not be payable if the Insured's death resulted, directly or indirect-

ly, from * * * (h) illness or disease; or, (i) any bacterial infection other than that occurring in consequence of accidental and external bodily injury."

The plaintiff's evidence may be summarized as follows: Homer R. Pease, a clerk who had been employed for 20 years at the Palace Hotel in North Platte, testified by deposition that the deceased had been an occasional guest at the hotel over a period of four or five years, sometimes staying one day, up to as high as seven or eight days in a month; that in August of 1940 he registered at the hotel and remained there for a few days; that at 9:30 one morning deceased came down from his room and limped, and he had not limped the day before, and that witness went up to his room with him, where the deceased removed his trousers and rolled up his shirt sleeves and disclosed black-and-blue bruises; that one near the elbow was about the size of a dollar; that his leg was hurt and his head was also injured some, and that the deceased had some lotion which the witness rubbed upon the arm and the leg; that he did not see any of these injuries the afternoon before.

On cross-examination he said that he could not remember which arm or leg it was that he rubbed the lotion on. He said the injury to the head was some kind of a break in the skin on the forehead and above the eye. He testified that Mrs. McNaught came down on the train that night, but did not register because they compliment the wife of a traveling man, and so she just went up to his room. He said that after he had rubbed the lotion on the injuries of the deceased he did not see him again that day, but saw him the morning he checked out, and his wife was with him.

The plaintiff testified that they had been married about ten years; that her husband, as representative of the Mankato Brewing Company, traveled the whole state of Nebraska; that they were living in Omaha, but he had driven her out to Scottsbluff to visit her folks while he worked around in western Nebraska; that he was in good health when he left her the middle of July; that she went to North Platte to ride to Omaha with him; that he came up to their room in

the hotel about 10:30 to 11:00 p. m., after she had gone to bed; that she noticed bruises on his arm, chest and ankle, consisting of a dark discoloration on the left forearm, just below the elbow, as big as the palm of her hand, on the right chest just below the collarbone, and a severe bruise on the ankle. She was not allowed to give the conversation with her husband as to how these bruises occurred. She testified that on the following Saturday morning, August 17, they drove to Omaha, arriving there late at night; that the discoloration on his arm remained for two weeks after they reached Omaha. She further testified that on the night of September 7 her husband became ill. Dr. McGee was called, who had him taken to the Lutheran Hospital, where his death occurred.

Dr. John W. McGee testified by deposition that he had been practicing in Omaha since 1925, and was called to see deceased at his home because of severe chest pains on September 8, 1940, and stayed several hours. "When I first saw him he was very seriously ill, and I thought he was going to die. He looked like it. He was still able to stand up, but he was in terrific pain. * * * I diagnosed his condition as an emboli, probably of the chest."

He returned early the next morning and stayed until about noon, then saw him again about 4 p. m., and had him removed to the hospital. "This thing started as a tremendous thing right off the bat."

Dr. McGee said he continued to treat him until his death September 17. In answer to the question as to the cause of death, Dr. McGee testified: "I feel that he died of an emboli for the reason that he had been feeling quite well except for an occasional sharp pain in his left chest. He had been temperature free. He just had a little bit of temperature the first day he was in the hospital. Third day temperature down to normal, occasionally got the chest pains no raise of temperature. I think it was undoubtedly an embolic condition. * * * There is no question about that. He may have had besides pulmonary emboli, coronary emboli—emboli of the heart, but I felt the main cause of death

was the pulmonary emboli. * * * Q. What other action can occur from the blood clots? A. If it hits a vital area you die. Q. What do you mean by a vital area? A. If it hits coronary artery it disturbs the action of the heart enough to stop it. If it would hit an end artery like the brain, like a respiratory center, it would stop it right there. In my death certificate I said the primary cause of death was pulmonary emboli but this man had coronary emboli too. Q. Coronary emboli? A. Coronary emboli—it is a small clot that will hit an end artery of the coronary artery supplying the heart itself. Q. Would that cause death? A. That could cause death, surely. Q. What generally are the causes of an emboli? A.Usually there is a history of an injury. Q. What kind of an injury? A. Where a vessel has been bruised hard enough that it has stagnated enough to form a clot. * * * Q. And the fact is, Doctor, that when you made out this death statement you did not feel that it was the result of the accident—you aren't certain now? * * * A. I wasn't entirely certain that it was the result of the accident. I know of no other known cause for the emboli. Yet, there is no question but that it was an embolic death."

Dr. Ralph J. Malott, a graduate of Northwestern University Medical School, had practiced medicine at Scottsbluff since 1929, and testified that he treated deceased for influenza in February, 1940, that he fully recovered, and after his recovery he examined his heart and the condition of his heart was normal. He was asked this hypothetical question: "Q. Now, Doctor, assuming that on or about the 15th of August, 1940, William McNaught received an injury to his arm in the vicinity of the forearm, near the elbow, which was somewhat painful and became discolored, the size of the discoloration being about the size of the palm of Mrs. McNaught's hand, and that the discoloration remained on the arm for about two weeks, and then on September 7, 1940, Mr. McNaught became ill and suffered with severe pain in the chest, and then taking into consideration the hospital charts, which are Exhibits A, A-1 to A-20, which you have examined, do you have an opinion as to what

caused the death of Mr. McNaught on September 17, 1940?" and after objection and ruling thereon answered: "I believe Mr. McNaught's death was due to coronary embolus."

The witness was then asked another hypothetical question, ending with the following: "considering the matters contained in the hospital charts, which are Exhibits A and A-1 to A-20, which you have just examined, and taking into consideration your knowledge of the physical condition of William C. McNaught, do you have an opinion as to what caused the embolus which you stated caused his death? * * * A. I think Mr. McNaught died of coronary embolus which arose from the site of the injury to his left arm. * * * Q. Do you have an opinion as to where this blood clot originated? * * * A. Yes. Q. Where, in your opinion, did it originate? * * * A. It originated at the site of this contusion on his arm."

The defendant's witnesses consisted of three physicians. Dr. R. H. Whitehead, Jr., testified by deposition that on September 17, 1940, he was a resident physician of the Lutheran Hospital, Omaha, Nebraska; that just before McNaught died he was called, and was with him for about 30 minutes before he died, administering nasal oxygen, and that his diagnosis of the death was cardiac decompensation with possible coronary occlusion; that he did not see anything which would have indicated to him that the death was caused by accidental injuries.

Defendant's exhibit A-4, being a hospital chart, signed by Dr. Whitehead, reads in the last paragraph as follows: "9-17-40 Pt (*patient*) while being taken from bed pan suddenly complained of pain in chest (12 midnite) and not able to get air ect Face became cold and clammy and respiration increased. Was pulseless. In spite of stimulents and nasal oxygen he became weaker and expired at 12:30 A. M. Cause of death cardiac decompensation or possible coronary occlusion Whitehead."

On cross-examination Dr. Whitehead testified that he knew that Dr. John W. McGee was treating the patient; that he had seen McNaught twice, once the day before and

at the time he expired. He testified that a pulmonary embolus is caused by a clot of blood breaking away from the scene of an injury, striking the lungs and causing sudden death; that he did not believe he had ever seen a man pass out from pulmonary emboli; that it is hard to prove unless they perform an autopsy.

Dr. Frank W. Plehn testified that he had practiced medicine in Scottsbluff since 1907; that he had examined the Lutheran Hospital charts in evidence, covering the entire hospital record of William McNaught from September 8 to September 17, 1940. He answered a hypothetical question that, from the study of the charts, in his opinion McNaught died from a disease of the coronary artery of the heart, and the cause of death was coronary thrombosis; that the hospital records and the facts assumed in the hypothetical question form almost a textbook record of the symptoms of coronary thrombosis; that he could conceive of no accident that would result in a coronary thrombosis, which comes as a result of a disease of the lining of the arteries; that he could not agree with the conclusion reached by Dr. McGee that McNaught died from pulmonary emboli from an injury received two weeks previous.

Dr. W. C. Harvey testified that he was a graduate of the University of Nebraska college of medicine, had practiced since 1920, and was on the staff of the Methodist Hospital and of the Fair Acres Hospital at Scottsbluff; that he had made a study of the exhibits in this case, and in answer to a hypothetical question said the deceased died of coronary occlusion; that the underlying cause of this is an inflammatory condition of the lining of the coronary artery, which may be accompanied by a hardening of the outer wall, and a clot is formed because of the inflammatory condition of the lining of the artery, which shuts off the blood flowing through.

The defendant assigns twelve errors relied upon for a reversal of the judgment in the case at bar. The first five errors assigned charge that the evidence was not sufficient to sustain the judgment, which was contrary to the evi-

dence and to the law; that the defendant's motion to dismiss the action at the close of the plaintiff's evidence, and again at the close of all the evidence, should have been sustained.

In order that we may pass on these first five assignments of error, we have hereinbefore set out a brief summary of the evidence showing the facts of the injury suffered by the deceased at North Platte, and the testimony of the plaintiff's medical experts, together with the evidence leading to the direct conclusion that the death of McNaught was due to a clot arising at the site of the injury he had received in his arm, while on the other hand the medical experts for the defendant insurance company testified that the death was caused by a diseased condition, or inflammation, of the lining of the arteries, which in no way was caused by the accident, and hence there could be no recovery under the terms of this policy, according to the evidence given by defendant's witnesses.

Dr. McGee testified that deceased came to his death from pulmonary emboli, and he was asked on cross-examination: "Q. And the cause of that emboli was and still is obscure in your mind? A. The only known cause that I could find was this blow on the right arm."

In a compensation case in which the facts relating to the death were somewhat similar, a milkman cut his hand on a broken bottle. His death occurred from coronary thrombosis six months later. In the cross-examination of his doctor appears the following testimony: "Q. Doctor, was it your opinion that you thought he died of this coronary thrombosis merely because you couldn't find any other reason to account for his death? A. That is the only logical conclusion I could come to. Q. Under the circumstances then it would be just equivalent to hazarding a guess as to what he died from? A. No, it is not a guess; it is a conclusion." The superior court decided that the theory and conclusions of Dr. Biddle were sufficient in quality to sustain the award, and entered judgment for claimant. *Swalm v. J. H. Brokhoff, Inc.*, 145 Pa. Super. Ct. 218, 20 Atl. 2d 797.

In the case of *Petruzzi v. A. Levy & Co.*, 108 Pa. Super. Ct. 566, 165 Atl. 543, deceased sustained a bad fracture of his left arm near the wrist on December 14, 1928. On May 7, 1929, the bone was rebroken and reset. On May 21 he suffered from paralysis of the left arm and leg, and on September 8 died of an embolism. The superior court of Pennsylvania held that, while experts testified that he had a heart murmur and it was possible that his death might have come as a result of the heart condition, the board accepted the evidence that the embolus came from the rebreaking of the wrist rather than the heart murmur.

In a very similar case to the one at bar, viz., *Kundiger v. Prudential Ins. Co. of America*, 17 N. W. 2d (Minn.) 49, we have an action in which the causal connection between any bodily injuries and his subsequent death was admittedly a highly scientific question. Lay jurors could not intelligently determine from their own knowledge and experience whether the injuries were the sole cause of death; hence, without some supporting expert medical testimony, there would have been no proper foundation for a finding by the jury that the injuries were the sole cause of death. The jury did not sit simply to count the number of expert witnesses, nor was it required to accept or reject the testimony of each expert *in toto*. His testimony, like that of any other witness, could be believed in part and disbelieved in part.

"The opinions of medical experts are not conclusive, but are to be weighed by the jury like all other evidence. The jury may act against the greater number of opinions, and in favor of the fewer; for the opinion of one expert may, on account of his greater knowledge and experience on the subject, or from his giving fuller details of the case, or more probable reasons for his opinion, be of greater value to the jury than the opposite opinions of several." Lawson, Expert and Opinion Evidence (2d ed.), 177.

" * * * when expert opinion as to causation is admissible, the weight of the opinion is to be determined by the jury." 20 Am. Jur., sec. 867, p. 732.

In a very recent opinion by this court, *Long v. Railway*

Mail Assn., decided February 16, 1945, *ante*, p. 623, 17 N. W. 2d 675, we said: "Where an expert witness gives an opinion based upon facts established by the record upon a matter recognized as a proper subject of expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain a verdict."

Therefore, in the case at bar, when the contradictory and conflicting evidence of the medical experts could not be reconciled as to whether an accident or existing disease caused the death of the insured, there was presented a definite jury question, and the trial court was justified in overruling the two motions made by the defendant for a directed verdict.

We will next consider the objection of the appellant to permitting Dr. McGee to testify that in getting the history from the deceased he was told deceased had sustained a blow to his right arm. It is insisted that this was not necessary for a diagnosis or treatment, and, being so long after it had occurred, it was simply a narrative of a past event and hearsay, and its admission prejudicial.

In *Block v. Milwaukee Street Ry. Co.*, 89 Wis. 371, 61 N. W. 1101, a doctor was allowed to testify to statements made to him by the patient a year and a half after the accident.

In *Sweeney v. Midwest Life Ins. Co.*, 129 Neb. 521, 262 N. W. 47, the evidence disclosed that the deceased slipped and fell on October 19, 1931, and that her death occurred December 2, 1931. Dr. Hanisch was allowed to testify to the personal history given by the deceased on November 13, which lapse of time after the accident and before the history was given was similar to the lapse of time in the case at bar.

"Physician's Knowledge of Symptoms based on Hearsay of Patients and Others. Here, again, the law cannot afford to stiltify itself by refusing to recognize, in testimonial rules, the safe and accepted practices of medical science. When a physician examines a patient to ascertain his ailment and to prescribe for it, a portion of his reasons for action must be the patient's own statements. To exclude testimony not wholly independent of this foundation for

opinion is, in strictness, to exclude almost always medical testimony based on a personal examination. * * * Any attempt to draw the line in rulings, and to exclude a physician's testimony because his diagnosis is based in part on such statements, is unpractical, and defies the usual processes of medical thought. Hence it should be avoided." 3 Wigmore, Evidence (3d ed.) sec. 688, p. 4.

The approved rule in regard to physician securing a history from the patient to enable him to properly treat the patient is announced in annotation, 65 A. L. R. 1223, as follows: "The opinion of a physician or surgeon as to the condition of an injured or diseased person is not rendered incompetent by the fact that it is based upon the history of the case given by the patient to the physician or surgeon on his examination of the patient, when the examination was made for the purpose of the treatment and cure of the patient." This rule is supported by opinions there cited from many states.

The sixth and seventh assignments of error relate to the refusal of the court to submit to the jury instructions Nos. 4 and 5 requested by the defendant. An examination of the instructions as given by the court discloses that instruction No. 9 set out all of the terms of the double indemnity agreement, and No. 11 required the plaintiff to show that the deceased came to his death solely through external, violent and accidental means, and instruction No. 12 instructed the jury that, if the deceased came to his death from illness or disease, their verdict would be for the defendant. These three instructions included everything asked by the defendant in instructions Nos. 4 and 5 as submitted by it, and there was therefore no error in rejecting these tendered instructions. See *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N. W. 97.

The defendant's eighth and ninth assignments of error charge that the testimony of Dr. McGee that the deceased told him he had sustained a blow on his arm, which we have already discussed, and the receiving in evidence of exhibit No. 1, the death certificate, signed by Dr. McGee on Septem-

ber 17, 1940, constituted prejudicial error. This death certificate gave as the cause of death pulmonary emboli. After the words "Due to" there was filled in by Dr. McGee "Probly. from injury received 2 wk. previous", and again the printed words "Due to", after which was filled in, "Blow on R. arm."

We find in *Omaha & C. B. Street Ry. Co. v. Johnson,* 109 Neb. 526, 191 N. W. 691, that it was held by this court in 1922 that in a case under the workmen's compensation law such medical certificate of death was incompetent when offered as proof of the cause of death as shown by the recitals therein. In that case no one of the physicians who attended the deceased was called upon to testify, but in the case at bar Dr. McGee, who signed the certificate of death, testified in his deposition to all of the statements found in the medical portion thereof, and one of these answers, to which objection was made and overruled, reads: "Patient gave a history of having been hit on the right arm August 12, 1940, also of having a pain in arm up to the time of the sickness."

Contrary to the rule expressed in this Nebraska decision, many states permit a death certificate to be received in evidence as presumptive evidence of the facts stated therein. See 16 Am. Jur., sec. 16, p. 18; Annotations, 42 A. L. R. 1454, and 96 A. L. R. 324.

However, in the case at bar, since Dr. McGee testified to all the points criticized in this exhibit No. 1, the ruling of the court would not be prejudicial, or require a reversal of the case.

The last assignments of error charged by the defendant as prejudicial embrace the overruling of the motion for a new trial, the allowance of attorneys' fees, and the overruling of the motion to retax costs.

It is argued that if $400 is allowed for a two days' trial it is highly exorbitant, that it would be error to allow any attorneys' fees for the first trial because the trial court instructed a verdict for defendant, and that such a fee is so unreasonable as to be punitive rather than compensatory.

In defense of these fees, the plaintiff argues that preparation for trial included the taking of depositions in Omaha, North Platte and Dallas, Texas, and two contested trials in the district court, and that $400 is not excessive for the services rendered.

Section 44-359, R. S. 1943, directs the court in such cases to allow a reasonable sum for attorney's fee, to be taxed as part of the costs, and that this court shall also allow a reasonable sum in the appellate proceedings.

In *Gillan v. Equitable Life Assurance Society*, 142 Neb. 497, 6 N. W. 2d 782, a judgment was recovered of $102.40, and the district court allowed $500 attorney's fees, and this court in addition allowed $200. In *McCleneghan v. London Guarantee & Accident Co.*, 132 Neb. 131, 271 N. W. 276, the judgment was $2,700, and district court attorney's fees of $300 were allowed, and $200 was allowed in this court.

In all such cases, the trial court has observed the course of the proceedings, and has considered the amount involved, the questions of law raised, the time and labor necessarily involved, as well as the professional diligence and skill required, and when all these facts are considered it does not appear to us that there has been any abuse of discretion in fixing the fee in the district court at $400. In regard to the fee in this court, it was argued to this court after the first trial in the lower court, and then reargued upon the direction of this court. It has now been argued here for the third time, and we fix the attorneys' fee in this court at the sum of $300.

Finding no prejudicial error, the judgment of the trial court is hereby affirmed.

AFFIRMED.

IN RE ESTATE OF JOSEPH MCCLENEGHAN. LESTER V. PULLIAM, ADMINISTRATOR DE BONIS NON WITH WILL ANNEXED, APPELLEE, V. JOSEPH MCCLENEGHAN, JR., APPELLANT.

17 N. W. 2d 923

FILED MARCH 9, 1945. No. 31883.

1. **Pleading.** When a petition is filed to which a demurrer is sustained and with leave of court an amended petition is filed containing substantially the same allegations as the original petition, it is proper practice to call the matter to the attention of the court by motion to strike such amended petition from the files.
2. ———. In determining whether an amended petition states a cause of action the court will not ordinarily look beyond the pleading against which the attack is directed.
3. ———. The rule that a demurrer searches the entire record applies only when a demurrer is filed to a pleading subsequent to the petition.
4. ———. A pleading which has been superseded by an amended pleading is only evidence of the facts therein alleged, and must be introduced as any other evidence in order to be considered.
5. ———. The rule that a party may at any and all times invoke the language of his opponent's pleading as rendering facts therein alleged indisputable applies only to statements in the pleadings upon which the case is tried.
6. **Case Distinguished.** *Witzenburg v. State*, 140 Neb. 171, 299 N. W. 533, distinguished.
7. **Pleading.** Neither the fact that the petition may be informal or open to objection in respect of particular allegations, nor the fact that the record in the probate proceedings attacked may disclose facts at variance with some of its allegations, afford any ground of demurrer or warrant for striking it from the files.
8. **Limitation of Actions.** The statute of limitations, the statute of nonclaim and *res adjudicata* are ordinarily affirmative defenses. It is only when they affirmatively appear to exist from the petition itself that they afford a basis for the sustaining of a general demurrer.
9. **Pleading.** A transcript on appeal may not be referred to in determining whether a petition states a cause of action.

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

Wells, Martin & Lane, for appellant.

Ellick, Fitzgerald & Smith and *William R. Patrick, contra.*

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

CARTER, J.

This is an appeal from a judgment of the district court dismissing plaintiff's petition on appeal from the county court after a motion to strike addressed thereto had been sustained and plaintiff had elected to stand thereon.

The second amended petition alleges that on and prior to May 12, 1942, Joseph McCleneghan, Jr., the plaintiff, and Joseph McCleneghan, Sr., were partners carrying on a livestock commission business at the Union Stock Yards in Omaha under the name of The Record Live Stock Commission Co. On May 12, 1942, Joseph McCleneghan, Sr. died. The plaintiff contends that as the sole surviving partner he is entitled to the possession of the assets and business of the partnership for the purpose of liquidation and distribution. One John A. Hart was appointed special administrator and on June 17, 1942, the will of Joseph McCleneghan, Sr. was admitted to probate and Hart was appointed executor of the estate. On May 18, 1942, the county court ordered Hart as special administrator to take possession of the business and assets of The Record Live Stock Commission Co., and to continue the business of the company. In compliance with this order Hart took possession of the property, assets and earnings of the partnership business up to and including September 5, 1942, when he resigned. During this period he collected funds from the partnership business in the amount of $3,777.40, $1,705.59 he paid out on claims on the order of the county court and $2,071.81 he retained in cash for distribution. Upon the resignation of Hart the county court appointed Lester V. Pulliam administrator *de bonis non* to complete the administration of the estate. Pulliam received the funds heretofore mentioned from Hart and now holds them subject to the order of the court. The petition alleges that plaintiff as the sole surviv-

ing partner has the duty of liquidating the affairs of the partnership and making distribution of the remaining assets, and is therefore entitled to the possession of the $3,777.40 as against the administrator. The petition further alleges that the partnership was fully liquidated in December, 1942, and that nothing remained to be done except to arrive at an accounting between the plaintiff as the sole surviving partner and the administrator of the estate. It is further alleged that at a hearing duly had in the county court on September 28, 1943, a full accounting of the affairs of the partnership was had which was approved by the administrator and the county court. It was therein determined that the administrator held $3,777.40, which constituted the sole assets of the partnership and out of which the estate was entitled to $1,112.71 and the plaintiff to $2,664.69. This is the order from which this appeal was taken. Demand has been made for the payment of the funds above set out and the administrator has failed to pay the same or any part thereof to the plaintiff. The petition prays that the court order a distribution in accordance with the accounting had in the county court, or, if the court finds that a proper accounting has not been had, that a proper accounting be made and a distribution of assets ordered pursuant thereto. To this second amended petition the administrator filed a motion to strike, which was sustained and, plaintiff electing to stand thereon, the action was dismissed. Plaintiff contends that the trial court committed error in so doing.

The record shows that plaintiff filed his petition in the district court, after lodging his appeal there, on November 13, 1943. A general demurrer thereto was sustained on January 10, 1944. On the same day an amended petition was filed. The defendant moved to strike the amended petition on January 29, 1944. On April 10, 1944, this motion was sustained for the reason that the matters set forth in the amended petition were essentially the same facts pleaded in the original petition to which a demurrer had been sustained. On June 7, 1944, a second amended petition was

filed. On June 22, 1944, a motion to strike the second amended petition was filed and on July 22, 1944, the motion to strike was sustained for the reason that the second amended petition was essentially the same as the original petition to which a general demurrer had been sustained.

When a petition is filed to which a demurrer is sustained and with leave of court an amended petition is filed containing substantially the same allegations as the original petition, the proper practice is to call the matter to the attention of the court by motion to strike such amended petition from the files. *Clark v. Lincoln Liberty Life Ins. Co.*, 139 Neb. 65, 296 N. W. 449; *Loghry v. Fillmore County*, 75 Neb. 158, 106 N. W. 170. It is error, however, to strike such an amended petition if it is materially different from the original and states a cause of action. *Wheeler v. Barker*, 51 Neb. 846, 71 N. W. 750; *Brandeen v. Beale*, 117 Neb. 291, 220 N. W. 298. We are satisfied that the allegations of the second amended petition are materially different from the original and that it could not be properly stricken on that ground. The question to be determined is whether plaintiff's second amended petition states a cause of action.

The administrator contends that the petition contains two causes of action; one upon a personal oral promise of Joseph McCleneghan, Sr., to pay a bank overdraft of The Record Live Stock Commission Co. in the amount of $1,979.89 on February 1, 1938, the date of the formation of the partnership; the other, equitable in nature, seeking an accounting of the earnings of the partnership after the death of Joseph McCleneghan, Sr. The difficulty with defendant's position is that the second amended petition makes no mention of the aforesaid items or of the transactions out of which they arose. The petition merely alleges that Hart took possession of the assets of the partnership which amounted to $3,777.40, alleges that they legally belonged to the plaintiff as the surviving partner for purposes of liquidating the affairs of the partnership and of making distribution of the remaining assets. Under the applicable statute, section 30-503, Comp. St. 1929, it was the duty of

the surviving partner to make settlement of the affairs of the partnership with the administrator of the estate and submit such settlement to the county court for approval, correction or disallowance. We find no allegations in the second amended petition consistent with defendant's position that two causes of action are pleaded therein, one of which is shown on the face of such petition to be barred by the statute of limitations and the statute of nonclaim. The fact is that plaintiff's second amended petition does not break down the item of $3,777.40, no date is set out with reference thereto, nor is any statement made therein from which it can be inferred that the four-year statute of limitations had run against any part of the amount or that any part of it was barred by the statute of nonclaim.

Defendant urges that in determining whether the second amended petition states a cause of action, the court will take judicial notice of the facts pleaded in the petitions previously filed and of the facts appearing in the transcript from the county court. In this we think the defendant is in error. The rule is that, in determining whether an amended petition states a cause of action, the court will not look beyond the pleading against which the demurrer or motion is directed. In *Robert v. Hefner*, 81 Neb. 460, 116 N. W. 36, this court said: "We understand, from brief of appellee and from the oral argument on the submission of the case, that the district court, in sustaining the demurrer, proceeded upon the theory that a demurrer searches the whole record, and that the record on the first trial was a part of the record which might be examined to determine the sufficiency of the amended petition; that the petition upon which the first trial was had asked a rescission of the contract, and the plaintiff, having elected to sue for a rescission of the contract, is barred of an action for damages. The rule that a demurrer searches the entire record applies only when a demurrer is filed to a pleading subsequent to the petition or declaration. Both by the common law and by our statute a petition is demurrable only when it appears on its face that it does not state a cause of action. * * *

Again, the rule is well established that a pleading which has been superseded by an amended pleading is only evidence of the facts therein alleged, and must be introduced as any other evidence in order to be considered. *Shipley v. Reasoner*, 87 Ia. 555. The reason for this is evident: A party may, through inadvertence, mistake, or misinformation, make admissions of facts which have no existence, or are inconsistent with the statements of his amended pleading. If the original pleading is before the court for its consideration, without being offered in evidence, the party making such admissions has no opportunity to explain the circumstances under which they were made, and is thus faced with an admission which might, perhaps, be easily explained and its force wholly avoided." See, also, *State ex rel. Johnson v. Consumers Public Power District*, 142 Neb. 114, 5 N. W. 2d 202; *In re Estate of Statz*, 144 Neb. 154, 12 N. W. 2d 829. In the latter case we said: "A demurrer to a petition admits only facts well pleaded therein and the court will not consider extrinsic facts admitted or alleged by the parties or their counsel. As a general rule only the demurrer and the pleading demurred to may be considered in passing thereon. *Griffin v. Gass*, 133 Neb. 56, 274 N. W. 193. * * * When a petition is filed alleging an original cause of action directed against administration proceedings to obtain relief by the application of equitable principles, on demurrer thereto, other records in the probate proceeding which are not a part of the petition or demurrer are not before the court until some issue of fact or law is properly raised requiring an investigation thereof. *Genau v. Abbott*, 68 Neb. 117, 93 N. W. 942. Therefore, whether as contended by appellee, the executor had filed a full and final report and account as executor, obtained decree of final settlement and distribution to him as trustee, was finally discharged as executor and served thereafter as trustee under the will, depriving the county court of jurisdiction, is a factual and legal question which cannot be determined by this court upon demurrer to the petition." We think the rule is clear that the court will not ordinarily go beyond the pleading

questioned in determining whether a cause of action is stated. If the transcript on appeal, or previously filed petitions, contains statements tending to support defendant's position, they may be introduced as evidence on the trial, but they may not be considered in determining whether a cause of action has been stated in the amended petition on which the plaintiff elected to stand.

We are not unmindful of the rule that a party may at any and all times invoke the language of his opponent's pleading as rendering certain facts indisputable and, in doing this, he is neither required nor allowed to offer the pleading in evidence in the ordinary manner,—it is a part of the proceedings without being introduced in evidence. *Bonacci v. Cerra,* 134 Neb. 476, 279 N. W. 173; *Gibson v. Koutsky-Brennan-Vana Co.,* 143 Neb. 326, 9 N. W. 2d 298. A careful reading of the foregoing cases will reveal that this rule applies only to statements in the pleadings upon which the case is tried. It has no application to statements contained in pleadings which have been superseded by amended pleadings as in the case at bar.

The defendant relies strongly upon the case of *Witzenburg v. State,* 140 Neb. 171, 299 N. W. 533, wherein it is stated that the general rule is that, while a court will take judicial notice of its own records, it will not in one case take judicial notice of the records in another case. We think that case and the cases cited in support of the rule indicate that it has no application to the rule herein announced. The rule in those cases indicates that this court will take judicial notice of final orders of this court made in the same case on a former appeal or in other cases which are so interdependent as to warrant the application of the rule. These are exceptions to the general rule warranted from the necessity of giving effect to former holdings which finally decide questions of fact and law. The rule established by the *Witzenburg* case does not and was never intended to apply to the situation now before us.

The administrator further contends that, in the consideration of the question whether the second amended petition

states a cause of action, the court will take judicial notice of the matters contained in the transcript on appeal. This contention applies particularly to the question whether the second amended petition shows on its face that the cause of action is barred on the ground that it had previously been adjudicated. The judgment urged as constituting *res adjudicata* is not pleaded or mentioned in the second amended petition. It appears only in the transcript of the proceedings had in the county court. We think the correct rule is stated in *Genau v. Abbott*, 68 Neb. 117, 93 N. W. 942, wherein we said: "Neither the fact that the petition may be informal or open to objection in respect of particular allegations, nor the fact that the record in the probate proceedings attacked may disclose facts at variance with some of its allegations, affords any ground of demurrer or warrant for striking it from the files."

Giving effect to the principles of pleading herein announced, it is evident that the second amended petition does not show on its face that the cause of action is barred by the statute of limitations, the statute of nonclaim or *res adjudicata*. It is not urged that the second amended petition fails to state a cause of action for any other reason. Under such circumstances the trial court erred in sustaining defendant's motion to strike and in dismissing the action.

REVERSED.

CHARLES LINTZ, APPELLANT, V. GEORGE APKING ET AL., APPELLEES.

18 N. W. 2d 55

FILED MARCH 9, 1945. No. 31902.

Specific Performance. In order to enforce an oral contract for the conveyance of the estate of a deceased person the evidence of the contract and its terms must be clear, satisfactory and unequivocal; the evidence of performance must be clear and satisfactory; and the thing done constituting performance must be such as is referable solely to the contract sought to be enforced and not such as might be referable to some other and different contract.

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

W. J. Moss, Melvin Moss and *Albert S. Johnston,* for appellant.

Hartigan & Skultety, contra.

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

YEAGER, J.

This is an action instituted by Charles Lintz, plaintiff and appellant, against George Apking, individually, and as executor of the estate of Anna K. Bell, deceased, whereby plaintiff seeks specific performance of an alleged parol contract entered into between him and Anna K. Bell whereby the said Anna K. Bell agreed to convey to him a fee simple title to the southwest quarter of section seven (7), township four (4) north, range two (2) east of the sixth P. M., in Jefferson county, Nebraska. By the decree of the court the petition of plaintiff was denied. From this decree plaintiff has appealed.

The pertinent history which furnishes the background for plaintiff's claim of a contract and a right of recovery is substantially the following: In 1917 Anna K. Bell became the owner of the described real estate. At that time plaintiff became her tenant and thus continued until 1922 when he entered into a contract for the purchase of the land. The contract was canceled on March 5, 1937, by written agreement between the parties at which time plaintiff and his wife quitclaimed whatever interest they had in and to the land to Anna K. Bell. By the terms of the agreement plaintiff became tenant thereon from the date thereof to March 1, 1939. The stipulated rent for the period from March 5, 1937, to March 1, 1939, was $200. As a part of the agreement plaintiff was given an option to purchase the land for $12,000 by March 1, 1939. The option was never exercised.

The plaintiff in his petition claims that at some time before the expiration of the lease Anna K. Bell orally offered,

which offer was accepted by plaintiff, that if plaintiff would remain and continue to live on the premises, leave improvements on the premises placed thereon by plaintiff, keep the premises in repair, make necessary improvements and pay the customary rent until her death, she would leave the farm to him as his absolute property. He alleges that he fully performed but that Anna K. Bell in her will left him only a life estate in the farm.

The statutory provisions declaratory of the rights of parties under parol contracts relating to lease and conveyance of real estate are quoted at large in *Taylor v. Clark,* 143 Neb. 563, 13 N. W. 2d 621, and *Crnkovich v. Crnkovich,* 144 Neb. 904, 15 N. W. 2d 66; therefore they do not require repetition here.

There is no longer any doubt as to the evidentiary burden which must be sustained by a party seeking the enforcement in a court of equity of a parol contract for the conveyance of real estate. It was said in *Overlander v. Ware,* 102 Neb. 216, 166 N. W. 611: "In considering cases of this character, where one is claiming the estate of a person deceased under an alleged oral contract, the evidence of such contract and the terms of it must be clear, satisfactory and unequivocal. Such contracts are on their face void as within the statute of frauds, because not in writing, and, even though proved by clear and satisfactory evidence, they are not enforceable unless there has been such performance as the law requires. The thing done, constituting performance, must be such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other and different contract—something that the claimant would not have done unless on account of the agreement and with the direct view to its performance—so that nonperformance by the other party would amount to fraud upon him."

This statement of principle has been reiterated by direct quotation or reference in the recent cases of *Taylor v. Clark, supra; Cahill v. Mockett,* 143 Neb. 730, 10 N. W. 2d 679; *Crnkovich v. Crnkovich, supra*; and *Diez v. Rosicky, ante,* p. 242, 16 N. W. 2d 155.

The burden in the light of this rule has devolved upon the plaintiff (1) to prove an oral contract the terms of which are clear, satisfactory and unequivocal, and (2) that his acts constituting performance were such as were referable solely to the contract sought to be enforced, and not such as might have been referable to some other or different contract.

As to the first of these propositions the record is devoid of any evidence of the date of any offer or acceptance. In fact there is not even a word of evidence of any occasion when the parties negotiated or entered into any kind or character of agreement with regard to the farm in question after the date of the agreement entered into on March 5, 1937. The only evidence in the record even remotely indicating any kind of oral agreement was the testimony of certain witnesses who testified that Anna K. Bell expressed to them an intention of leaving the farm to plaintiff and a post card written by her bearing the following words: "It is in my will that the place is yours; * * * ."

This evidence falls short of proof that the performance claimed by plaintiff was referable solely to an oral contract to convey to plaintiff title to the land in question. We have no difficulty in arriving at the conclusion that the claimed performance was as readily referable to a contract to pass to plaintiff a life estate, the estate which was actually passed, as a fee title.

The decree of the district court is affirmed.

AFFIRMED.

ELOF E. BLIXT, APPELLEE, V. HOME MUTUAL INSURANCE COMPANY OF IOWA, APPELLANT.

18 N. W. 2d 78

FILED MARCH 16, 1945. No. 31766.

1. **Constitutional Law.** The legislature may not validly in a regulatory act under the police power invade the right of contract, impair rights of property or restrict the courts in the considera-

tion of evidence and the determination of title and ownership of property and contractual rights and obligations.

2. Insurance. A provision in an automobile liability insurance policy providing automatic insurance on a newly acquired automobile for ten days is for the benefit of the insured and is effective from the date of acquisition of the newly acquired automobile notwithstanding the existence of infirmities in the title thereto.

APPEAL from the district court for Custer county: ELDRIDGE G. REED, JUDGE. *Reversed and dismissed.*

L. R. Doyle and *Schaper & Runyan,* for appellant.

Roy E. Blixt, Kelly & Deming and *Evans & Lee, contra.*

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

YEAGER, J.

This is an action by Elof E. Blixt, plaintiff and appellee, against Home Mutual Insurance Company of Iowa, defendant and appellant, for recovery of the costs of repair of a Dodge automobile claimed to be due from defendant to plaintiff under an insurance contract insuring plaintiff in the first instance against loss or damage to a Chevrolet automobile owned by him.

The case was tried to the court, a jury having been waived, which resulted in judgment in favor of plaintiff for $335. The defendant has appealed.

The pertinent facts are not in dispute. On or about March 21, 1940, plaintiff procured from the defendant an insurance policy insuring a Chevrolet automobile against damage by collision. The advance premium was $16. It provided that in case of accident and damage to the automobile an additional premium of $25 should be paid. While the insurance was upon the Chevrolet described, the policy contemplated that the insured might exchange it for another automobile which other automobile, within certain specified limits and conditions, would be protected by the policy. The policy contained the following provisions covering such a contingency: "Automatic Insurance for Newly Acquired Automobiles. If the named Insured who is the owner of the

automobile acquires ownership of another automobile, such insurance as is afforded by this Policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions: * * * (2) if the Company does not insure all automobiles owned by the named Insured at the date of such delivery, insurance applies to such automobile, if it replaces an automobile described in this Policy and may be classified for the purpose of use stated in this Policy, but only to the extent applicable to the replaced automobile; (3) the insurance afforded by this Policy automatically terminates upon the replaced automobile at the date of such delivery; and (4) this agreement does not apply * * * (b) unless the named Insured notifies the Company within ten days following the date of delivery of such other automobile, * * * (d) unless the named Insured pays any additional premium required because of the application of this insurance to such other automobile." On November 9, 1940, plaintiff exchanged the Chevrolet for the Dodge in question here. For the Dodge he gave in exchange the Chevrolet and a bank check for $390. From that date on he had the possession of and used the Dodge in his business and activities as he had formerly used the Chevrolet. Although he had possession of the Dodge thenceforth and the license plates of the Chevrolet were attached to it his title was not assigned to him until November 20, 1940, which assignment did not reach him until probably November 29, 1940, and certainly not earlier than November 27, 1940. On December 2, 1940, the collision occurred which is the basis of the action. On the same day the agent of the defendant was notified of the accident and on the same day or the next the defendant received notice for the first time that the Chevrolet had been displaced by the Dodge.

The plaintiff filed proof of loss and defendant denied liability on the ground that the Dodge was not covered by the insurance policy, for the reason that notice was not given of the replacement within ten days as was required by the terms of the policy. The question of whether or not notice

was given within ten days within the meaning of the terms of the policy is the only issue presented by the pleadings and evidence.

The plaintiff predicates his cause of action on the proposition that, though he had possession and use of the Dodge from November 9, 1940, yet since his title thereto was not perfected until November 29, he had ten days from that date to satisfy the requirements of the insurance policy as to notice. In other words, that they were satisfied by the notice given on December 2 or 3.

The plaintiff cites no decision to support his position. It appears that he rests his contention upon the last sentence of section 60-1004, Comp. St. Supp. 1941, (now section 60-105, R. S. 1943) as follows: "No court in any case at law or in equity shall recognize the right, title, claim or interest of any person in or to any motor vehicle, hereafter sold or disposed of, or mortgaged or encumbered, unless evidenced by a certificate of title or manufacturer's or importer's certificate duly issued, in accordance with the provisions of this Act."

This provision is part of an act the design of which is to control within fixed limits the use and operation of motor vehicles and to establish methods and means for conveyance of title in order that the provisions for control and use may be made effective. It is a regulatory act under the police power. As such, no doubt, it is a valid exercise of the police power.

The provision goes far beyond a mere regulation under the police power. It amounts to an invasion of the right of contract, the impairment of rights of property and a restriction upon the right of the courts to weigh and consider evidence and to make determinations with regard to title and ownership of property and contractual rights and obligations.

The plaintiff has cited no case and we have found none the effect of which is to say that the legislature is empowered, under the guise of a police regulation, to validly invade the field of contract and property rights and to restrict the courts in the exercise of their proper functions.

We must therefore hold that this statutory provision may not be considered as in aid of plaintiff's cause of action. The case must turn on other considerations.

The policy provides that the insurance shall attach to a newly owned automobile from the date of delivery for ten days without notice. This is for the benefit of the insured so that he may have protection from the time of commencement of use of the newly acquired automobile.

In the opinion in *Maryland Casualty Co. v. Toney,* 178 Va. 196, 16 S. E. 2d 340, where the court was called upon to interpret and apply an insurance contract containing the same provisions as the one before us, the court, speaking of the purpose of the provision, said: "It will be observed that this clause is expressed in the broadest terms and is for the benefit of the insured." Further, on applying it, the court said: "The insured is afforded protection from the earliest time he needs protection—that is, from the time the new car is delivered to him. Protection is not delayed until ownership is complete in the insured or until the title is registered in his name, or even until the newly acquired car is placed in service. From the time of delivery of the car to the insured—that is, from the time he takes possession of it—he is protected by the policy." In that case the court sustained a denial of liability since the accident therein involved occurred more than ten days after delivery without notice of replacement having been given within ten days.

In *Dean v. Niagara Fire Ins. Co.*, 24 Cal. App. 2d Supp. 762, 68 Pac. 2d 1021, a case also involving interpretation and application of terms like those contained in the policy here, the court said: "There is nothing in the policy to suggest or justify giving to the word 'delivery' as used therein any meaning other than its ordinary one, which in the context quoted, would signify a handing over of physical possession and control of the automobile. The fact that the Motor Vehicle Code provides that * * * 'No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to

have been made and any attempted transfer shall not be effective for any purpose until transfer or registration is made and the department has issued a new certificate of ownership and registration card' except as therein provided, does not prevent the owner or prospective owner of an automobile from validly contracting for insurance against perils of use dependent upon possession irrespective of the status of registered ownership."

The cases of *Jamison v. Phoenix Indemnity Co.*, 40 Fed. Supp. 87, and *Merchants Mutual Casualty Co. v. Lambert*, 90 N. H. 507, 11 Atl. 2d 361, 127 A. L. R. 483, are also declaratory of the principles announced in the cases from Virginia and California. We think the principles announced in these cases are sound and accordingly they are approved for the purposes of this case.

Here the delivery and commencement of use took place on November 9, 1940, and continued to December 2, 1940, when the accident occurred. No notice of exchange was given to the defendant until after the accident. These matters are without dispute in the evidence. The policy of insurance no longer attached to the Dodge automobile on December 2, 1940, hence there was no liability on the part of the defendant for the accident in question.

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

REVERSED AND DISMISSED.

ELLA LOIS BIZE, APPELLANT, V. DAVID BIZE, APPELLEE.
18 N. W. 2d 75

FILED MARCH 16, 1945. No. 31881.

Appeal and Error. Findings of facts based on an inspection by a trial judge are entitled to no weight and may not be considered unless the record contains competent evidence to support the findings.

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

Chambers, Holland & Locke, for appellant.

Max Kier, contra.

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

YEAGER, J.

This is an action instituted by Ella Lois Bize against David Bize for divorce on the ground of cruelty. By the decree plaintiff was granted a divorce, the property of the parties was divided and in that manner the question of alimony was disposed of, plaintiff was awarded custody of the minor children of the parties and defendant was ordered to make payments to plaintiff for the support of the children. The plaintiff has appealed. In her appeal she contends that the alimony allowance or division of property was insufficient and inequitable, that the allowance for child support was insufficient and that the court erred in refusing to allow attorney's fees and costs. The propriety of the divorce itself is not presented by the appeal.

In order to determine the questions presented it becomes necessary to review to some extent the incidents of the married life of the parties and to examine into their property and its acquisition. The parties were married June 30, 1925. The defendant was a schoolteacher and for a number of years taught school at various points in the state of Nebraska. In 1934 or 1935 the parties moved to Lincoln, Nebraska. Up to that time the property and money accumulated was meager. They had some furniture a part of which was sold to provide funds for removal to Lincoln. Also there appears to have been accumulated a thousand dollars as estimated by one of the parties and twelve hundred by the other which was loaned to defendant's father. After coming to Lincoln, for a considerable period of time, the parties resided in very modest surroundings. Their income, to which both contributed, was quite limited. After a time defendant obtained employment at the Lincoln, Nebraska, Post Office. His employment was under civil service and his salary at the time of the trial was approximately

$200 per month. On or about August 28, 1937, these parties, under a memorandum agreement between plaintiff and the Continental Company, Trustee, became the occupants of the premises known as 1845 D street, Lincoln, Nebraska, the legal description of which is Lots 1, 2, 3 and 4, Block 7, Capitol Addition to Lincoln, Lancaster county, Nebraska. Under the agreement they were not required to pay any rental but were required to make improvements thereon. They improved the property and installed furniture. Thereafter, except for the portion occupied by the parties as their residence, the premises were used for rental purposes. The venture was profitable. The parties lived there continuously until after the commencement of this action. Thereafter the defendant moved away. The amount of money expended in the improvement and in the acquisition of furniture and other equipment is not disclosed by the record. There can be no doubt that both parties contributed much work to the improvement. The management of the enterprise appears for the most part to have been in the hands of plaintiff. From March 1, 1939, to August 31, 1940, the parties occupied these premises under a lease whereby they were required to pay a rental of $25 per month from September 1, 1939. After the expiration of this lease no rent was paid.

On January 11, 1944, James P. Kennedy, father of plaintiff, purchased this property under contract from the Continental Company, Trustee, subject to an action of the County of Lancaster, Nebraska, for foreclosure of an accumulation of taxes. The purchase price was $2,000. The further conditions of the contract and terms of payment need not be set out here. The contract was performed by Kennedy, and Kennedy also became the purchaser at the tax foreclosure sale. The bid at the tax sale was $6,010. At the time of the trial neither of the parties hereto had any record interest in this real estate. Defendant however contends substantially that the interest acquired by Kennedy was for plaintiff and that whatever money he advanced was obtained from plaintiff and that such money belonged to

plaintiff and defendant. The personal property on the premises all belonged to plaintiff and defendant.

On or about April 22, 1940, the parties hereto purchased under contract the real estate referred to in the record as 1604 Prospect street, Lincoln, Nebraska, for $4,300, subject to a mortgage in the amount of $3,400. The building was improved, divided into apartments, equipped and furnished and used for rental purposes. At the time of trial the indebtedness had been reduced to about $700. The cost of improving this property is not definitely ascertainable from the evidence but it appears to have been around $1,500. There is an equal lack of certainty as to the value of furniture and equipment but it appears to be somewhere near $1,000.

On January 28, 1941, the parties acquired by contract of purchase the real estate referred to as 1830 E street, Lincoln, Nebraska, for $5,500. At the time of trial it was encumbered for $2,300. The building was divided into apartments and used for rental purposes. As near as it is ascertainable from the record the value of the furniture and equipment of this property was $2,500.

The parties owned a cabin near Milford, Nebraska, the value of which appears to be about $200.

The parties also had two automobiles, one a Packard worth from $1,000 to $1,200 and a Ford of about the same value. The defendant had life insurance, the paid up value of which was about $1,800. At the time this action was commenced the parties had certain stocks and some turkeys. Defendant sold these for about $700. He retained the proceeds of the sales. Defendant contends that there was personal property at 1845 D street of a value in excess of $5,000.

The trial court found the following: At 1845 D street, real estate $14,000, furniture $2,465, chicken raising equipment $300, with an encumbrance of $5,000 against the real estate; at 1830 E street, real estate $7,800, encumbrance $2,300, furniture $2,500, or a net value in real estate and personal property of $8,000; at 1604 Prospect street, real

estate $5,000, encumbrance $600, furniture $1,000, or a net value in real estate and personal property of $5,400; that plaintiff had on hands a balance from property management of $871.64 and defendant a balance of $750.10. Findings were also made with reference to the two automobiles, the Milford cabin, the details of which are not necessary here.

On the basis of the evidence as reflected by the findings the court awarded the custody of the two minor children of the parties to the plaintiff with provision that defendant pay $50 per month for their support until the older, who was 17 years of age, should arrive at the age of 21 or until the further order of the court, and thereafter $25 per month for the younger, who was 11, until he should attain the age of 21 years or until the further order of the court; that plaintiff should receive the real estate at 1845 D street, the personal property thereon, the cabin, the Ford automobile and $935 in cash which by adjustment of accounts would require defendant to pay the plaintiff $499.18. By the decree all other property was awarded to the defendant.

The parties agree that because of the manner in which the estate was accumulated there should be substantially an equal distribution with a reasonable allowance to plaintiff from defendant for the support of the minor children. The defendant insists that this objective has been accomplished by the decree. On the other hand plaintiff insists that the decree is grossly disadvantageous to her.

In the light of the condition of the record it may be said here that anything approaching exactitude of determination of value for the purposes of division of the properties is out of the question. There was no effort whatever made by either party to furnish the court with any satisfactory criteria for the determination of the value of either the real estate involved or the personal property. For ascertainment of values dependence must be had for the most part on conclusions scattered through the record.

It is true that the record discloses that the trial judge made an inspection of the properties and the decree indicates that based thereon he made a finding of values. These

findings, however, have no value since they are without evidence to support them. Findings of facts based on an inspection of premises by a trial judge are entitled to no weight and may not be considered unless the record contains competent evidence to support the findings. *Carter v. Parsons,* 136 Neb. 515, 286 N. W. 696; *Columbian Steel Tank Co. v. Vosika,* decided February 2, 1945, *ante,* p. 541, 17 N. W. 2d 488.

The only method apparent for an arrival at values upon which to base a division and award is that adopted by plaintiff, that is to accept in general the values contended for by defendant as to all properties except the real estate at 1845 D street which, basing these values in considerable degree on original cost, appear fairly reasonable. As to 1845 D street it appears necessary to draw what we consider proper conclusions from the testimony of the witnesses with regard to the acquisition thereof and the present ownership.

Following this scheme the required finding is that the real estate and personal property at 1830 E street was of the net value of $7,606.08; that 1604 Prospect street was of the net value of $5,289.88; the value of the cabin near Milford was $200; the Packard automobile was of the value of $1,200; the Ford automobile was of the value of $1,200; the cash value of life insurance was $1,800; stocks sold were of the value of $350; turkeys sold were of the value of $350; the value of the furniture at 1845 D street was $2,465; at the time of the trial plaintiff had net from the operation of 1845 D street and 1604 Prospect street, $871.64; the defendant had net from the operation of 1830 E street, $750.10.

As to the real estate at 1845 D street such interest as was taken was taken for the benefit of plaintiff by her father and in his name. The investment therein was approximately $3,410, as follows: $2,000 to the Continental Company, Trustee, $1,010 to the sheriff as part payment of the bid at the tax foreclosure and something near $400 for current taxes. The only evidence in the record as to whose money was employed for this purpose was that of plaintiff's father,

and he said that it was his own. His testimony was none too satisfactory but it stands without refutation. Defendant suggests that the money was supplied by plaintiff but there is no evidence to support the suggestion. There is nothing therefore from which a proper inference could be drawn that these payments were made by plaintiff, hence this may not be regarded as an asset of the parties. The balance of the purchase price, or $5,000, was raised by a loan secured by a mortgage on the real estate for that amount, with a chattel mortgage on the personal property thereon given by plaintiff as additional security for the loan. There is no evidence whereupon a value could be attributed to this property in excess of its cost. As already pointed out there is no evidence to indicate that plaintiff has contributed anything to the cost. Hence this real estate may not be considered as of value in the division of the property of the parties. A fair analysis of the evidence would indicate that the value of the personal property at 1845 D street is in excess of that claimed by plaintiff by from one thousand to two thousand dollars.

With these values in mind it would appear reasonably fair and equitable that the following division of the property should be made: The plaintiff should have in lieu of alimony all of the personal property situated at 1845 D street together with any interest the parties have, if any, in or to the real estate at that location, the real estate and personal property at 1604 Prospect street, the cabin at Milford, the Ford automobile, and the income which she has received from 1845 D street and 1604 Prospect street; that the defendant should have the real estate and personal property at 1830 E street, the Packard automobile, the life insurance, the money received for stocks and turkeys and the income he has received from 1830 E street. It further appears that the portion of the decree pertaining to support for the minor children should remain as fixed in the decree.

The decree of the district court is therefore reversed and the cause remanded with directions to enter a decree in conformity herewith. An attorney's fee in the amount of $200

shall be taxed against the defendant for plaintiff's attorneys for services in this court.

REVERSED, WITH DIRECTIONS.

IN RE ESTATE OF MARGARET KEUP.
MINNIE HALSTED ET AL., PROPONENT, APPELLEE, V. ADELINE SCHUETZ ET AL., CONTESTANTS, APPELLANT.

18 N. W. 2d 63

FILED MARCH 16, 1945. No. 31875.

1. **Wills.** The burden is upon the proponent of a will, both in the county court and in the district court on appeal, to prove, not only the execution of the will, but the capacity of the testator.
2. ———. However, if the proponent makes a *prima facie* case as to both and the evidence of contestants proves to be insufficient upon which to justify a submission of either or both issues, the court should not submit such issue or issues to the jury but should direct a verdict thereon for the proponent.
3. **Trial.** It is the duty of the court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested so to do or not.
4. **Appeal and Error: TRIAL.** The charge of the court to the jury should always be founded on and applicable to the testimony, and when it is not, and is calculated to mislead the jury in considering the facts of the case, the judgment ought to be reversed.
5. ———. Erroneous instructions to the jury will not work a reversal of a case unless they are prejudicial to the complaining party.
6. ———. The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law.
7. **Wills.** The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are (1) that the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; (4) that the result appears to be the effect of such influence.
8. ———. While the four elements must be established by the evidence to make a case sufficient to submit the issue to a jury and to sustain a verdict based thereon, however, it is not necessary that the court give an instruction setting forth the four elements

separately provided they are sufficiently contained in the instructions given.

9. Trial. Matters of opinion and arguments of jurors in the jury room are considered as inhering in the verdict, and not such matters of misconduct as can be proved by the jurors themselves.

APPEAL from the district court for Dixon county: SIDNEY T. FRUM JUDGE. *Affirmed.*

Mark J. Ryan and *P. F. Verzani,* for appellants.

Malcolm R. Smith, Kingsbury & Kingsbury and *S. W. McKinley, Jr., contra.*

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

WENKE, J.

This action is a will contest appealed from the district court for Dixon county.

Margaret Keup died on January 31, 1943, a resident of Dixon county. She left a will, dated September 18, 1941, in which two of her nieces, Minnie Halstead and Margaret Nelson, were named as the sole beneficiaries. One of the nieces, Minnie Halstead, filed a petition in the county court of Dixon county to have this will allowed and admitted to probate and asking that she and Margaret Nelson, named in the will as executrices, be granted administration of the estate.

Louise Bartelt, Myrtle Kasten, Malinda Kasten, Walter Keup, Elva Keup, Althea Keup, Edwin J. Keup, Hertha Kohlwey and Adeline Schuetz, beneficiaries under a will made by the deceased dated August 22, 1941, filed objections thereto and offered for probate this latter will.

On April 28, 1943, the county court allowed and admitted to probate the will offered by the proponent. From this order the contestants appealed to the district court.

In the district court the cause was tried to a jury and from a verdict for the proponent and a judgment thereon allowing and admitting to probate the will dated September 18, 1941, the contestants appeal.

For the purpose of this opinion the parties will be referred to as proponent and contestants.

Contestants assign as error the fact that the court submitted to the jury the issue of testamentary capacity.

We have examined the evidence and find that after the proponent made a *prima facie* case the contestants offered no evidence sufficient to justify a submission of the issue of testamentary capacity to the jury. There was, in fact, no sufficient evidence offered by contestants to support a verdict finding a lack of testamentary capacity. While " 'The burden is upon the proponent of a will, both in the county court and in the district court on appeal, to prove, not only the execution of the will, but the capacity of the testator.' *Seebrock v. Fedawa,* 30 Neb. 424, 46 N. W. 650." *In re Estate of Bose,* 136 Neb. 156, 285 N. W. 319. Nevertheless, if the proponent makes a *prima facie* case as to both and the evidence of contestants proves to be insufficient upon which to justify a submission of either or both issues, the court should not submit such issue or issues to the jury but should direct a verdict thereon for the proponent. See *In re Estate of Slattery,* 125 Neb. 194, 249 N. W. 597.

And we have held: "It is the duty of the court to instruct the jury upon the issues presented by the pleadings and the evidence, whether requested so to do or not." *Hackbart v. Rohrig,* 136 Neb. 825, 287 N. W. 665. Also, *Hall v. Rice,* 117 Neb. 813, 223 N. W. 4. And in relation thereto, that: "The charge of the court to the jury should always be founded on and applicable to the testimony, and when it is not, and is calculated to mislead the jury in considering the facts of the case, the judgment ought to be reversed." *Mannion v. Talboy,* 76 Neb. 570, 107 N. W. 750. See, also, *Koehn v. City of Hastings,* 114 Neb. 106, 206 N. W. 19.

However, "Erroneous instructions to the jury will not work a reversal of a case unless they are prejudicial to the complaining party." *Rocha v. Payne,* 108 Neb. 246, 187 N. W. 804. " 'The giving of erroneous instructions is not cause for reversal, if the instructions are more favorable to the complaining party than he is entitled to under the law.'

(*Webb v. Omaha & S. I. R. Co.*, 101 Neb. 596, 164 N. W. 564)." *Holley v. Omaha & C. B. Street Ry. Co.*, 110 Neb. 541, 193 N. W. 710. The rule is stated in 5 C. J. S., sec. 1678, p. 824, as follows: "Any error in sending the case or an issue to the jury is not a basis for objection on appeal where it operates in favor of appellant; and so a submission of the case to the jury furnishes appellant with no ground of complaint where the evidence is such as to warrant the court in directing a verdict against him. * * * or where such submission gives the jury an opportunity to find against appellee on a question of fact that should not have been submitted to it; * * * ."

We do not think the submission of testamentary capacity, upon which the proponent was entitled to a directed verdict, was so related with the issue of undue influence that it could in any way mislead the jury or confuse them in considering the facts with reference to that issue, upon which the evidence presented a question of fact. Therefore, merely placing a greater burden on the proponent than the evidence justified was not such error as was prejudicial to the contestants.

Contestants further complain that under the issue of undue influence the court failed to define the four elements thereof as they are set forth in *In re Estate of Hagan*, 143 Neb. 459, 9 N. W. 2d 794: "The elements necessary to be established to warrant the rejection of a will on the ground of undue influence are (1) that the testator was subject to such influence; (2) that the opportunity to exercise it existed; (3) that there was a disposition to exercise it; (4) that the result appears to be the effect of such influence."

After properly placing the burden of proof as to undue influence on the contestants the court instructed as follows:

"Undue influence is that which compels or induces the testatrix to do that which is against her will. It may result from constant presure (pressure) and importunity, a desire to please, or some feeling which the testatrix is unable to control and from an impelling mental force of such degree that, under all the circumstances, whe (she) is un-

able to resist. It must amount to such a degree of restraint or coercion as to destroy the testatrix' free agency, and induce her to make a different disposition of her property than she intended to.

"Therefore, if you find that Margaret Keup was so compelled or induced to execute the instrument, Exhibit 2, against her will and influence was brought to bear by said Minnie Halstead and Margaret Nelson or either of them, or by any one in their behalf, which was of such degree that it destroyed the free agency of Margaret Keup, so that she made a different disposition of her property than she intended to do, under all the circumstances, then you should find that the will was executed under undue influence, and your verdict should be for contestants; * * * ."

In *Gidley v. Gidley,* 130 Neb. 419, 265 N. W. 245, we approved a general definition of undue influence, taken from 31 C. J. 1183, as follows: "All that can be said, in the way of formulating a general rule on this subject, is, that whatever destroys free agency, and constrains the person whose act is brought in judgment, to do what is against his will and what he would not have done if left to himself, is 'undue influence,' no matter by what means the control is exercised, whether the control is exercised by physical force, duress, fraud, threats, importunity, or any other species of mental, moral, or physical coercion. The means employed, the extent or degree of the influence, or by whom the influence is exerted, is immaterial, for the test always is, was the influence, whether slight or powerful, sufficient to destroy free agency, so that the act put in judgment was the result of the domination of the mind of another rather than the expression of the will and mind of the actor?"

While the four elements must be established by the evidence to make a case sufficient to submit the issue to a jury and to sustain a verdict based thereon, however, it is not necessary that the court give an instruction setting forth the four elements separately provided they are sufficiently contained in the instructions given. We have examined the instructions given by the court and find they are sufficient.

Contestants further complain that in overruling proponent's objections to certain evidence offered by contestants as to other wills, partition proceedings, and oral declarations of deceased the court limited the purpose of this testimony by rulings and instructions as follows: "This character of evidence, however, will be received for the sole purpose of showing the state of mind of deceased and the consequent susceptibility, if any, to undue influence." While courts should generally refrain from limiting the purpose for which admissible evidence is received, however, the limitation here is within the language of this court in the case of *In re Estate of Bowman,* 143 Neb. 440, 9 N. W. 2d 801, wherein we stated: "The declarations of testator are admissible to show his state of mind and consequent susceptibility to undue influence." This ruling was made on proponent's objection to evidence when offered by the contestants. Contestants took no exception to the court's ruling, made no objection to the limited purpose for which the evidence was received and did not make any offer of the evidence for any other or additional purpose after the ruling. We think there is no merit in the contention.

Contestants offered the affidavit of one of the jurors that while the case was being deliberated another juror stated that, "Henry Halstead, the husband of proponent Minnie Halstead, and who was one of the witnesses for said proponents, was a good friend of his, that he stopped in and traded at his market in Emerson, that he knew him well and he was too good a fellow to do wrong." In an affidavit by the juror accused of this statement he denies having made it but says what he did say was "I know Henry Halstead, he sometimes trades at my market." Contestants filed the affidavit of another juror stating that during their deliberations one of the jurors stated: " * * * they should decide the case at once, get it over, and said 'I don't want no twelve men upsetting my will,' * * * ." This was denied in an affidavit of the juror accused thereof. Whether these statements were made by these jurors in the deliberation of the case is immaterial. They are nothing more than ex-

pressions of opinion and not statements of fact. As stated in *Egan v. State,* 97 Neb. 731, 151 N. W. 237: "Matters of opinion and arguments of jurors in the jury room are considered as inhering in the verdict, and as not such matters of misconduct as can be proved by the jurors themselves." See, also, *Welsh v. State,* 60 Neb. 101, 82 N. W. 368; *Hamblin v. State,* 81 Neb. 148, 115 N. W. 850.

The testimony of another juror was taken showing that before the trial of the case Henry Halstead, husband of the proponent, mentioned the case in his presence but without giving any details thereof. We do not think the juror was disqualified on the basis of the testimony given nor was the verdict in any way affected thereby.

In their briefs both proponent and contestants argue the merits of their case. There was a conflict in the evidence on the issues of execution and undue influence. These issues were properly submitted to the jury and by it determined in favor of the proponent. A will contest is triable to a jury and on appeal is not for trial *de novo* here. *In re Estate of Hagan, supra.* We are bound by the jury's verdict where there is sufficient competent evidence to sustain it.

For the reasons stated we find the proceedings had in the lower court should be sustained.

AFFIRMED.

IVA MERLE DUNLAP, APPELLEE, V. WILLIAM GLENN DUNLAP, APPELLANT.

18 N. W. 2d 51

FILED MARCH 16, 1945. No. 31900.

1. **Divorce.** The wife's alimony and the children's maintenance, if included in the same decree, should be separated into distinct items, and not included in one sum.
2. **Divorce.** An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allow-

ance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. Such an allowance is not subject to modification under the provisions of section 42-324, R. S. 1943.

3. ———. In the absence of such judgment the court, upon proper petition and showing thereon, has power to revise and alter its awards of alimony as to future payments under the provisions of section 42-324, R. S. 1943.
4. ———. The basis for changing such payments in the future must be founded upon new facts which have occurred since the decree was entered, and, in the absence of such facts, the matter is deemed to be *res adjudicata* between the parties.
5. ———. No specific words of reservation are necessary, of course, as a foundation for the right of modification, and, indeed, such right will be held automatically to exist, unless, as we have indicated above, the decree defines and limits the rights of the parties with such completeness and finality as to be clearly capable of and intended as a present vesting, and hence to possess in its scope, the attributes of a final judgment.
6. ———. Generally, we do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time.

APPEAL from the district court for Dakota county: SIDNEY T. FRUM, JUDGE. *Affirmed as modified.*

George W. Leamer, for appellant.

William P. Warner, contra.

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

WENKE, J.

This appeal is from an order of the district court for Dakota county modifying an alimony award.

On November 27, 1939, Iva Merle Dunlap, plaintiff and appellee, obtained an absolute divorce from William Glenn Dunlap, defendant and appellant, and was awarded the custody of their four children, Leora, aged 20 years, Dale, aged 18 years, Ward, aged 16 years, and Raymond, aged 13 years. This decree provided: " * * * that plaintiff also have and

recover from the defendant the sum of $40.00 per month, payable monthly in advance, to the clerk of this court, for the use and benefit of the plaintiff, on the 5th day of each month, beginning with December 5th, 1939, for the maintenance and support of the plaintiff and said children, until the youngest child of said parties is through high school, or until this judgment, upon application of one or both of said parties, is changed or modified by subsequent order of the court."

On December 22, 1943, plaintiff filed her petition for revision, modification and extension of this decree as to the provision for the payment of alimony. After hearing thereon the court, on June 8, 1944, entered its decree awarding to the plaintiff the payments of $40 due September 5, October 5, November 5, and December 5, 1943, and, commencing with January 5, 1944, ordered payments of $10 per month until further order of the court. From this order the defendant appeals.

For the purpose of this opinion the appellant will be referred to as the defendant and the appellee as plaintiff.

The record discloses that the plaintiff has at all times, since the decree was entered, maintained a suitable home for the four children. The three oldest children went through high school and are now married. Raymond, the youngest, who was 18 years of age on January 26, 1944, quit high school near the end of the first semester of the 1942-1943 school year when he was a junior. He then worked on a farm. In September of 1943 he returned to school for one day. Being advised to retake the entire junior year he quit and subsequently, with the plaintiff's consent, joined the Marines. Plaintiff owns her household goods and continues to live in the same home, although her married daughter now lives with her. She is 46 years of age and in about the same state of health as when the divorce decree was entered. She works out about two days a week doing housework for which she receives approximately $5.50 per week and receives $37 per month from the government as an allotment for her son, who is in the service. The de-

fendant made all payments up to September 5, 1943. He receives about $200 to $210 per month, after all deductions, for his services with the Interstate Transit Lines. However, it is not shown whether his income is any different from what it was at the time the decree was entered. As a whole, the record fails to show any material change in the status of the parties except that all four children were definitely through high school on September 5, 1943, when the defendant quit paying the $40 per month.

We first desire to call attention to the terms of the original decree in which the court allowed $40 per month for the maintenance and support of the wife and children. This decree does not make any finding as to what part was allotted to the plaintiff and what part was allotted to her for the support and maintenance of the children. The decree of the trial court, in so far as minor children are concerned, is never final in the sense that it cannot be changed. Section 42-312, R. S. 1943, provides: "If the circumstances of the parties shall change, or it shall be to the best interests of the children, the court may afterwards from time to time on its own motion or on the petition of either parent revise or alter, to any extent, the decree so far as it concerns the care, custody and maintenance of the children or any of them." See *Carlson v. Carlson*, 135 Neb. 569, 283 N. W. 214. In considering the many factors which may affect a court's subsequent ruling thereon, such as a change of custody, earnings of either party as affecting the amount, or the reaching of maturity of some of the minors, it is necessary to know what part was allotted for the support and maintenance of the minors. If the amount is included in one sum the court must then go back and endeavor to ascertain what part was allowed as alimony and what part for the support and maintenance of the minor children. This will often be difficult and necessarily involve considerable additional testimony. The rule that should be followed is properly stated in *Connett v. Connett*, 81 Neb. 777, 116 N. W. 658, as follows: "The wife's alimony and the children's maintenance, if included in the same decree,

should be separated into distinct items, and not included in one sum."

It is apparent that the court based its order of June 8, 1944, wherein it modified the decree of November 27, 1939, upon the terms of the stipulation of the parties as to a property settlement which it found filed in the original case, dated the same day the original decree was entered. Courts may approve property and alimony settlements made between the parties, when a divorce is granted, if it finds the same to be fair and equitable. However, when the court in its decree determines and fixes the amount of alimony and no appeal is taken therefrom, the effect of the stipulation, so far as the decree is concerned, is that it was taken merely as advisory to the court and the terms fixed by the decree are controlling. We therefore view the case from the standpoint of the provisions of the decree.

Whether the decree in a divorce action as to property settlement or alimony is subject to revision and alteration from time to time under the provisions of section 42-324, R. S. 1943, depends upon the terms of the decree entered.

In *Ziegenbein v. Damme,* 138 Neb. 320, 292 N. W. 921, we held: "An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in instalments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. * * * Such an allowance is not subject to modification under section 42-324, Comp. St. Supp. 1939 (now section 42-324, R. S. 1943), providing that the court may from time to time revise and alter the amount of alimony and make any decree with respect thereto which it might have made in the original suit." See, also, *Beard v. Beard,* 57 Neb. 754, 78 N. W. 255; *Graham v. Graham,* 135 Neb. 761, 284 N. W. 280.

In the absence of such judgment the court, upon proper petition therefor and proper showing thereon, has power

to revise and alter its awards of alimony under the provisions of section 42-324, R. S. 1943. This rule is stated in *McIlwain v. McIlwain*, 135 Neb. 705, 283 N. W. 845, as follows: "The power of the court to alter and revise provisions for alimony in a divorce decree is unquestioned." However, this applies only as to future installments for as stated in *Sullivan v. Sullivan*, 141 Neb. 779, 4 N. W. 2d 919: " 'The law is well established in this state that instalments of alimony become vested as they accrue, and the past-due instalments become final judgments, and courts have no authority to cancel or reduce the amount of such accrued payments. *Wharton v. Jackson*, 107 Neb. 288, 185 N. W. 428; *McIlwain v. McIlwain*, 135 Neb. 705, 283 N. W. 845; *Wassung v. Wassung*, 136 Neb. 440, 286 N. W. 340.' *Clark v. Clark*, 139 Neb. 446, 297 N. W. 661."

And the basis for changing payments in the future is stated in *Chambers v. Chambers*, 75 Neb. 850, 106 N. W. 993, as follows: "It has been held that an application for a change in the amount of alimony, after divorce, must be founded upon new facts which have occurred since the decree was entered, and that, in the absence of such facts, the matter is deemed to be *res adjudicata* between the parties." See, also, *Graham v. Graham, supra,* and *Morris v. Morris*, 137 Neb. 660, 290 N. W. 720. This is stated in *McIlwain v. McIlwain, supra,* as follows: "We conclude that a hearing upon an application to revise and alter a decree under this statute is not a retrial of the original case, or a review of the equities of the original decree. The court upon such application considers the new or changed conditions of the parties and adapts the decree thereto, as present conditions require." And in *Graham v. Graham, supra,* we approved this statement of the same principle from 2 Nelson, Divorce and Separation, sec. 934, p. 888: "In those states where the decree for alimony may be revised it is held that no change will be made unless it is shown that the wife's needs or the husband's faculties have increased or diminished. The decree is *res judicata* as to all matters existing at the time it was rendered. New facts occurring since the decree must

be shown. The estoppel extends to all matters properly before the court which the parties might have litigated."

All of the payments due under the decree providing "until the youngest child of said parties is through high school" had been paid for the youngest son quit high school before September 5, 1943, and did not continue when he returned for one day in September of that year. He is now in the Marines. The evidence fails to show any new or changed conditions of the parties that would justify any modification awarding the plaintiff additional alimony above that provided in the decree. In fact, the changes that are shown, such as the army allotment for her son, the fact that her daughter is living with her who pays for the groceries and that she has time to go out and do housework, are beneficial to the plaintiff and not the defendant.

Nor does the provision in the decree "or until this judgment, upon application of one or both of said parties, is changed or modified by subsequent order of the court" add anything to the rights of the parties or the power of the court. As stated in *Ziegenbein v. Damme, supra*: "No specific words of reservation are necessary, of course, as a foundation for the right of modification, and, indeed, such right will be held automatically to exist, unless, as we have indicated above, the decree defines and limits the rights of the parties with such completeness and finality as to be clearly capable of and intended as a present vesting, and hence to possess in its scope, the attributes of a final judgment."

In view of the order of the trial court, under the facts of this case, directing the plaintiff to pay $10 per month until further order of the court or for an indefinite period of time, we find it desirable to discuss that feature although such payments are set aside. We recognize that under our statutes the legislature has enabled the court to retain control over the financial situations of the parties, where it is necessary or advisable to do so. However, we do not think the purpose of divorce proceedings are designed or intended to prevent domestic misadventure from ever be-

coming a closed book financially as between the parties. There are cases, and we have so held, where the situation of the parties and the contingencies are such that the amount of alimony cannot be placed in a lump sum without danger that such allowance may prove unjust or inequitable to one or the other of the parties and it is therefore proper for the court to provide for the payment of a stated sum at fixed periods over an indefinite period. However, "Generally, we do not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time." *Martin v. Martin,* decided February 16, 1945, *ante,* p. 655, 17 N. W. 2d 625. See *McGechie v. McGechie,* 43 Neb. 523, 61 N. W. 692.

We find that all payments due under the decree of November 27, 1939, have been paid and that the evidence is insufficient to justify a modification of the decree by awarding $10 per month additional alimony until further order of the court. It is therefore ordered that the decree of the trial court be modified accordingly. The decree is affirmed in so far as the costs are taxed to the defendant. Costs in this court, including a fee of $100 allowed plaintiff as attorney's fee, are taxed to the defendant.

AFFIRMED AS MODIFIED.

CHAPPELL, J., dissenting.

IRA DORMER ET AL., APPELLEES, V. DAVID DREITH ET AL., APPELLANTS.

18 N. W. 2d 94

FILED MARCH 23, 1945. No. 31877.

1. **Trial.** When a request is properly made of the court for separate findings of fact and conclusions of law, under section 25-1127, R. S. 1943, the provisions of the statute are mandatory.
2. **Easements.** The right to an easement for a road from an inside forty acres, over adjoining land to the section line, passes from grantor to grantee, although not specifically mentioned in the deed.

3. ———. A road across adjoining land, established by open, notorious, adverse user for over ten years, must be limited in width to that actually proved by the evidence to be so used.

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

Morrow & Miller, for appellants.

Auburn H. Atkins, contra.

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

PAINE, J.

This is an action brought by plaintiffs and appellees to enjoin defendants from preventing the plaintiffs using a road across their land and to quiet title in the plaintiffs to a strip of land 25 feet wide across defendants' land. A hearing was had upon the application, the defendants introducing no evidence, and the court granted a temporary injunction on April 14, 1943, upon the plaintiffs executing an undertaking in the sum of $300. On March 30, 1944, defendants filed their amended answer and a cross-petition praying that plaintiffs be enjoined from using the road. Trial was had. Judgment was entered for plaintiffs.

The defendants and appellants set out seven errors relied upon for reversal, which may be summarized as follows: That the court erred in finding the issues in favor of the plaintiffs, and such decree is not supported by the evidence, and is contrary to the evidence and contrary to law.

The last four assignments of error charge that the court erred in failing and refusing to make separate findings of fact and conclusions of law, as requested, and intermingling findings of fact and conclusions of law, and that the supplemental findings of the court numbered 1 to 7 are contrary to the evidence and to the law, and are erroneous.

In this case the trial began on May 5, 1944, and a journal entry by the judge sets out that he had viewed the premises on that date.

The evidence discloses that the 40 acres of plaintiffs is

the northwest quarter of the southeast quarter of section 34 and, being an inside 40 acres, has no road out to a section line except this road in controversy. The plaintiffs acquired the land in 1937 and the defendants acquired theirs in 1940, so the plaintiffs must depend upon their predecessors to establish any right to the road, and the large amount of evidence was to bring out the use of this road by their predecessors.

When the land was first homesteaded by Richard A. Cawley, he drove out in any direction; he began to farm the land in 1912, while none of defendants' land was farmed until 1916.

In 1916 an irrigation district constructed a ditch on the east side of the defendants' land, and a bridge was erected over this irrigation lateral, and after that bridge was constructed the road over defendants' land ran to that bridge, as they went out to the section line road on the east side of their land. It is admitted that the prescriptive period did not commence to run until the year 1917, as that was when the land was improved, and it was not until that year that those using defendants' land had to farm along this lateral.

Plaintiff Dormer inspected the land and the road before he bought it. Defendant Dreith moved onto his land in 1941, and up to this date there had never been any objection made to those who owned and used plaintiffs' land using this road as their only egress to the section line on the east side of the section, being the shortest way to any section line road.

On the day of the trial the attorneys for the defendants filed a request for separate findings of fact and conclusions of law, as follows:

"Come now the defendants in the above entitled cause at the close of the testimony and prior to the arguments of counsel in said cause, and respectfully request the court to make separate findings of fact and conclusions of law.

"Said defendants further request the court to make specific findings of fact concerning the following:

"1. The date that each owner of defendants' land ac-

quired title thereto and the date when he conveyed said real estate or was entirely divested of his title.

"2. The period or periods of time that plaintiffs' land was occupied by the owner or owners, and the period or periods of time that said land was occupied by tenants of the owner or owners thereof.

"3. The period or periods of time that defendants' land was occupied by tenants of the owner thereof.

"4. The date that the lateral ditch along which the road involved in this case is located, was constructed, and the purposes other than going to and from plaintiffs' land for which said road was used."

In response to such demand for separate findings, the court on May 16, 1944, filed separate findings of fact and conclusions of law. In response to paragraph 1, the court finds that on May 22, 1895, George S. Arnold received a patent from the United States government for land now owned by defendants, and then followed a chain of eleven conveyances, beginning with patentee, giving the date of the conveyance and the grantors' and the grantees' names, and ending with February 24, 1940, when J. L. Witters and wife conveyed said real estate to David Dreith and Anna Dreith as joint tenants and not as tenants in common, being the defendants herein.

In response to paragraph 2 of defendants' request, there are set out by the court certain facts which were stipulated as to ownership of plaintiffs' land, and evidence covering the period from 1911, Richard A. Cawley receiving his patent February 26, 1916, and setting out what the evidence shows as to the owners thereafter, and whether they lived on the premises or not, and what years the evidence failed to show who occupied the premises.

As to paragraph 3, definite answer is made by the court of facts shown by the evidence. As to paragraph 4, answer is set out that the lateral ditch along which the road in this case is located was in use in the year 1917, and that the road along this lateral ditch has been used by the owners and tenants and others in going to and from what is now the

plaintiffs' land, and that it was also used by the Farmers Irrigation District for the purpose of maintaining and inspecting said lateral by its ditch riders, and that it was used as well by the owners and tenants of the defendants' land in connection with all farming operations of that portion of the premises lying north of said lateral and in the harvesting of crops raised thereon by all persons who had occasion to go to that portion of the defendants' land.

Thereafter on May 18, 1944, there was filed by the trial judge supplemental findings of fact and conclusions of law, setting out that the court finds that the plaintiffs have sustained the burden of proof of the user of said road, either by themselves or their predecessors in title, for a period of more than ten years prior to the bringing of this action.

It further finds that on the question of "tacking" there can be no dispute that the road in question has been used by the parties heretofore enumerated for a period of more than 20 years prior to bringing the action, and that the use was open, adverse and notorious, and that by such use a right to use the road by prescription obtained, notwithstanding the fact that no conveyance of plaintiffs' land ever included this road as appurtenant to that land; that it has been held that an easement will pass by deed or grant if it is apparent to an ordinary observer and naturally and necessarily belonged to the premises, and that, while no mention of the road in question has been made in the deeds, the court is of the opinion that the period of a tenant's use can be tacked to the use of the landlord or subsequent owner to complete the period essential to such prescriptive right.

The court further finds that a wagon track, or automobile track, was clearly and definitely defined, and that the south marking of the track from the north bank of the lateral varies from one foot to five or six feet, and that in moving hay sweeps, hay racks, or grain drills, it would be impracticable, if not impossible, to haul them to the plaintiffs' premises along an automobile or wagon track, and the court finds that an easement should be granted to the plaintiffs of 25 feet for the use of said road, the measurement to commence at the north bank of the irrigation lateral.

The court further sets out in its findings that the defendants were not *bona fide* purchasers without notice that plaintiffs and their predecessors had claimed an easement across the land that they were about to purchase, for the tenant testifies that he informed the defendants, while they were yet dealing for the land, that the plaintiffs used said road in going to and from their premises, and that the defendants inspected said land before they purchased it, and the physical facts were so apparent that any one could see as to the use being made of the road.

The court further finds that the evidence does not disclose that prior to March 1, 1940, any owner or tenant of what is now the defendants' land had ever objected to the use of said road by the owners or tenants of what is now plaintiffs' land, and as a matter of fact did not molest the road or its use thereof by any one.

The court was of the opinion that there was more than user alone, and that the user was adverse, as indicated above.

As four of the seven errors assigned for reversal are objections to the court's failing and refusing to make separate findings of fact and conclusions of law as seasonably requested, we have discussed and set out the patient attempt of the trial court to fully comply with said request.

Section 25-1127, R. S. 1943, states that when requested the court shall state in writing the conclusions of fact found separately from the conclusions of law.

It has been held that such a request is a mandatory requirement in a law action tried to the court (*Carl v. Wentz*, 116 Neb. 880, 219 N. W. 390), and it may be helpful in equity actions, such as the one at bar, which depend upon the testimony of many witnesses.

In 1874 Judge Gantt, in discussing this section, said in an opinion: "And notwithstanding, the old settled rules of law, in the determination of actions at law and suits in equity, must, at least in some measure, be observed, yet under our judiciary system, which recognizes but one form of action called a civil action, it seems clear that the re-

quirements of the code of civil procedure, must, so far as applicable, be applied to actions of purely an equitable nature, as well as actions at law. Section 297 of the civil code clearly provides, that in all actions tried by the court, there must be a general finding, and when requested by one of the parties, a special finding." *Sprick v. Washington County,* 3 Neb. 253. See, also, *Donald v. Heller,* 143 Neb. 600, 10 N. W. 2d 447; *Henley v. Live Stock Nat. Bank,* 127 Neb. 857, 257 N. W. 244.

In considering the assignment of error that the decree is contrary to law, the defendants claim that the use of a way across real estate while in possession of a lessee cannot be tacked to the use thereof while in the possession of the owner to make up the period necessary to acquire the right to the use thereof by prescription. The defendants cite the case of *Kramper v. St. John's Church,* 131 Neb. 840, 270 N. W. 478, in reference to tacking the use by one to that of another, in which case the chain of title deeds had all exempted the specific land claimed, which is not the fact in the case at bar.

"Possession of a tract of land by an agent or tenant under adverse holding inures to the benefit of the adverse holder. Personal occupation in such a case is unnecessary. *Lantry v. Parker,* 37 Neb. 353; *McComb v. Saxe,* 92 Ark. 321; *Strom v. Hancock Land Co.,* 70 Or. 101; *Abel v. Love,* 81 Ind. App. 328. And it is held in *Pearce v. Wright,* 284 Ill. 221, that on the issue of adverse possession through a tenant it is immaterial whether the leases were written or verbal. 'Possession through a tenant or agent is of course sufficient actual possession to support the claim of adverse possession.' Tiedeman, Real Property (3d ed.) sec. 493." *Cassens v. Wisner,* 122 Neb. 408, 240 N. W. 526.

It appears in the case at bar that, for a period of twice the required ten years, the previous owners and tenants of the plaintiffs' land have at all times, whenever desired, used the road in question across defendants' land without substantial change. See *Engle v. Hunt,* 50 Neb. 358, 69 N. W. 970. In such a case, the use of it will be presumed to have

been under a claim of right, and not by license of the owner. See *Majerus v. Barton,* 92 Neb. 685, 139 N. W. 208; *Moll v. Hagerbaumer,* 98 Neb. 555, 153 N. W. 560.

It is admitted that the easement for this road from this inside 40 acres to the section line was not mentioned in the many deeds of conveyance on this land from one grantor to another since 1917, yet as this plain, well-used road, being the only road from this homestead on this 40-acre tract, was perfectly apparent to every one, as well as to the grantors and grantees, it naturally and necessarily belonged as an easement to this 40 acres. See *Agnew v. City of Pawnee City,* 79 Neb. 603, 113 N. W. 236; *Neilson v. Leach,* 140 Neb. 764, 1 N. W. 2d 822.

In the decree entered herein, it was found that the acts of the defendants and their predecessors amount to a dedication of the use of said road, and the plaintiffs should have a permanent injunction enjoining the defendants from interfering in any way with the use of said road as used along the lateral and to the bridge over the Farmers Irrigation District on the east of said section, and are estopped and should be enjoined from in any way interfering with the use thereof, or with the plaintiffs' repair and maintenance of said road, and that said road, and the use thereof, is appurtenant to plaintiffs' land, and that the easement for the use of said land is forever quieted in the plaintiffs and in said land, but that said easement is subject to the use of the defendants in their farming operations, including use as a turn row.

However, the court in its decree gave plaintiffs a permanent injunction against defendants' interfering in any way with plaintiffs' use of a road 25 feet in width from the north bank of the lateral No. 2695, etc.

To this the appellants insist that the court has given a road three times as wide as has ever been used, and that the decree of the district court should be modified so as to confine plaintiffs to the use of the road as actually used. There is merit in this contention.

In *Christensen v. Luehrs,* 133 Neb. 50, 273 N. W. 839, this

court limited an easement for a driveway to so much of a strip of ground as is reasonably necessary and convenient for such driveway.

We find in the evidence testimony of owners or tenants who have taken many kinds of farm machinery over this road, including grain drills which are from 7 to 12 feet wide, hay rakes 10 feet wide, and discs 8 feet wide, and one witness said the road used reached from 15 to 20 feet from the ditch bank, but the evidence does not justify granting an easement for a road over 20 feet in width, and the decree is hereby limited to this width, and no more.

Finding no other errors in the record, the decree of the trial court is modified as to the width of the road, and affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. GUY EDWIN MCCOY, DEFENDANT IN ERROR.

18 N. W. 2d 101

FILED MARCH 23, 1945. No. 31904.

1. **Infants.** The purpose of the statutes creating juvenile courts was not to provide additional courts for the punishment of crime, but was to establish special tribunals having jurisdiction, within prescribed limits, of cases relating to the moral, physical, and mental well-being of children to the end that they may be directed away from paths of crime.
2. ———. Juvenile courts do not have the sole or exclusive jurisdiction of children under eighteen years of age who have violated our laws.
3. ———. The county attorney is not limited by the Juvenile Court Act in any way in his duty to file proper complaints against wrongdoers and prosecute the same.

ERROR to the district court for Douglas county: HERBERT RHOADES, JUDGE. *Exceptions sustained.*

Kelso Morgan and *C. E. Walsh,* for plaintiff in error.

Joseph M. Lovely and *Edward T. Hayes, contra.*

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

PAINE, J.

The county attorney for Douglas county filed a petition in error to review an adverse ruling in the district court on a motion to quash the information which he had filed against the defendant.

On June 9, 1944, a state complaint was filed in the criminal branch of the municipal court in Omaha, charging Guy Edwin McCoy with receiving a stolen automobile, and thereupon the defendant was bound over to the district court by the judge of the municipal court under bond of $2,500.

On June 13, 1944, Kelso Morgan as county attorney filed an information in the district court, charging the defendant in error with the crime of receiving a stolen automobile. A copy thereof was served on the defendant in error on June 16. Thereafter, on July 31, while the said defendant was held in custody, a motion to quash said information was filed for the said defendant by Joseph M. Lovely, public defender for Douglas county, and Edward T. Hayes, his assistant, as attorneys for the defendant.

This motion to quash set out that there were three defects appearing on the face of the record, which may be concisely stated as follows: (1) Because exclusive jurisdiction over all persons under the age of eighteen years is given to the juvenile court of the district court for Douglas county, Nebraska; (2) that no concurrent jurisdiction is conferred upon the criminal division of the district court over persons under the age of eighteen years; (3) that the defendant is improperly charged because the procedure against any person under the age of eighteen years must be by a petition rather than by information under the laws of Nebraska.

A hearing was held June 13, 1944. The bill of exceptions discloses that the county attorney first objected to the case being transferred to the juvenile court. Objection was overruled by the court on the ground that the case was not being transferred to the juvenile court, but that the judge of the juvenile court was sitting as a district judge in the

district court. The county attorney then requested that the prisoner be present at the presentation of the case. "THE COURT: I do not think it necessary for the prisoner to be here at all, if you will just make your record here." Thereupon, Mr. Hayes, the assistant public defender, asked the county attorney to stipulate that the defendant charged with receiving a stolen automobile was over sixteen years and under eighteen years of age. The county attorney again requested that the boy should be present during the hearing, and objected to the court taking jurisdiction in the matter (1) because the juvenile court has no jurisdiction where an information has been filed in a criminal case; (2) because the act creating and giving authority to the juvenile court is unconstitutional and the Act has been declared partly void; (3) because the Act has not been reenacted after it was declared void; and (4) because the statutes of Nebraska take away from the juvenile court any authority to sentence to the industrial school, reformatory or penitentiary any child or person over sixteen years of age, and limits the juvenile court to sentence under sixteen years of age unless one over sixteen and under eighteen has pleaded guilty or been convicted of a crime. Such motion was overruled by the court for the reason that the presiding judge had transferred this case to Judge Herbert Rhoades, the duly appointed judge of the juvenile court division of the district court for Douglas county, and that the court in hearing the motion to quash is sitting as a criminal judge of the district court for Douglas county, and not as a juvenile judge.

The county attorney was again asked to stipulate as to the age of the defendant, and agreed to stipulate if the defendant was present in court. The court said that the defendant might be put on the stand for that one purpose and no other. Thereupon the defendant was sworn, stated his name was Guy Edwin McCoy, and he resided at 7919 Cass street, and that he was 17 years of age December 25, 1943.

It was then stipulated that the defendant was committed to the Kearney Industrial School by Judge Rhoades, of the

juvenile court, on October 5, 1943, and ran away from that school on May 29, 1944; that he was arrested June 2, 1944, in Omaha, and has been held since said date in the Douglas county jail, in the adult division of that jail, and is unable to raise the bond, and that jury term would not be held until October 16, 1944.

The matter was thereupon continued from June 13 to August 8, 1944, at which time it was stipulated that no petition had been filed in the juvenile court charging the defendant with delinquency, and it was further stipulated that no investigation had been made by the juvenile court of the case.

The arguments having been made, the court thereupon orally dictated his decision of five pages to the court reporter, and the same appears in the bill of exceptions, the conclusion being:

"In the judgment of this court, the filing of the information against the boy McCoy, is without authority of law, for the reason that the said statutes of the state have not been complied with and the complaint is, therefore, without force and effect.

"The motion to quash is sustained; the information is dismissed. The proper juvenile authorities are hereby ordered to file the proper petition against the boy. That the proper investigation shall be made as required by law, and for such other and necessary proceedings as provided for by law, shall be complied with."

In the petition in error, ten grounds are set out as prejudicial errors justifying a reversal of the order sustaining the motion to quash and dismissing the case. Said errors may be epitomized as follows: That the district court by sustaining the motion found that the exclusive jurisdiction over all persons under the age of eighteen years for the commission of a criminal offense is given to the juvenile court for Douglas county, Nebraska, which is contrary to the law; that by so sustaining the motion to quash, the court held that all persons under the age of eighteen years who are alleged to have committed a crime cannot be tried in the

criminal division of the district court for Douglas county, and that the only procedure to punish a person under the age of eighteen years for the alleged commission of a criminal offense must be by a petition, rather than by complaint and information, which is contrary to law, thereby holding that a person under eighteen years of age is not subject to the criminal laws of the state of Nebraska; that the court, over the objection of the county attorney, dismissed the cause of action and sustained the motion to quash the information, whereas said court has no jurisdiction to dismiss a criminal case except where trial is had, or upon motion of the county attorney; and charged lastly that the judicial department thereby exercised the prerogative of the executive department of the government of the state of Nebraska, in violation of the laws thereof.

Serious differences have thus arisen between the county attorney of Douglas county and the judge of the juvenile court in Omaha as to the proper proceedings in handling a youth under the age of eighteen years who has allegedly committed a crime.

It being necessary to examine our laws relating to this matter, we find that the first reference is in the Constitution of 1875, under article VIII, on the subject "Education". Section 12 thereof provides: "The legislature may provide by law for the establishment of a school or schools for the safe keeping, education, employment and reformation of all children under the age of sixteen years, who for want of proper parental care, or other cause, are growing up in mendicancy, or crime."

The first act of the legislature in reference thereto is found in an Act to locate a state reform school for juvenile offenders, beginning on page 413, Laws 1879. Section 6 is entitled "Juvenile convicts," and reads:

"Sec. 6. When a boy or girl under the age of sixteen years, shall, in any court of record in this state, be found guilty of any crime except murder or manslaughter, the court may, if in its opinion the accused is a proper subject therefor, instead of entering judgment, cause an order to be

entered that said boy or girl be sent to the state reform school in pursuance to the provisions of this act; and a copy of said order, duly certified by the clerk, under seal of said court, shall be a sufficient warrant for carrying said boy or girl to the school, and for his or her commitment to the custody of the superintendent thereof."

The following sections provide that, when such a youth shall be convicted, in an inferior court, of being a disorderly person, the whole matter shall be sent to a court of record, and direct what proceedings shall take place before commitment to the reform school, where such youth shall remain until he is reformed, or reaches his majority.

This Act was incorporated in the Compiled Statutes of 1881, and in subsequent editions of the Compiled Statutes, as chapter 75.

In 1887, chapter 75, Compiled Statutes, was entirely repealed and a new Act substituted in lieu thereof, which was substantially a reenactment of the former Act, Laws 1887, ch. 74, p. 589, except that the age is raised to eighteen years in the opening part of the section, which reads as follows:

"Sec. 5. When a boy or girl of sane mind under the age of eighteen years shall, in any court of record in this state, be found guilty of any crime except murder or manslaughter, committed under the age of sixteen years, or who for want of proper parental care is growing up in mendicancy and vagrancy, or is incorrigible and complaint thereof is made and properly sustained, the court may, if in its opinion the accused is a proper subject therefor, instead of entering judgment, cause and order to be entered that said boy or girl be sent to the State industrial school in pursuance of the provisions of this act, * * * ."

In 1897, section 5 of the Act of 1887 was amended. Laws 1897, ch. 59, p. 305. The only change made by this Act with reference to age was in the opening part of the section, and the part changed is underlined in the quotation which follows:

"Section 5. When a boy or girl of sane mind under the age of eighteen years shall, in any court of record in this

state, be found guilty of any crime, except murder or manslaughter, committed under the age of *eighteen* years, * * * ."

In *Scott v. Flowers,* 60 Neb. 675, 84 N. W. 81, in an opinion rendered on November 8, 1900, the court held section 5 of chapter 75 unconstitutional and void, because it permitted the commitment to the industrial school of children over the age of sixteen years, while the Constitution inhibited the legislature from providing for the commitment to the industrial schools of children of any class, either of an incorrigible nature or criminals in fact, if beyond the age of sixteen years.

As a result of this opinion, the legislature on March 29, 1901, amended and reenacted chapter 75, Comp. St. 1899, changing section 5 back to sixteen years of age. Laws 1901, ch. 51, p. 404.

In the rehearing of *Scott v. Flowers,* 61 Neb. 620, 85 N. W. 857, decided April 10, 1901, the court reversed its former holding and held that section 5 of chapter 75 was only unconstitutional in authorizing the commitment of children over the age of sixteen years, and that it "is valid and enforceable to the extent that it authorizes commitment to the state industrial school of children under the age of sixteen years who, for want of proper parental care, are growing up in mendicancy or crime."

By an error the Compiled Statutes of 1901 still carried the age in section 5 at eighteen years in the opening sentence, although it had been changed that same year by the legislature.

In 1903 the legislature amended this section to read as follows: "Section 5. When a boy of sane mind under the age of eighteen years shall in any court of record in this state, be found guilty of any crime, except murder or manslaughter, or who * * * is growing up in mendicancy or crime and complaint is made therefore and properly sustained, the court may, * * * cause an order to be entered that said boy be committed to the State Industrial School, * * * ." Laws 1903, ch. 69, p. 369.

In 1920 the Constitution provided in section 12, art. VII, that the legislature may provide for school or schools for safekeeping and reformation of children under the age of eighteen years.

This briefly presents the provisions of our Constitution and statutes relating to the commitment of youth to the State Industrial School. In connection therewith, we must also consider the State Reformatory Act, which provides generally in section 83-455, R. S. 1943, that any person not less than sixteen nor more than thirty years of age, when convicted of a first felony, may be sentenced to the State Reformatory.

It now becomes necessary to examine the laws relating to the Juvenile Court Act, which was first enacted as Laws 1905, ch. 59, p. 305, and consisted of 20 sections. In section 1, the age of children subject to the terms of the act was prescribed as "under the age of sixteen (16) years," but sections 1, 6, 7 and 9 of the Juvenile Court Act were amended in 1907 (Laws 1907, ch. 45, p. 185), and the age of dependent, delinquent and neglected children which were subject to the act generally was raised to eighteen years (R. S. 1943, sec. 43-201).

In 1911 sections 7 and 9 of the Juvenile Court Act were again amended. Laws 1911, ch. 41, p. 207. The age at which children could be committed to the Industrial School was amended to read "or, if under the age of sixteen (16) years, or if he pleads guilty to or is convicted of any crime, to the care of the state industrial school."

The original jurisdiction over juvenile courts is lodged in the district courts, and in the judges thereof in vacation. The county court has concurrent jurisdiction, but in counties with a population of over 50,000 such jurisdiction shall not be exercised by the county court except in the absence of the district judge or judges from the county. It is further provided in section 43-202, R. S. 1943, that in all trials where the delinquent child is charged with a crime, any interested person, or the judge on his own motion, may order a jury to try the case. In cities having a population of

40,000 and upward, the police judge thereof shall have jurisdiction under this act, concurrent with the county judge, within the limit of such city.

In counties having a population of over 50,000, the judges of the district court shall select one of their number to preside over what is termed the juvenile court, which judge serves during his term, unless the judges choose another of their number to act. Such judge of the district court thereupon gives precedence in his work as district judge to the cases which arise under the juvenile court act, and hears such other cases as may be assigned to him. R. S. 1943, sec. 43-204.

Any reputable person of the county, who knows of a dependent, neglected, or delinquent child, may file a complaint with the clerk of the court, whereupon a summons shall issue to the person to appear with such child within 24 hours, and the court shall hear and dispose of the case. R. S. 1943, secs. 43-205 and 43-206.

It is also provided that, if any child under the age of eighteen years shall be found to be delinquent, dependent, or neglected within the meaning of the act, he may, if under the age of sixteen years, or if he pleads guilty to or is convicted of a crime, be committed to the care of the State Industrial School. R. S. 1943, sec. 43-208.

It has been contended that the Juvenile Court Act, in case of conflict, governs over the industrial school laws. However, in section 43-217, R. S. 1943, the contrary is clearly stated, "and in all commitments to said institutions the acts in reference thereto shall govern the same." See *Cohen v. Clark*, 107 Neb. 849, 187 N. W. 120.

In connection with the Industrial School Act and the Juvenile Court Act, we find that in 1921 the legislature enacted the State Reformatory Act. Laws 1921, ch. 208, p. 741. Section 4 of this act provided: "Any person not less than sixteen nor more than thirty years of age at the time of conviction of a felony for the first time may be sentenced to confinement in said reformatory instead of to the penitentiary, when in the judgment of the court said person is ca-

pable of reformation and said sentence is compatible with the general welfare." (R. S. 1943, sec. 83-455.)

Then the legislature, in addition to the other laws relating to minors herein discussed, enacted another bearing directly upon the question before us, and that is section 43-222, R. S. 1943, reading as follows: "All minors under eighteen years of age, who, in the judgment of the juvenile court, are delinquent, dependent, defective or neglected and require state institutional care and custody shall be wards of the state, and shall be committed to the care and custody of the Board of Control, which board thereupon becomes vested with the sole and exclusive custody of such minors."

The case at bar has raised some questions for the first time in this court, and the first one is, Does the judge of a juvenile court in Nebraska have sole and exclusive jurisdiction over the trial of youth under the age of eighteen years to the extent that he can direct whether a petition, complaint, or information shall be filed against such defendant?

In the brief filed by the public defender for the defendant it is said that "Juvenile delinquency is a general word, like 'crime,' and embraces everything from murder to truancy from school and the legislature has power to provide that an act committed by an infant shall not be a crime and to classify persons by their age for the purpose of dealing with them as delinquent persons"—citing 31 Am. Jur., sec. 16, p. 791, authority for which is based upon the case of *Ex parte Mei,* 110 A. L. R. 1080 (122 N. J. Eq. 125, 192 Atl. 80), in which it was held:

"2. A person under the age of sixteen years may not be loosely charged with 'juvenile delinquency;' he must be charged with the specific offense which, if he did it, makes him a juvenile delinquent.

"3. A commitment of a person fifteen years and four months of age at the time of the alleged crime, issued by the Hudson Oyer and Terminer, pursuant to an indictment for murder found by the grand jury, held to be valid."

" * * * it is not the purpose of the statutes creating juvenile courts to provide additional courts for the punish-

ment of crime. The purpose is to establish special tribunals having jurisdiction, within prescribed limits, of cases relating to the moral, physical, and mental well-being of children to the end that they may be directed away from paths of crime." 31 Am. Jur., sec. 26, p. 796.

"While * * * the powers conferred by statute upon a juvenile court have been liberally construed * * * the courts in the more recent cases have manifested a distinct tendency to confine the jurisdiction of the juvenile courts within the limitations imposed by statute, namely, to cases involving neglected or delinquent minors, and not to encroach upon the jurisdiction in respect to minors theretofore existing in courts of general jurisdiction." Annotation, 78 A. L. R. 317. See, also, 31 Am. Jur., sec. 29, p. 798.

It was held in *Johnson v. State,* 43 Ga. App. 474, 159 S. E. 295, that the Juvenile Court Act did not deprive the superior court of a county where that act was applicable of its jurisdiction to try a defendant indicted for a felony, although the defendant may have been less than sixteen years of age at the time of the alleged commission of the crime.

The Juvenile Court Act of Nebraska "makes no provision for a trial by jury except where a delinquent child is charged with a crime." *Laurie v. State,* 108 Neb. 239, 188 N. W. 110.

Now, if we are to arrive at an answer to the question propounded, we must ascertain the duty of the county attorney under our law.

"It shall be the duty of the county attorney, when in possession of sufficient evidence to warrant the belief that a person is guilty and can be convicted of a felony or misdemeanor, to prepare, sign, verify, and file the proper complaint against such person, and to appear in the several courts of his county and prosecute the appropriate criminal proceeding on behalf of the state and county." R. S. 1943, sec. 23-1201.

In an endeavor to learn and carry out the meaning of the legislature, we reach the conclusion that the judge of the juvenile court does not have the sole or exclusive jurisdic-

tion of youth under eighteen years of age; that the county attorney is not limited by the Juvenile Court Act in any way in his duty to file the proper complaints against wrongdoers and prosecute the same.

However, in this respect we have not overlooked section 43-211, R. S. 1943, wherein it is provided that, where a juvenile court is held, as provided in section 43-204, R. S. 1943, if a child under the age of sixteen years is arrested, with or without a warrant, and taken before a justice of the peace, or public or police magistrate, such case shall be transferred to the juvenile court.

It thus clearly appears that there is a concurrent jurisdiction between these several courts. While we are inclined to the view that the juvenile court of each county in the state has a broad discretion in the handling of all cases involving dependent, neglected and delinquent minors, however, other courts also have concurrent jurisdiction under the general criminal laws of our state, and complaints can properly be brought before all such courts by the county attorney.

Holding these views, we find that the trial court was in error in sustaining the motion to quash the information filed by the county attorney, charging the defendant, who was under eighteen years of age, with receiving a stolen automobile, and the exceptions of the county attorney are sustained under section 29-2316, R. S. 1943.

EXCEPTIONS SUSTAINED.

FRED INGERSOLL (REVIVED IN THE NAME OF ELLEN C. ROSS, ADMINISTRATRIX OF THE ESTATE OF FRED INGERSOLL), APPELLEE, V. JAMES SULLIVAN, APPELLANT.

18 N. W. 2d 119

FILED MARCH 23, 1945. No. 31863.

Appeal and Error. Where prejudicial error is not shown by the record, a verdict of a jury on conflicting evidence will not be disturbed on appeal.

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

John N. Baldwin, for appellant.

Oscar T. Doerr, contra.

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

CARTER, J.

Plaintiff commenced this action against the defendant to recover damages for an injury growing out of an assault made by the defendant upon the person of the plaintiff. The jury returned a verdict for the plaintiff in the amount of $700. Judgment was entered on the verdict and defendant appeals.

The record shows that the defendant was operating a rooming house and the plaintiff was a tenant renting a room by the month. On May 21, 1943, plaintiff went to defendant's room for the purpose of paying his room rent. An altercation ensued as to the amount. Plaintiff testifies that defendant became enraged, struck him in the mouth, knocked him back on the bed and struck him again, breaking off a tooth. Plaintiff testified that the next morning defendant came to his room, renewed the altercation and threw plaintiff to the floor, injuring his arm and hip. He testifies that he also suffered pain as a result of his fall because of injury to an existing hernia with which he had been afflicted for five or six years. Two witnesses corroborate the plaintiff's assertion that his lip was lacerated on the inner side and that he was unable to walk without assistance after the second altercation. The evidence shows that plaintiff was taken to the police station by a friend and from there to a hospital where a police surgeon examined him and permitted him to be returned to his room. On January 21, 1944, plaintiff was operated on to correct a strangulated hernia. There is expert medical evidence in the record that the hernia condition could have been and probably was accelerated by the injuries received by plain-

tiff on May 21 and 22, 1943. Plaintiff was almost 80 years of age at the time of the alleged assault. He weighed 167 pounds at that time. At the time of the trial he weighed 131 pounds, most of the loss in weight occurring after his operation in January, 1944. There is evidence in the record connecting the operation and the cause thereof with the alleged assault.

The defendant denies that any assault occurred or that he in any way caused injury to the plaintiff. He denied positively certain admissions alleged to have been made by him.

There was evidence in the record to sustain the allegations of plaintiff's petition. The defendant's evidence was in direct conflict with that of the plaintiff and the question therefore became one for the jury to determine. The jury resolved the questions of fact in favor of the plaintiff. There is no basis afforded for this court to interfere with the judgment entered on the jury's verdict. The evidence is ample to support the judgment and, the insufficiency of the evidence to support the verdict being the only error assigned, the judgment must be affirmed.

AFFIRMED.

CATHERINE E. LEWIS, APPELLEE, V. BERNICE B. MARKER, APPELLANT.

18 N. W. 2d 210

FILED MARCH 23, 1945. No. 31912.

1. **Deeds.** It is essential to the validity of a deed that there be a delivery and the burden of proof rests upon the party asserting delivery to establish it by a preponderance of the evidence.
2. ———. To constitute a valid delivery of a deed there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently.
3. ———. Where an unrecorded deed is found, after grantor's decease, in a safety deposit box to which the grantee had a right of access as a joint lessee thereof with such grantor, this of itself

will not sustain a finding that the deed was delivered when the grantor retained control of the property, collected the rents, made repairs and paid taxes thereon as he did before the date of the purported delivery.

APPEAL from the district court for Lancaster county: RALPH P. WILSON, JUDGE. *Affirmed.*

George I. Craven, for appellant.

Jack Devoe, contra.

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

CARTER, J.

This is a suit in equity by Catherine E. Lewis to secure the cancellation of a quitclaim deed to a residence property in Lincoln in which Bernice B. Marker was the grantee. The trial court set aside and canceled the deed, and entered a judgment for $1,634.96 for the value of the use, less the cost of repairs and maintenance, during the time the plaintiff was denied possession. From this decree the defendant appeals.

The record shows that Elizabeth M. May became the owner of the real estate in question on or about July 31, 1926, by quitclaim deed from her husband. The evidence shows that Bernice B. Marker, a sister of Elizabeth M. May, lived with Mrs. May and her husband for many years and continued to live with Mrs. May after her husband's death in November, 1927. Mrs. May died on August 23, 1936, leaving as her sole heir at law her 16-year old adopted daughter, Catherine E. Lewis, the plaintiff in the present suit. The estate of Elizabeth M. May was duly administered and the real estate in question assigned by decree of the probate court to Catherine E. Lewis. Bernice B. Marker was appointed guardian for Catherine E. Lewis and performed the duties of such guardian until she resigned on or about August 13, 1938. On June 9, 1938, Bernice B. Marker recorded a deed to the property in question dated July 17, 1936, in which Elizabeth M. May was the grantor and Bernice B. Marker

was the grantee. The case resolves itself into the question of whether there was a delivery of the deed by Elizabeth M. May in her lifetime.

The evidence shows that Elizabeth M. May appeared at the place of business of the First Trust Company in Lincoln on July 17, 1936, and requested an employee to notarize the deed, which was done. There seems to have been a conversation between the notary and Mrs. May, the substance of which was that the property was being deeded to Bernice B. Marker because Catherine E. Lewis was then a minor and that Miss Marker would see that the daughter was provided for. Mrs. May left the presence of the notary with the deed in her possession.

The testimony of Bernice B. Marker is that she found the deed in a safety deposit box during the latter part of May or the first part of June, 1938. It was clipped to the deed which William A. May executed and delivered to Elizabeth M. May and both deeds were clipped to an insurance paper belonging to Bernice B. Marker. With reference to the safety deposit box the record shows that it was leased jointly by Elizabeth M. May and Bernice B. Marker and that each had access to it. It is further shown that the First Trust Company made a record on each occasion that one of the joint lessees gained access to the safety deposit box. There is no entrance ticket indicating that Elizabeth M. May ever had access to the safety deposit box from July 17, 1936, the date of the execution of the deed, to August 23, 1936, the date of her death. An attempt was made to show that there was a possibility of losing an entrance ticket or that it could be taken by someone without the knowledge of the company. An officer of the trust company testified to the care with which the entrance tickets were preserved. The evidence tending to show the loss or abstraction of some of the entrance tickets to the safety deposit box does not rise above mere surmise or conjecture. There is no evidence in the record which even indicates that Elizabeth M. May had access to the safety deposit box from the date the deed was made to the date of her death. Bernice B. Marker

did testify that in September, 1943, she saw an entrance ticket signed by Elizabeth M. May which was dated June 20, 1936. No such ticket appears in the trust company's records. Assuming this statement to be true, it has no probative value for the reason that Mrs. May could not have placed the deed in the safety deposit box on that date because it had not on that date been executed. We think the evidence negatives the claim that Mrs. May placed the deed in the safety deposit box. Consequently, the fact that the deed was found in the safety deposit box is not, of itself, sufficient to sustain a finding that there was a delivery of the deed in the lifetime of Mrs. May.

There is much evidence in the record concerning the relations of Elizabeth M. May and Bernice B. Marker. They lived together for some 23 years and apparently got along well during that time. Miss Marker was a schoolteacher and undoubtedly made substantial contributions to the maintenance of the home. There is no evidence that she ever paid room and board in the ordinary sense, the home being operated more in the nature of a joint enterprise. There is evidence that Mrs. May on occasion stated that she intended to convey the residence to Bernice B. Marker because Catherine E. Lewis was a minor and that Miss Marker could better handle the property and care for Catherine. She did execute the deed, but the record is devoid of evidence sufficient to sustain a finding that she ever carried out her expressed intent by delivering the deed. The trial court was clearly correct in finding that the quitclaim deed to Bernice B. Marker should be canceled and held for naught as an undelivered deed.

The applicable rules are as follows: It is essential to the validity of a deed that there be a delivery. To constitute a delivery there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect presently. *Smith v. Black*, 143 Neb. 244, 9 N. W. 2d 193. The burden of proof rests upon the party asserting such a delivery to establish it by a preponderance of the evidence. Where the evidence fails to show that the grantor

did anything evidencing an intent to divest himself of title to the property, especially where he retains its possession, a delivery is not established. *Ehlers v. Seip,* 136 Neb. 722, 287 N. W. 202. Where an unrecorded deed is found, after grantor's decease, in a safety deposit box to which the grantee had a right of access as a joint lessee thereof with such grantor, this of itself will not sustain a finding that the deed was delivered when the grantor retained control of the property, collected the rents, made repairs and paid taxes thereon as he did before the date of the purported delivery. *Owens v. Reed,* 141 Neb. 796, 4 N. W. 2d 914. And where, as here, the preponderance of the evidence is to the effect that the grantor did not place the deed in the safety deposit box for the reason that she never had access to it from the time the deed was executed until the time of her death, the finding of the deed in the safety deposit box does not, of itself, constitute evidence of delivery on the part of the grantor. Defendant advances no other basis to establish a delivery of the deed. We conclude that the trial court was correct, therefore, in holding that a delivery of the deed was not established by the evidence and, the burden being upon the defendant, her defense must fail.

Defendant complains of the entry of the judgment against the defendant in the amount of $1,634.96. The record shows that defendant had been in wrongful possession of the real estate in question for a period of 70 months and that the reasonable rental value thereof was $40 a month. The court further found that defendant had expended $1,165.04 for repairs, upkeep and taxes. These items, and the value thereof, are amply sustained by the evidence. The judgment awarded for the difference, amounting to $1,634.96, is in all respects proper.

We find no error in the record. The judgment of the trial court is affirmed.

AFFIRMED.

E. HENRY SCHNELL, APPELLEE, V. UNITED HAIL INSURANCE COMPANY, APPELLANT.

18 N. W. 2d 112

FILED MARCH 23, 1945. No. 31814.

1. **Appeal and Error.** In an action at law the findings of the district court on issues tried have the effect of a verdict where a jury is waived by the parties. In such a case, if the evidence supports the findings and judgment thereon and there is no error in the proceedings the judgment of the district court will be affirmed upon appeal.
2. ———: TRIAL. As a general rule courts do not amend or correct verdicts in matters of substance after discharge of the jury, and where the determination of the amount of recovery is exclusively within the province of the jury this court has no power upon appeal to amend the verdict by increasing the amount thereof.
3. **Insurance.** Ordinarily, it is within the power of an insurance agent to make an oral contract of insurance or to agree that the insurance shall be in force after the application is signed and the premium paid and before a policy is actually written, unless the assured is, or should be held to be, apprised in some manner, either in the application or otherwise, that the insurance will not be in force until the application is approved at the home office and the policy issued and delivered.
4. ———. An insurance company is bound by all acts, contracts, or representations of its agent, whether general or special, which are within the scope of his real or apparent authority, notwithstanding it is in violation of private instructions or limitations upon his authority of which a person dealing with him and acting in good faith has neither actual nor constructive knowledge.
5. ———. Except as a right of cancellation of an insurance policy is provided for by statute, or reserved in the contract, neither the insured nor the insurer can effect a cancellation without the consent of the other, and such cancellation can be effected only by a strict compliance with the terms and conditions provided therefor by the contract and by statute.
6. ———. When an assessment hail insurance company is organized under the laws of this state, the provisions of the statute authorizing its organization, the articles of incorporation and the bylaws of the company, together with the application for membership and the policy issued thereon, or the application if it is in fact also a policy of insurance, constitute the contract between the company and the assured.
7. ———. Where an assessment hail insurance company, after receiving statutory notice of loss claimed by a member, denies the

making of the contract of insurance and all liability thereunder, or fails or refuses, within a reasonable time, to proceed and take the necessary steps required by statute to provide for payment of the loss, a right of action by the insured immediately accrues to recover for any loss sustained although the contract contains a clause providing that all losses shall be due and payable 90 days after a date certain, designated as expiration of the crop season.

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

C. M. Skiles, for appellant.

Morrow & Miller, contra.

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

CHAPPELL, J.

This is a law action in which plaintiff sought recovery from defendant upon an alleged contract of hail insurance for loss resulting from damage to his growing wheat, barley and bean crops. Jury was waived and the cause tried and submitted upon its merits to the district court for Banner county, Nebraska, whereupon certain findings were made and plaintiff was awarded a judgment for $330.92. Defendant's motion for new trial was overruled and it appeals, contending that there was no insurance contract between plaintiff and defendant; that if there was such a contract plaintiff's action was prematurely brought; and that the judgment is contrary to law, not sustained by the evidence, and in excess of the amount claimed in plaintiff's petition. Plaintiff did not attack the judgment by motion for new trial or otherwise in the district court. However, in this court he assigns what is called "cross-errors", contending that we should affirm the case but correct the judgment and make it for a greater amount because the trial court erroneously found that a 10 per cent deductible clause should be operative upon damages to plaintiff's bean crop, and erroneously allowed defendant an offset for the face amount of plaintiff's premium note instead of a lesser sum. Plaintiff's position is that the facts in connection therewith are

undisputed and that the judgment may be judicially corrected by a simple mathematical calculation. After considering all of these contentions made by the parties we decide that they cannot be sustained and that the judgment of the trial court should be affirmed.

We will first dispose of plaintiff's alleged "cross-errors". With reference to the offset, an examination of plaintiff's petition discloses that to establish an existing and enforceable contract of insurance plaintiff pleaded that he executed and delivered to defendant his promissory chattel mortgage note for the sum of $157.69 which was accepted in payment of premium for the insurance contract. A copy of the alleged contract which is attached to and made a part of plaintiff's petition likewise so recites. A copy of the premium note for that amount due October 15, 1942, with interest at 8 per cent from that date, no part of which had been paid, is also attached to and made a part of plaintiff's petition. Defendant in its answer prays that, if the court should find defendant liable, the amount of the premium note with interest be offset against plaintiff's recovery. Plaintiff in reply to defendant's answer pleads that defendant's acceptance and retention of the premium note given by plaintiff to defendant estopped it from denying liability upon the contract. It will be readily seen therefore that the amount of the note was not an issue in the case and the trial court correctly offset against plaintiff's recovery the amount thereof, $157.69, with interest at 8 per cent from October 15, 1942.

An examination of the pleadings and the evidence discloses that the question whether the 10 per cent deductible clause applied to plaintiff's bean crop was not undisputed but a question of fact for the trial court to decide. In this connection we find that it was a matter of substance as distinguished from form and inherent in the verdict. We have held that, "In an action at law the findings of the district court on issues tried have the effect of a verdict, where a jury is waived by the parties." *Palmer v. Schaber*, 141 Neb. 138, 2 N. W. 2d 923. In *Swygert v. Platte Valley Public*

Power and Irrigation District, 133 Neb. 194, 274 N. W. 492, it was held: "As a general rule, courts do not amend or correct verdicts in matters of substance after discharge of the jury, but this does not prevent corrections with respect to clerical errors or formal matters and the elimination of interest which the law forbids." It was said in *Cerny v. Paxton & Gallagher Co.,* 83 Neb. 88, 119 N. W. 14: "The statutes regulating the course of procedure do not specifically provide for setting aside a verdict in part. On the contrary, the remedy provided for errors committed during a trial, as prescribed by section 314 of the Code, (now section 25-1142, R. S. 1943) is a new trial." See, also, *Bielfeldt v. Grand Island Transit Co.,* 123 Neb. 368, 243 N. W. 76. The applicable rule is appropriately stated in 64 C. J., sec. 899, p. 1099: "As a general rule where the determination of the amount of recovery is exclusively within the province of the jury the court has no power to amend the verdict by increasing the amount found by the jury; * * * ." By analogy of course this court has no power to do so upon appeal. Authorities relied upon by plaintiff are clearly distinguishable from the case at bar. It follows that this court cannot summarily correct the judgment or direct the trial court to do so.

Defendant contends that it had no contract of hail insurance with plaintiff because its agent had no authority to insure bean crops or issue a policy with a bean endorsement thereon; that no policy was ever issued to plaintiff; and that defendant notified him promptly upon receiving the application for insurance that he was not insured or protected by the company. It is admitted in the answer that defendant was authorized to insure growing crops in this state against loss by hail and that the agent who took plaintiff's application was its agent to solicit such insurance. The record discloses that on May 25, 1942, the agent called upon plaintiff at his farm and procured from him an application for hail insurance upon plaintiff's growing wheat, barley and bean crops described therein upon certain conditions and for a prescribed amount during the period of

one crop season. The application provided in part: "This application for insurance shall become effective on the first 12 o'clock noon succeeding twenty-four (24) hours after such application has been properly executed, in the presence of the Company's agent, and addressed to the Company at its Home Office and placed in, and postage stamp cancelled by, any United States post office and to be governed by the articles of incorporation and by-laws printed on the policy issued by the Company." Thereafter follow provisions for adjustment of loss after the application became effective as insurance, a description of the crops insured, the amount thereof, and other relevant matters. Defendant's agent wrote the necessary information in the blank spaces and read the application to plaintiff who signed it. Defendant's agent then signed as witnessing the execution of the instrument. At the same time plaintiff executed and delivered to defendant's agent his promissory chattel mortgage note payable to defendant and witnessed by the agent, in payment of the insurance premium. Both the application and premium note were delivered to the agent who mailed them to the company. Defendant admits that they were received on June 1, 1942, and retained by it at all times thereafter. However, no policy was delivered to plaintiff before he suffered the loss by hail storm on July 19, 1942.

The agent did not testify and we find no evidence in the record or authority of law, statutory or otherwise, which would justify a finding by the court that defendant or its agent had no authority to insure bean crops. It is admitted that on June 1, 1942, when it received the application the defendant had authority from the Department of Insurance to insure bean crops and attach a 10 per cent deductible clause as a part of the policy. That plaintiff acted in good faith when he executed the application cannot be questioned, and we find no evidence in the record that would justify a finding that plaintiff had either actual or constructive notice of any limitation upon the authority of defendant's agent to take plaintiff's application in the manner and form in which it was executed.

It was held by this court in *Clark v. Bankers Accident Ins. Co.*, 96 Neb. 381, 147 N. W. 1118: "Ordinarily, it is within the power of an insurance agent to make an oral contract of insurance, or to agree that the insurance shall be in force after the application is signed, and the premium paid, and before a policy is actually written, unless the assured is, or should be held to be, apprised in some manner, either in the application or otherwise, that the insurance will not be in force until the application is approved at the home office and the policy issued and delivered." Also, it was said in *Cline v. Fidelity Phenix Fire Ins. Co.*, 113 Neb. 481, 203 N. W. 578: "The rule is well settled that an insurance company is bound by all acts, contracts or representations of its agent, whether general or special, which are within the scope of his real or apparent authority, notwithstanding it is in violation of private instructions or limitations upon his authority, of which a person dealing with him, acting in good faith, has neither actual nor constructive knowledge." See, also, *Rankin v. Northern Assurance Co.*, 98 Neb. 172, 152 N. W. 324; *Whitehall v. Commonwealth Casualty Co.*, 125 Neb. 16, 248 N. W. 692.

Section 44-102, R. S. 1943, defines insurance. In the case at bar the application itself was in effect the policy of insurance. It contained all the necessary elements of a policy for hail insurance including the time that it should be in full force and effect to protect the plaintiff and bind the defendant in the same manner as if called a policy of insurance. It is effective as such whether a policy so-called was ever issued or not unless the application was rejected or canceled by defendant in some appropriate legal manner. Defendant contends that the application was rejected by its letter to plaintiff dated June 1, 1942. If this letter purports to be a notice of cancellation it was not sent by registered mail as provided by section 17 of defendant's bylaws, and the trial court found that if such a letter were ever written plaintiff did not receive it. We do not deem it necessary to recite the evidence in that connection but find that since there is very credible evidence to sustain such a finding it will not be disturbed by this court.

Further, after receiving plaintiff's application and premium note on June 1, 1942, defendant wrote to plaintiff on June 14, 1942, in part as follows: "We thank you for your hail insurance and the time payment of your premium note has been approved and is satisfactory to this company. We have, and shall endeavor to help you save money on your insurance and give you good service." After offering plaintiff a 10 per cent discount for cash payment of his premium note, the letter concluded: "Assuring you that we appreciate having your good name added to our 1942 policyholders and with best personal regards, we remain, Sincerely yours, United Hail Insurance Company, C. Fullagar."

On July 13, 1942, plaintiff wrote defendant acknowledging receipt of the above letter and inquiring about his policy of insurance. Defendant replied to this letter on July 14, 1942, advising plaintiff, among other things, "that in order to complete your application for hail insurance we must have the enclosed Bean Endorsement signed by you. * * * Thanking you for an immediate reply enclosing this endorsement, we remain, Yours truly, United Hail Insurance Co., K. C. Knudson." Plaintiff admitted receipt of this letter by him but denies that there was any bean endorsement enclosed. This letter could not be said to be a rejection or cancellation of the application. In any event, defendant at all times retained plaintiff's note in its possession, never tendering it back to him, as it should have done, until after the loss, which tender he then rightfully refused.

In *Moore v. Washington National Ins. Co.*, 135 Neb. 29, 280 N. W. 221, the court said: "A policy of insurance can be canceled under the provisions of the statute, or according to the provisions of the policy. Recently this court said: ' "Where a valid contract of insurance has been effectuated, the company cannot cancel the policy without consent of insured, except where it may be permitted to do so by statute or by a reservation in the policy itself. Such a reservation is valid, but, under the general rule, it will be strictly construed against the company." 32 C. J. 1245.' *Petersen v. Ohio Casualty Ins. Co.*, 131 Neb. 128, 267 N. W. 393. At

about the same time we said: 'Except as a right of cancelation of an insurance policy is provided for by statute, or reserved in the contract, neither the insured nor the insurer can effect a cancelation without the consent of the other, * * * such cancelation can be effected only by a strict compliance with the terms and conditions provided therefor by the contract and by statute.' *Sanks v. St. Paul Fire & Marine Ins. Co.*, 131 Neb. 266, 267 N. W. 454. In the previous case cited, *Petersen v. Ohio Casualty Ins. Co., supra,* it was stated: 'The burden of establishing an effective cancelation before loss is on the insurer. Notice of cancelation must be in accord, and in substantial compliance, with the provisions of the policy relating thereto, and be peremptorily explicit and unconditional.' " We find no provision either in the statutes or the contract involved and none has been called to our attention permitting defendant to reject or cancel plaintiff's contract without proper and timely notice thereof and without also tendering the return of his premium note. In the final analysis it is fundamental that defendant could not, with full knowledge of the facts, receive and retain the fruits of its agent's contract with plaintiff until after his loss and then deny that the agent had authority to make the contract. 3 Thompson, Corporations (3d ed.) sec. 2071, p. 698.

It is conceded that plaintiff filed this action on August 21, 1942. Defendant insists that plaintiff's action was prematurely brought under its bylaws which are a part of plaintiff's contract. Section 18 of the bylaws provides: "Insurance for the crop season on small grain shall expire at 12 o'clock noon on August 20th, * * * and all losses shall be due and payable within ninety (90) days thereafter." While plaintiff here denies that the bylaws are a part of his contract we find that the application upon becoming effective as insurance was "to be governed by the articles of incorporation and bylaws printed on the policy issued by the company." This court has held that, "When an assessment hail insurance company is organized under the laws of this state, the provisions of the statute authorizing its organiza-

tion, the articles of incorporation, the by-laws of the company, the application for membership, and the policy issued thereon constitute the contract between the company and the assured." *Jensen v. Lincoln Hail Ins. Co.*, 125 Neb. 87, 249 N. W. 94. Of course, if the application for insurance was also in legal effect plaintiff's policy of insurance, as heretofore stated, then as provided therein the bylaws would be a part of the contract.

Section 44-806, R. S. 1943, 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 person or persons authorized by such company to adjust losses shall proceed to ascertain the amount of such loss or damage, and adjust the same." Section 44-807 provides: "Suits at law may be brought against any member who shall neglect or refuse to pay any assessment made against him, in the same manner as for the collection of any other debt; *and a member may bring an action against the company for any loss sustained.*" (Italics supplied.) Section 44-808 provides: "If the officers and directors of any such association shall fail or refuse, after receiving notice of a loss, to take the necessary steps to provide for the payment of the same, they shall render themselves individually liable therefor, and an action may be maintained against them to collect such amount." Other sections of the statute provide that the company shall deposit 50 per cent of all assessments or premiums received from its members for payment of losses in full or upon a *pro rata* basis if its assets are in sufficient to pay in full.

It is admitted in the case at bar that the plaintiff gave defendant notice of his claim in proper manner and form almost immediately after the loss. The record discloses that defendant before this action was filed denied that it had a contract of insurance with plaintiff, and denied all liability under such a contract. Further, within a week after plaintiff's loss the vice-president, who was also the treasurer and managing officer of defendant in Nebraska, called at plain-

tiff's farm and told plaintiff that he did not have any insurance and offered to return plaintiff's note, which the latter refused. It is also clear that the company refused to proceed and take the necessary steps required by statute to ascertain the amount of the loss, adjust the same, and provide for payment thereof. In fact at the trial this officer testified that if plaintiff had then tendered payment of the note it would not have been accepted and that he never intended to take plaintiff's loss into consideration, and that plaintiff could not get on a *pro rata* basis for payment thereof until and unless plaintiff established his claim by the judgment of a court.

The above sections of the statutes contemplate that the amount of the loss shall be determined and adjusted by an assessment insurance company without delay in order that the amount of the loss or damage may be determined and the necessary steps may be timely taken by it under the statute to provide for payment of each or all claims from the loss fund in full or upon a *pro rata* basis, dependent upon the amount of the company's assets. That the provisions of the contract of which the statute is a part are reciprocal and mutual cannot be questioned. It is apparent from this record that if defendant were to pay losses from funds on hand for that purpose or had been compelled to prorate losses, plaintiff's claim would not have been taken into consideration by defendant in doing so and available funds would have been paid out on other losses and perchance exhausted if plaintiff had not commenced this action to establish his claim before ninety days from August 20, 1942. It is only because this action was commenced that defendant, as shown by this record, did set aside funds, $828, money on hand for payment of plaintiff's loss in the event that he should obtain judgment.

Section 18 of defendant's bylaws is for the benefit of the insurer and applies only when the cause of the loss has been ascertained, the amount of the loss determined, and adjusted, and the necessary steps have been taken to provide for payment. It is waived by the company and has no applica-

tion where, after receiving statutory notice of loss claimed by a member, the company denies the making of the insurance contract and all liability thereunder, or fails or refuses within a reasonable time to proceed and take the necessary steps required by the statute to provide for payment of the loss. To deny the right to an action immediately, when such a situation is presented, would deprive the insured of a timely remedy to which he was not only lawfully entitled, but one specifically granted by statute.

This position is not only supported by statute but by adjudicated cases. The court held in *Western Home Ins. Co. v. Richardson,* 40 Neb. 1, 58 N. W. 597, that, "Where an insurance company denies the making of the policy and all liability thereunder, and absolutely refuses to pay the loss, the right of action of the insured immediately accrues, although the policy contains the clause giving the company an option either to pay the loss or replace the property damaged within a specified time." In this opinion it was stated: "The authorities sustaining this proposition are numerous. In *Norwich & New York Transportation Co. v. Western Massachusetts Ins. Co.,* 34 Conn. 561, it was held that the denial of all liability and refusal to pay the loss was a waiver of the stipulation in the policy allowing the insurer sixty days within which to pay the loss, and that the suit could be maintained on the policy at once. To the same effect are *Phillips v. Protection Ins. Co.,* 14 Mo., 220; *Allegre v. Maryland Ins. Co.,* 10 Md. App., 408." In *Modern Brotherhood of America v. Cummings,* 68 Neb. 256, 94 N. W. 144, the court held: "Where an insurance company denies all liability on a policy, basing its refusal on the ground that the loss or injury insured against has not occurred, the insured may bring an action thereon without waiting for the expiration of the period limiting the time within which an action may be brought." Also, in *Omaha Fire Ins. Co. v. Hildebrand,* 54 Neb. 306, 74 N. W. 589, it was said: "Where an insurance company, either before suit brought or by answer in the action, denies that the policy was in force when the loss occurred, it cannot avail itself of the provision in the policy

that no action shall be brought until sixty days after receipt of proofs of loss and adjustment." See, also, *Home Fire Ins. Co. v. Fallon,* 45 Neb. 554, 63 N. W. 860; *Northern Assurance Co. v. Hanna,* 60 Neb. 29, 82 N. W. 97; 33 C. J., sec. 782, p. 75.

These cases hold in effect that such stipulations and provisions are intended to give the insurer time to inquire into the cause of loss, the amount thereof, and make provision for payment, the very reason for the provision in defendant's bylaws. Defendant cites no authority which makes a different rule applicable to assessment insurance companies than to others. The authorities relied upon by it are not controlling in the case at bar and we must decide that plaintiff's action was not prematurely brought.

We find that the judgment does not exceed the amount claimed and prayed for by plaintiff in his petition, and while there is a conflict in the evidence as to the amount of damages suffered by plaintiff, we are of the opinion that the judgment is amply supported by the evidence. The applicable rules are that, "In a law action where a jury is waived the findings of fact of the trial judge shall have the same force and effect as a verdict of a jury and will not be set aside unless clearly wrong." *In re Estate of Hagan,* 143 Neb. 459, 9 N. W. 2d 794. And, "Where the evidence supports the findings and judgment of the district court on the issues tried in an action at law, the judgment will be affirmed on appeal, there being no error in the proceedings." *Palmer v. Schaber,* 141 Neb. 138, 2 N. W. 2d 923.

For the reasons heretofore stated the judgment of the trial court is affirmed.

AFFIRMED.

BLANCH BEND, APPELLANT, V. BERT M. MARSH ET AL., APPELLEES.

18 N. W. 2d 106

FILED MARCH 23, 1945. No. 31864.

1. **Equity:** JUDGMENT. The rule obtains in this jurisdiction that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy.
2. **Limitations of Actions.** The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief.
3. ———. Where it appears from the statement of facts in the petition that the cause of action is on its face barred by the statute of limitations, and there are no allegations tolling the statute, a demurrer can be properly interposed to such cause of action.
4. **Pleading.** Where the laches of the plaintiff and the staleness of his claim are apparent from the petition, objection may be taken by demurrer.
5. **Trusts.** The interest of the beneficiary in the trust property is not cut off by a transfer by the trustee in breach of trust to a third person who at the time of the transfer has notice that the transfer is in breach of trust, and the beneficiary can in equity compel the third person to restore the property to the trust. The third person holds the interest which he acquires by the transfer upon a constructive trust for the beneficiary of the trust.
6. **Limitation of Actions.** In the case of a constructive or implied trust, except where the trust is imposed on the ground of actual fraud which is not immediately discovered, or there has been a fraudulent concealment of the cause of action, the statute begins to run in favor of the party chargeable as trustee as soon as the trust relation is created, or from the time when the wrong is done by which the trustee becomes chargeable, or the time when the beneficiary knew or ought to have known thereof and can assert his rights; not from the time when demand is made on the trustee, or the trust is repudiated by him, for no repudiation of an implied or constructive trust is ordinarily necessary to mature a right of action and set the statute in motion.
7. **Equity.** Independently of any limitation for the guidance of

courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked.

APPEAL from the district court for Saline county: EDMUND P. NUSS, JUDGE. *Affirmed.*

Lloyd Dort and *Coburn Campbell,* for appellant.

Brown, Crossman, West, Barton & Fitch, Kennedy, Holland, DeLacy & Svoboda and *Lester L. Dunn, contra.*

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

WENKE, J.

The plaintiff, Blanch Bend, commenced this action in the district court for Saline county on August 14, 1942, naming as defendants, Bert M. Marsh, Fred H. Bruning, Bert M. Marsh and Fred H. Bruning, as executors of the estate of DeWitt C. Marsh, deceased, Arnold C. Blattspieler, as special administrator of the estate of DeWitt C. Marsh, deceased, Retta McGee Dunning, United States Fidelity and Guaranty Company, a corporation, and Massachusetts Bonding and Insurance Company, a corporation. The purpose and object of the plaintiff's petition, as amended on April 14, 1943, is to recover the sum of $10,000, with interest at six per cent from August 17, 1932, and farm lands, together with the income and profits therefrom from August 17, 1932. From an order sustaining the demurrers of all the defendants to the amended petition and dismissing plaintiff's action, plaintiff has appealed.

For the purpose of this opinion the appellant will be referred to as plaintiff and the appellees by their respective names.

The facts as alleged in the plaintiff's amended petition and admitted by the demurrers are: That in 1893 DeWitt C. Marsh and Ellen C. Marsh, husband and wife, requested the plaintiff, a niece of Ellen C. Marsh, to come from her home in Illinois, where she then resided, to the Marshes'

home at Tobias, Nebraska, to work and care for them. They agreed to pay her for her services when they were through with their property. That at various times she came to Nebraska and worked and cared for the Marshes and among the years she rendered such services are the years of 1893, 1899, 1903, 1904, 1906, 1908, 1923 and 1928. In 1928 DeWitt C. Marsh took the plaintiff with him and they looked at his various farms. He then told her to choose the farm she wanted. She chose the Bruning farm, legally described as the northeast quarter of section 30, township 4, range 2, and the south 95 acres of the southeast quarter of section 19, township 4, range 2, all in Thayer county, Nebraska. Thereafter, on August 18, 1928, at their home the Marshes made, executed and delivered to plaintiff a memorandum which plaintiff accepted in full payment, accord and satisfaction for the services she had rendered with the agreement that the delivery of the property was not to be made until the Marshes were through with it for their own use. This memorandum, which plaintiff alleges has either been lost or unintentionally destroyed, is as follows:

"Tobias, Nebraska, August 18th, 1928.

"I give to Blanch Bend my Bruning Farm and $10,000 for services since whe (she) was a girl.

"Mr. and Mrs. D. C. Marsh."

Ellen C. Marsh died intestate on May 22, 1929, and no administration has been had of her estate. DeWitt C. Marsh died on April 15, 1932, leaving a solvent estate which included the Bruning farm and cash, over and above all obligations of the estate, more than sufficient to cover the sum of $10,000.

Plaintiff alleges that DeWitt C. Marsh, by reason of the agreement, became a trustee of the property in his lifetime and the plaintiff became the equitable owner thereof; that during his lifetime he did not make any delivery of the property to the plaintiff nor make any provision for the delivery thereof to her after his death; that upon the death of DeWitt C. Marsh, of which plaintiff had actual knowledge within a month after it occurred, the plaintiff became enti-

tled to the possession and legal title of the property; and that Bert M. Marsh knew of the agreement but permitted the property to be included as part of the assets of the estate and distributed under the provisions of DeWitt C. Marsh's will.

After his death a will of DeWitt C. Marsh, dated March 28, 1932, and disposing of all of his property but making no provision for plaintiff as to the property here involved, was offered for probate in the county court of Saline county and over objections made to its allowance by William E. Lyon was admitted and allowed to probate on May 20, 1932. The contestant took an appeal to the district court which appeal was, on August 8, 1932, dismissed by the court. By decree of the county court, dated May 12, 1933, entered pursuant to stipulation of the residuary devisees and legatees, the remaining assets of the estate were distributed to them, they being Ira C. Marsh, Harry D. Marsh, Bert M. Marsh, DeWitt C. Marsh and Retta McGee Dunning. In this distribution the Bruning farm was included in the share of Bert M. Marsh and the personal property, including cash, was so distributed as to equalize the division of the lands. No demand was ever made by plaintiff upon any one for this property and the right thereto until in July of 1940 when demand was made upon Bert M. Marsh, who refused plaintiff's demands. This suit was subsequently filed on August 14, 1942.

Plaintiff alleges, contends and bases many of her propositions on the theory that the order of the district court for Saline county entered on August 8, 1932, in the matter of the Estate of DeWitt C. Marsh, deceased, dismissing the appeal of William E. Lyon, contestant, is void and consequently the will of deceased dated March 28, 1932, has never been allowed and admitted to probate and that there has never been a legal administration of the estate. This has been decided to the contrary in *In re Estate of Marsh, ante,* p. 559, 17 N. W. 2d 471. Consequently, all of plaintiff's allegations with reference to the execution of the will, the lack of testamentary capacity, the exercise of undue influence and fraud

practiced upon both the county court and the district court are without merit for all of these matters could have been raised either directly in the proceeding in the county court of Saline county, instituted on April 19, 1932, for the allowance and admission of the will as objections thereto or subsequently by statutory proceedings within the time fixed by statute. The time within which such proceedings could be brought has long passed. The rule as announced by this court in *Brandeen v. Beale,* 117 Neb. 291, 220 N. W. 298, is applicable: " 'The rule obtains in this and some other jurisdictions that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief against the enforcement of a judgment procured by fraud the party must not have neglected to avail himself of a statutory remedy. *Van Antwerp v. Lathrop,* 70 Neb. 747; *State v. Lincoln Medical College,* 86 Neb. 269; *Bankers Life Ins. Co. v. Robbins,* 53 Neb. 44; *Proctor v. Pettitt,* 25 Neb. 96; 23 Cyc. 981; *Wirth v. Weigand,* 85 Neb. 115; *National Surety Co. v. State Bank,* 56 C. C. A. 657; *Thompson v. Laughlin,* 91 Cal. 313.' " See *Krause v. Long,* 109 Neb. 846, 192 N. W. 729.

Plaintiff further contends that this action does not arise out of or through the estate but by reason of the trust which she claims was created by the agreement entered into with the deceased and that she can recover the property in the hands of third persons who took with knowledge thereof. For the purpose of the following discussion we will assume, but not decide, that by their agreement a trust was created, of which deceased was trustee, and subsequent to his death the parties took with knowledge.

Is the plaintiff now in a position to enforce her rights? She waited more than ten years from April 15, 1932, when DeWitt C. Marsh died and her right to possession and title of the property accrued, although she knew or had constructive knowledge of or by reasonable diligence could have ascertained that no provisions had been made by deceased whereby the property claimed was transferred to her and

when, in fact, it was listed and distributed as part of the estate.

As to when, for the purpose of the running of the statute of limitations, a cause of action has accrued, we stated the rule in *Department of Banking v. McMullen,* 134 Neb. 338, 278 N. W. 551, to be as follows: "The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief."

It is the holding of this court that both the question of limitations and laches can be raised by demurrer. As stated in *Pohle v. Nelson,* 108 Neb. 220, 187 N. W. 772: "Where it appears from the statement of facts in the petition that the cause of action is on its face barred by the statute of limitations, and there are no allegations tolling the statute, a demurrer can be properly interposed to such cause of action." See, also, *Parkin v. Parkin,* 123 Neb. 836, 244 N. W. 638. And in *Hawley v. Von Lanken,* 75 Neb. 597, 106 N. W. 456, we are also committed to the doctrine that, "Where the laches of the plaintiff and the staleness of his claim are apparent from the petition, objection may be taken by demurrer."

"In the case of *Wood v. Carpenter,* 101 U. S. 135, Justice Swayne said: 'Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and the antidote go together.' " *Department of Banking v. McMullen, supra.*

The will of deceased was allowed and admitted to probate

on May 20, 1932, whereby all his property was bequeathed and devised. If the trust existed and the legal representatives and the devisees and legatees took the same subject thereto, they thereby became constructive trustees for the purpose of carrying out the original terms and conditions of the trust. "The interest of the beneficiary in the trust property is not cut off by a transfer by the trustee in breach of trust to a third person who at the time of the transfer has notice that the transfer is in breach of trust, although he paid value for the transfer; and the beneficiary can in equity compel the third person to restore the property to the trust. The third person holds the interest which he acquires by the transfer upon a constructive trust for the beneficiary of the trust." Restatement, Trusts, sec. 288, p. 878.

In 37 C. J., sec. 270, p. 909, the application of the statute of limitations as to constructive trusts is discussed as follows: "It is generally held that the rule that the statute of limitations does not run in favor of a trustee against the cestui que trust applies only to express trusts, and that implied or constructive trusts are within the operation of the statute, so that a suit to impose and enforce such a trust may become barred. * * * In the case of a constructive or implied trust, except where the trust is imposed on the ground of actual fraud which is not immediately discovered, or there has been a fraudulent concealment of the cause of action, the statute begins to run in favor of the party chargeable as trustee as soon as the trust relation is created, or from the time when the wrong is done by which the trustee becomes chargeable, or the time when the beneficiary acquires knowledge of and can assert his rights; not from the time when demand is made on the trustee, or the trust is repudiated by him, for no repudiation of an implied or constructive trust—as an involuntary trust always is—is ordinarily necessary to mature a right of action and set the statute in motion; * * * ." The rule is stated in 17 R. C. L., sec. 162, p. 794, as follows: "The rule as to when the statute of limitations begins to run differs in the case of voluntary

and of involuntary trustees. If a voluntary trustee does not repudiate the trust, but continues to act under and in harmony with it, the beneficiaries have no right of action against him, and the statute must remain inoperative until the trust is repudiated. But it is generally held that no repudiation of an implied or constructive trust is necessary to set the statute in operation. In such cases the general rule is that it runs from the time when the act was done by which the party became chargeable as trustee by implication or, as it is sometimes expressed, from the time when the cestui que trust could have enforced his right by suit." See 34 Am. Jur., sec. 179, p. 143.

In *Department of Banking v. McMullen, supra,* we approved from *Hayden v. Thompson,* 71 Fed. 60, the following: "'* * * lapse of time is as complete a bar to a constructive or implied trust in equity as at law, unless there has been a fraudulent concealment of the cause of action.'" See *Haynie v. Hall's Executor,* 5 Humphr. (Tenn.) 290, 42 Am. Dec. 427.

Where, as here, the plaintiff knew of the death and had constructive notice of the probate of his will (*Miller v. Estate of Miller,* 69 Neb. 441, 95 N. W. 1010) and by reasonable diligence could have ascertained that the property was being handled as part of the estate and being distributed as such under the provisions of the will, we think the statute applies and has run. There was no concealment of how the property involved was being considered and handled. It was listed as part of the assets of the estate and distributed as such. For more than the statutory period the plaintiff has had her right to sue but failed to bring an action. She is barred as to all the defendants under every applicable statute of limitations.

There is another reason why the demurrers should be sustained. Plaintiff alleges that the defendant, Bert M. Marsh, knew of her agreement with the deceased and that shortly after the death of Ellen C. Marsh in 1929 he inquired of her as to a paper that was lost and, being advised she did not know where it was, he told her he would see

that she was provided for. However, with full knowledge that her claimed rights under the agreement with DeWitt C. Marsh had accrued upon his death on April 15, 1932, and of which she had actual knowledge within a month, she permitted the will of the deceased, dated March 28, 1932, to be admitted and allowed to probate and the estate to be administered pursuant thereto although this will made no provision for her as to the property she now claims. Without taking any action or making any demand upon the representatives of the estate or the beneficiaries under the will she permitted this property to be included as assets of the estate and distributed to the five residuary devisees and legatees, only two of whom are defendants in this action. The farm here sought to be recovered was received by Bert M. Marsh, a residuary devisee and legatee, as part of his share of the estate. Plaintiff never at any time until July of 1940 advised Bert M. Marsh or Retta McGee Dunning, the two residuary devisees and legatees made defendants in this action, that she claimed either the farm or the money.

" ' "Independently of any limitation for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked." *Abraham v. Ordway*, 158 U. S. 416.' *Severson v. McKenzie*, 122 Neb. 827." *Barger v. City of Tekamah*, 128 Neb. 805, 260 N. W. 366. "Laches does not grow out of the mere passage of time. It is founded upon the inequity of enforcing a claim where there has been a change in the condition or relations of the property or parties." *Platte Valley Bank v. Lemke*, 141 Neb. 218, 3 N. W. 2d 396. See *In re Guardianship of Protsman*, 136 Neb. 192, 285 N. W. 494.

The neglect of the plaintiff in waiting more than ten years from the time she knew, or ought to have known from the circumstances of which she had notice or by reasonable diligence could have ascertained, that the deceased had failed to carry out the terms of the agreement before commencing her action to recover the property she claims by reason

thereof, and permitting it to be included in his estate and distributed under his will as such and received by part of the residuary devisees and legatees who received the same as part of their share of the estate, is such laches as will bar the granting of the relief for which she here prays.

In accordance with the opinion, the action of the trial court is affirmed.

AFFIRMED.

SOPHIA KRENZER, APPELLANT, V. RUSSELL C. KRENZER, APPELLEE.

18 N. W. 2d 244

FILED MARCH 30, 1945. No. 31817.

Divorce. The judgment of the trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown.

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

Gross & Crawford and *Harry L. Welch,* for appellant.

Eugene D. O'Sullivan and *Arthur J. Whalen, contra.*

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

SIMMONS, C. J.

In this action plaintiff received a decree granting her an absolute divorce and certain real and personal property in lieu of alimony. Plaintiff appeals, seeking an additional award and attorney's fees. We affirm the judgment of the trial court.

The parties are in agreement that they were married May 22, 1940; that both had been married before; that plaintiff had a son by her prior marriage; that defendant had no children; that both were gainfully employed before the marriage and continued to work and earn thereafter; that

no children were born of the marriage; and that at the time of the marriage plaintiff was the owner of $2,400 in postal savings and $1,000 in government bonds, and defendant was the owner of some articles of household furnishings and woodworking tools. The domestic difficulties of the parties seem to stem from difficulties over money. That controversy persists in this appeal.

After the marriage, defendant delivered a substantial part of his earnings each week to the plaintiff. He testified $20, or more. She testified $20, or less. Plaintiff thereafter handled the fund so received, together with her own earnings. Plaintiff claims she paid all the bills, defendant claims he paid some of them.

Shortly after the marriage, the parties bought a small, furnished house in Omaha for $3,125. Of that price, $2,425 was paid by the use of plaintiff's savings and $700 was borrowed and repaid in installments out of the joint earnings controlled by plaintiff. The house was fully paid for when this action was tried. The parties are in dispute as to how much each contributed to the repayment of the $700 loan. Substantial improvements were made to the house, the parties not agreeing as to who paid for some material items, but agreeing that defendant did the work. Defendant placed in the home his articles of furniture and tools. Other items for the house were purchased by defendant from time to time.

Each of the parties purchased small denomination war savings bonds, either by direct purchase or pay roll withholding.

After the debt for the home had been paid, the savings from the current earnings were divided equally and invested in postal savings in the name of the individual. A substantial back payment received by the plaintiff was placed in postal savings certificates in her own name.

The trial court, in lieu of alimony, and attorney's fees, awarded the plaintiff the dwelling and lot on which it was situated, the furniture in the house when it was purchased and that purchased during the period of the marriage, the

bonds which she owned prior to her marriage, those purchased by her during the period of the marriage, and the postal savings certificates that were in her name.

Defendant was awarded his tools and woodworking machinery, the furniture, etc., which he owned prior to the marriage and brought into the home, and his postal savings and war savings bonds purchased by him. Each party was awarded his personal effects.

Plaintiff had been awarded some attorney's fees at the beginning of the action. No further attorney's fees were allowed.

Plaintiff seeks here an additional award of at least $750 in alimony, attorney's fees for services in both the trial and this court, and for her costs. This is a request for an award of substantially more than the present value of all bonds and postal savings awarded defendant. In short, plaintiff seeks a decree granting her all her own property, all the joint accumulations of the parties during their married life, and more.

The rule is: "The judgment of the trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown." *Passmore v. Passmore*, 144 Neb. 775, 14 N. W. 2d 670.

We see no good reason for disturbing the judgment of the trial court. The amount of the award to the plaintiff was such that she has no basis for complaint.

On motion, the trial court allowed plaintiff the costs of the transcript and docket fee in this court. On motion, this court allowed plaintiff $130 for the cost of the bill of exceptions and briefs. These allowances are not disturbed. The plaintiff is denied additional attorney's fees and costs.

The decree of the trial court is affirmed.

AFFIRMED.

CLYDE A. LINCH, APPELLEE, V. W. RAY LINCH, APPELLANT.
18 N. W. 2d 98

FILED MARCH 30, 1945. No. 31874.

1. **Partnership.** Ordinarily one partner cannot maintain an action at law against his copartner on matters relating to the partnership business until there has been a settlement of the accounts of the firm.
2. ———. But a partner may bring a suit at law upon a promissory note given him by his partner, since such an instrument itself constitutes an acknowledgment of a separate debt between the parties.
3. ———. The amount of such a loan is a personal debt of the promisor, and is recoverable in an action at law, without regard to the state of the partnership accounts at the time.
4. **Appeal and Error.** In a law case tried to the court, a finding on disputed evidence will have the same effect on appeal with this court as the verdict of a jury.

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

Chambers, Holland & Locke, for appellant.

Beghtol & Rankin and *John C. Mason, contra.*

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

PAINE, J.

Suit was brought upon a promissory note. The answer alleged that the cause of action was barred by the statute of limitations, and, in addition, included a cross-petition setting up a counterclaim. Jury was waived, trial was had to the court, and judgment was entered for plaintiff in the sum of $11,438.35. Motion for new trial being overruled, defendant appealed to this court.

The plaintiff filed petition October 29, 1941, alleging that defendant executed his promissory note for $16,082.93, with 7 per cent interest from date, on January 1, 1932, said note being payable upon demand. In said note these words were written: "This note is to balance W. R. & C. A. Linch account to this date as book account will show", which was in

the handwriting of defendant. On the back of said note appeared the following endorsement: "Dec 31st 1936. Credits hereon agreed to between W. R. Linch & C. A. Linch leaves due hereon as of this date $7654.01."

Plaintiff alleged that he was the owner and holder of said note; that demand for payment had been refused; and that there was owing to him $7,654.01, with interest at 7 per cent from January 1, 1937.

The transcript shows that thereafter on December 11, 1941, and pursuant to defendant's motion to require plaintiff to make his petition more definite and certain, plaintiff filed an amendment to his petition in compliance therewith, and setting out the items of interest, credits and debits between the parties, which resulted in the balance of $7,654.01 due from defendant to plaintiff on January 1, 1937.

The defendant in his second amended answer and cross-petition denied all of the allegations of the petition as amended and alleged that the cause of action did not accrue within five years before the commencement of this action. The cross-petition alleged that these two brothers, the plaintiff living at Big Springs, Nebraska, since 1932, and the defendant living in Lincoln, were engaged in numerous business enterprises, and owned farm and business properties. The defendant sets out in said cross-petition a large number of transactions between the parties, involving rentals and expense items on country property and city property, and alleges that on January 1, 1939, on these items plaintiff had concealed from the defendant the true facts as to the accounts upon the operation of the farms in Garden and Keith counties. The agreement was that the plaintiff should operate these farms and annually submit a report of the crop and expenses of the operation, and defendant charges that plaintiff had concealed from defendant the true profits in the operation of these farms for the years 1934 to 1937, as shown by exhibit A, attached to the cross-petition, which exhibit A consists of four pages and itemizes the amount due the defendant from the plaintiff, and the prayer of the cross-petition is that judgment be rendered against the

plaintiff and for the defendant in the sum of $36,132.91, with interest at 6 per cent.

In the amended reply plaintiff alleges that the plaintiff and defendant were partners at all times mentioned in the second amended answer and cross-petition; that no dissolution thereof nor accounting has been had, and that said relationship still continues, therefore no right of action exists against the plaintiff by reason thereof, and for further answer plaintiff alleges that said cross-petition is not, and does not purport to be, a counterclaim or set off, nor do the matters alleged in the cross-petition arise out of the same transaction set forth in plaintiff's petition, nor are such matters germane to the original suit, which was upon a promissory note, and prays that the prayer of his petition be granted and that defendant take nothing by his second amended cross-petition.

Trial was had, and on February 24, 1944, a judgment was entered, which set out that the parties had waived a jury, the court had heard the evidence, the case was submitted, and the court found generally for the plaintiff that the plaintiff was the owner and holder of the note which had been executed and delivered by the defendant; that the balance due and unpaid on said note as of December 31, 1936, was the sum of $7,654.01. Judgment was entered for plaintiff and against defendant in the sum of $11,438.35, with interest at 7 per cent.

Thirty-one errors are relied upon for a reversal of this judgment, and for purposes of argument it is stated in the brief of the defendant as follows: "The errors relied upon for reversal present two matters for decision. First is that the judgment in this case is contrary to the evidence, and second is that the court erred in excluding all evidence in support of defendant's counterclaim."

In the specific errors relied upon for reversal, there are set out in the brief many rulings of the trial court sustaining objections of plaintiff to the offer of many exhibits, also sustaining his objections to a number of depositions, as well as to many questions in the oral evidence of witnesses, all

of such objections being consistently sustained by the court on the ground that such evidence was offered in support of the allegations of the cross-petition supporting alleged partnership transactions.

In an opinion in 1882, it was said that, if it was shown that a partnership existed, an action at law could not be maintained between the partners, but one should ask for an accounting. *Younglove v. Liebhart,* 13 Neb. 557, 14 N. W. 526.

"The rule is firmly established that ordinarily one partner cannot maintain an action at law against his copartner on matters relating to the partnership business until there has been a settlement of the accounts of the firm." *Halleck v. Streeter,* 52 Neb. 827, 73 N. W. 219.

But, on the other hand, as in the case at bar, if one partner gives the other his promissory note, an action at law is proper and will lie on such note, since such an instrument itself constitutes an acknowledgment of a separate debt between the parties. See Annotation, 21 A. L. R. 65.

"In suits upon contracts or transactions outside of the partnership, the partners stand in the same relation to each other in the courts as other persons. And where one partner has made advances or loans to another partner as an individual for the purpose of forming a partnership, or for furthering the interests and welfare of the partnership, the amount of such advances or loans is a personal debt of the promisor and is recoverable in an action at law without regard to the state of the partnership accounts." 21 Standard Ency. of Procedure, 12, sec. 6.

While such a suit upon a note is sometimes referred to as an exception to the rule that one partner may not maintain an action at law against another for breach of contract arising out of the partnership relation, it is more correct to say that they are not within the rule, because they are not within the reason of the rule. See 40 Am. Jur., sec. 475, p. 458.

As supported by the authorities set out above, plaintiff had an unquestioned right to bring suit at law for the balance due on the promissory note, and we agree with the

trial court that such a suit at law could not be turned into an equitable action for an accounting by means of the allegations of the cross-petition filed with the answer. Therefore, the ruling of the trial court in keeping out all evidence relating to general partnership matters in the trial of this law action was correct.

It is also true that, in a law action where a jury is waived the findings of fact of the trial judge have the same force and effect as a verdict of a jury, and will not be set aside unless clearly wrong. See *In re Estate of Hagan,* 143 Neb. 459, 9 N. W. 2d 794, 154 A. L. R. 573.

We will now examine the evidence in the case at bar. There is no dispute that the defendant signed the note, exhibit No. 1, and delivered it to plaintiff; that more than once, plaintiff testified, he came down to Lincoln to get settlement of this note, but that defendant always claimed he did not have things ready, but finally defendant told him to come down, that he had his books ready.

Plaintiff further testifies that he came down to Lincoln, and they met in defendant's office at 237 North Tenth street, on June 30, 1937. The evidence discloses that this is one large room, in the northeast corner of which defendant had his desk, back of a partition which did not go up to the ceiling. Cliff Caldwell testified he had worked there for seven years, and had drawn his salary from the Western Finance Company, a corporation, which was in reality Clyde and Ray Linch, the parties hereto.

Cliff Caldwell did all the typewriting in the preparation of exhibit No. 2. It is not clear just how all of the items were arrived at, some from the books and perhaps some from duplicate copies of the loose-leaf books which had been sent to plaintiff.

It was getting late in the day, and the statement had been completed only down to the end of the year 1936, a copy of it having been made for each one. The plaintiff testifies that defendant dictated the statement at the bottom of exhibit No. 2, reading: "W. R. Linch gave note today, dated January 1st, 1937, in the sum of $7,654.01, payable to C. A.

Linch in settlement of the above accounts"; that when the statement had been completed the defendant said it was all right, and plaintiff makes this answer: "A. Well, the settlement was all over and he didn't give me a new note that night. He didn't say he wouldn't or anything else. Next day I was going home and I asked him for a new note and he said, 'Just credit it on the old one, it is the same thing.' "

The plaintiff testifies that, in accordance with defendant's request, he took a copy of exhibit No. 2 to his home, and a few days later took the original note from his safe deposit box in a Big Springs bank and wrote on the back of it: "Dec 31st 1936. Credits hereon agreed to between W. R. Linch & C. A. Linch leaves due hereon as of this date $7654.01."

The defendant denies that he told plaintiff to make this credit on the note, but the trial judge saw these brothers upon the witness stand, heard their testimony, and decided that there was actually a voluntary payment made on this note which reduced it, as of the date December 31, 1936, to $7,654.01. This finding on disputed evidence must have the same effect on appeal with this court as the verdict of a jury. Therefore, the statute of limitations was tolled by the payment made as set out herein. See *Kienke v. Hudson*, 126 Neb. 551, 253 N. W. 687; *Price v. Platte Valley Public Power and Irrigation District*, 139 Neb. 787, 298 N. W. 746; *Blair v. Estate of Willman*, 105 Neb. 735, 181 N. W. 615; *Brockman v. Ostdiek*, 79 Neb. 843, 113 N. W. 529.

Finding no prejudicial error in the judgment of the trial court, the same is hereby affirmed.

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. CHARLES HUTTER, DEFENDANT IN ERROR.

18 N. W. 2d 203

FILED MARCH 30, 1945. No. 31916.

1. **Homicide.** Criminal homicide constitutes one offense only and the sections of our statutes defining first degree murder, second degree murder and manslaughter are gradations of the same crime devised for the purpose of adjusting the punishment to the atrocity of the offense.
2. **Criminal Law.** In a criminal trial where the jury is discharged in accordance with section 29-2023, R. S. 1943, such discharge is without prejudice to the prosecution.
3. **Homicide.** A ruling of a trial court withdrawing from the consideration of the jury one or more of the degrees of criminal homicide for the reason that they lack support in the evidence does not afford a basis for a plea of previous acquittal or former jeopardy where the jury disagrees and fails to reach a verdict on the question of whether defendant was guilty of any degree of criminal homicide.
4. ———. Under such circumstances the second trial should proceed under the original charge as if no previous trial had been had and the defendant may properly be convicted, if the evidence warrants it, on any of the degrees of criminal homicide contained in such original charge.
5. **Criminal Law.** A defendant in a criminal case cannot successfully plead former jeopardy when the jury before whom he was first on trial was discharged with his consent.
6. **Homicide.** A dismissal of one or more degrees of criminal homicide by a trial court because of a want of adequate evidence to support them will ordinarily be construed as a withdrawal of such degrees from consideration by the jury.
7. **Criminal Law**: CONSTITUTIONAL LAW. Where a jury in a criminal case disagrees and is properly discharged, a second trial upon the original charge, even though one or more degrees of the offense may have been withdrawn from the consideration of the jury in the first trial because of a want of support in the evidence, does not violate section 12, art. I, Constitution of Nebraska, protecting against double jeopardy.
8. ———: ———. Neither does such a trial offend section 3, art. I, Constitution of Nebraska, guaranteeing due process of law, nor of section 1 of the Fourteenth Amendment to the Constitution of the United States, guaranteeing due process of law and the equal protection of the laws.
9. **Homicide.** A plea in bar to a first degree murder charge, ground-

ed on the fact that first and second degree murder was withdrawn from the consideration of the jury at the former trial because of the insufficiency of the evidence to sustain them, is demurrable. The sustaining of such a plea by the trial court constitutes error.

10. **Criminal Law**: ATTORNEY GENERAL. The attorney general has the same authority to bring exceptions to this court in a criminal case as does the county attorney by virtue of section 84-204, R. S. 1943.

ERROR to the district court for Douglas county: CHARLES E. ELDRED, JUDGE. *Exceptions sustained.*

Walter R. Johnson, Attorney General, H. Emerson Kokjer, Rush C. Clarke and *John H. Comstock,* for plaintiff in error.

George B. Hastings, contra.

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

CARTER, J.

This is a proceeding under sections 29-2314 and 29-2315, R. S. 1943, by the attorney general to secure a review of the proceedings had upon a plea in bar filed by the defendant in a murder case. This court previously sustained the attorney general's application and allowed the bill of exceptions to be filed. The case is now before us for review on the attorney general's exceptions. A brief history of the case is necessary to a proper understanding of the questions herein involved.

On March 24, 1944, the county attorney for Douglas county filed an information charging that on or about the 5th day of December, 1943, Charles Hutter, unlawfully, feloniously, purposely and of his deliberate and premeditated malice shot Grant Fallon with a pistol, and as a result thereof he died December 5, 1943, and that defendant thus committed murder in the first degree. The case came on for trial and at the conclusion of the state's evidence in chief the defendant moved the court to either dismiss the action or to reduce the charge stated in the information for the

reason that the evidence was insufficient to sustain a conviction of murder in the first degree, murder in the second degree, or manslaughter, or either of them. The ruling on this motion was reserved until the evidence was all in and both parties had rested, at which time it was renewed. The trial court then sustained the motion as to murder in the first degree and murder in the second degree, and overruled it as to manslaughter. The trial court's order states: "Thereupon defendant moving the court to dismiss the charge herein as to murder in the first degree, as to murder in the second degree and also as to manslaughter, upon consideration whereof and being fully advised in the premises it is ordered by the court that said motion be and hereby is sustained as to the charge of murder in the first degree and as to the charge of murder in the second degree and overruled as to the charge of manslaughter." The trial court, in submitting the question whether defendant had committed the crime of manslaughter, instructed the jury that the court had dismissed the charges of murder in the first degree and murder in the second degree. The jury was unable to agree upon a verdict and was discharged on or about May 21, 1944.

The matter came on again to be heard on July 11, 1944, at which time the defendant filed a plea in bar in which he urged that he could not be again tried for murder in the first degree, murder in the second degree and manslaughter, or either of them, for the reason that it would be violative of section 12 of art. I, Nebraska Constitution, protecting against double jeopardy; that it would be violative of section 3 of art I, Nebraska Constitution, guaranteeing due process; and that it would violate section 1 of the Fourteenth Amendment to the Constitution of the United States, insuring due process of law and the equal protection of the laws. Previous acquittal and former jeopardy were also pleaded as a bar to a second trial. The trial court sustained the plea in bar in so far as the information included charges of first and second degree murder and overruled the plea as to the charge of manslaughter and ordered the defendant

tried on that charge. It is the rulings of the trial court on the plea in bar which are before us for review.

It might be well to state that the defendant was subsequently tried on the charge of manslaughter and acquitted. The ruling on the attorney general's exceptions present important questions of law which should be decided for guidance in future cases, but can in no way effect the judgment of acquittal rendered in the action. R. S. 1943, sec. 29-2316. Nevertheless, the statute is a beneficent one. This court is the final adjudicator of questions of criminal law and procedure, yet trial courts are continually deciding such questions from which the defendant does not appeal. The result is that such rulings lack uniformity throughout the various judicial districts of the state. And ofttimes criminals escape conviction through incorrect rulings of the trial court. All this can but tend to demoralize our criminal system. The statute in question affords the means of securing uniformly correct rulings on similar propositions in future cases and in so doing adds stability and confidence to our criminal procedure.

The precise questions raised have never previously been decided by this court. The defendant in error poses the questions to be decided as follows: 1. Was the order entered during the first trial sustaining the motion for a directed verdict and dismissing the charges of murder in the first degree and murder in the second degree, a final judgment operating as an acquittal or discharge of the defendant as to those charges? 2. Did the trial and trial proceedings place the defendant in jeopardy as to murder in the first and second degrees, although the jury disagreed on the issue of manslaughter and was discharged with the consent of the defendant? 3. Did the trial judge in the second trial rule correctly in sustaining the plea in bar as to murder in the first degree and murder in the second degree? We propose to dispose of the case by answering the foregoing questions.

An historical approach seems necessary to secure an adequate discussion of the subject. There were no degrees of murder or manslaughter at common law. All criminal

homicide was either murder or manslaughter, but the latter was included in the former as a constituent element thereof, or it might exist as a distinct offense where there was no malice aforethought. At common law, murder is the unlawful killing of a person with malice aforethought, either express or implied, and manslaughter is the unlawful killing of another without malice express or implied. Manslaughter differs from murder in the want of malice, a condition of the blood or mind at the time of the act. This distinction is the only one that the accumulated wisdom of the common law deemed it advisable to make. "In dividing the crime of murder into two degrees the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine, in a particular case, whether the crime deserved the extreme penalty of the law or a less severe punishment. * * * After the act of 1856, which divided the crime into murder of the first and second degrees, *murder* remained, and it still remains, the unlawful killing of a human being with malice aforethought. * * * The fact that a severer penalty is to be imposed in one case than the other, does not change the effect of a previous conviction, and the defendant who, on his own motion, secures a new trial, subjects himself to a retrial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At the second trial he may, if the evidence justify such verdict, be found guilty of murder of the first degree." *People v. Keefer*, 65 Cal. 232, 3 Pac. 818, quoted and approved in *Bohanan v. State*, 18 Neb. 57, 24 N. W. 390.

The different degrees of homicide as defined by our statute are all carved out of murder and manslaughter as known to the common law. No new offense has been created, and no homicide which was not criminal at common law is made so by statute, but it is divided into degrees and the punish-

ment graded to meet the circumstances of the particular case. The decisions of this court clearly hold to this view. In *Baldwin v. State*, 12 Neb. 61, 10 N. W. 463, after stating that in a trial for murder the jury, after finding the defendant guilty, shall ascertain whether it be murder in the first or second degree or manslaughter said: "There is but one offense charged in the indictment in this case, viz: the unlawful killing of Allen J. Yokum. The different counts in the indictment merely charge the offense in the different degrees to meet the evidence."

In *Bohanan v. State, supra*, the *Baldwin* case is cited with approval and adhered to. In *Anderson v. State*, 26 Neb. 387, 41 N. W. 951, the court said: "The finding as to the higher degree merely applies to the atrocity of the crime; a verdict in either degree is for murder. But it may be said that the jury having found that the crime was premeditated, and that therefore the punishment should be death, that the court cannot review this finding and render a new judgment based upon the evidence. * * * If, therefore, the jury find a party guilty of a grade of murder higher than is warranted by the evidence, the court, while sustaining the conviction of murder, may reduce the grade to conform to the proof. The whole theory of our criminal law is that punishment shall be based upon the degree of guilt proved, and that no severer penalty shall be imposed than is warranted by the evidence. Hence this court is given power to review the evidence, and is required to see that the punishment is not in excess of that justified thereby. * * * In the case under consideration, as the proof fails to show premeditation and deliberation of the plaintiff in error before he committed the crime, but does show that he purposely and maliciously committed the same, he is not guilty of murder in the first degree and should not suffer death. It is our duty, therefore, to reduce the sentence, in accordance with the statute, to imprisonment in the penitentiary during his life; and the sentence is so modified." The only basis for the foregoing decision is that a criminal homicide is but one offense and that the determination of the degree goes to the

punishment. Otherwise this court could not possibly have the power to consider the evidence and reduce the degree of the crime to conform thereto.

In *Singh v. State,* 35 Ariz. 432, at p. 448, 280 Pac. 672, at p. 677, the court in considering this same question said: "It is the most atrocious murders that are classed as of the first degree and the least atrocious of the second degree, but both degrees are just grades of the same high crime—both consist in 'the unlawful killing of a human being with malice aforethought.'" In *State v. Phillips,* 118 Ia. 660, 92 N. W. 876, the court stated the same principle in the following language: "There is, under our law, but one crime called murder. The so-called degrees of this offense do not constitute distinct crimes, but gradations of the same crime, devised for the purpose of permitting punishment to be varied according to the circumstances of greater or less enormity characterizing the criminal act." In *State v. Gunn,* 89 Mont. 453, 300 Pac. 212, the rule was stated as follows: "'Murder is the unlawful killing of a human being with malice aforethought.' (Sec. 10953, Rev. Codes 1921.) There is but one crime of murder, and its division into degrees is simply for the purpose of adjusting the punishment with reference to the presence or absence of circumstances of aggravation. * * * While it is true the statute requires the jury to determine the degree of murder (sec. 12022, Rev. Codes 1921), this is done for the purpose of having the jury take into consideration the distinguishing features of the two degrees, so that the punishment may be fixed with reference to the elements of the particular degree."

We are convinced that the correct rule is that sections 28-401, 28-402 and 28-403, R. S. 1943, defining murder in the first degree, murder in the second degree and manslaughter, construed with section 29-2027, R. S. 1943, define the degrees of the crime of criminal homicide, a single offense. The unlawful killing constitutes the principal fact and the condition of the mind or attendant circumstances determine the degree or grade of the offense, and when the greater of the degrees has been committed, the lesser de-

grees have also been committed, they being necessarily involved as a constituent part of the higher crime. Consequently, a conviction of murder in the second degree, or manslaughter, could legally be sustained, although the evidence made out a case of murder in the first degree.

This leads us to the conclusion that the order entered during the first trial sustaining the motion for a directed verdict and dismissing the charges of murder in the first degree and in the second degree was not a final judgment operating as an acquittal or discharge of the defendant on those charges. There are many reasons why this is so. In the first place, when the jury disagrees there is no verdict determining the primary element of the crime, whether or not there was an unlawful killing. Until there has been a final determination of the crime charged, there is no verdict which can be pleaded as a prior conviction or acquittal. *People v. Bain,* 279 Ill. 206, 116 N. E. 615. In the last case cited the court said: "The rule of law that where a defendant is indicted for an offense and on trial is convicted of a lesser offense also included in the charge in the indictment the verdict of the jury must be held to be an acquittal of the defendant as to the greater offense charged in the indictment cannot be applied in this case, or in any other case in which there is no conviction of a lesser offense charged and in which the verdict of the jury does not amount to a finding of guilty or of not guilty as to any charge contained in the indictment." We think the foregoing principle has application to the case at bar.

This is further illustrated in cases where there has been a conviction, an appeal of the case and a reversal. This court has held that the case goes back for retrial on the highest degree charged, even though his previous conviction was on a lesser degree. *Bohanan v. State, supra*; *Clarence v. State,* 89 Neb. 762, 132 N. W. 395; *Pembrook v. State,* 119 Neb. 417, 229 N. W. 271. But in those cases a verdict of guilty was returned which, if not appealed from, would constitute a bar to another prosecution for any of the degrees of which he was or could have been convicted under

the information on which he was tried. But when the defendant appeals in such a case claiming error, he waives or abandons his right to plead the conviction as a bar.

In the present case the jury never arrived at a verdict. There was nothing which the defendant at any stage of the proceedings could have pleaded as a previous conviction or acquittal. It is urged, however, that the action of the trial judge in dismissing the charge of first and second degree murder amounted to an acquittal of those degrees. There is no merit in this argument. *State v. Shuchardt*, 18 Neb. 454, 25 N. W. 722. In the first place there is but one offense charged and there can be but one verdict. A finding of guilt and a fixing of the degree thereof is the only proper verdict that can be returned, other than that of acquittal. Such a verdict, if it be less than first degree, in effect determines that the evidence was insufficient to sustain a finding of guilt on a higher degree. " 'There can be no legal determination of the character of the malice of a defendant in respect to a homicide which he is not found to have committed, or rather, of which, under his plea, he is in law presumed to be innocent.' " *Bohanan v. State, supra.* A verdict upon a charge containing lesser degrees of the offense or on separate counts for the same offense, must be an entirety which lays the foundation for a single judgment. It is only where an information charges separate and distinct offenses in separate counts, or where a part of several defendants are acquitted, that the verdict need not be an entirety.

It is contended, however, that the trial court is bound to submit to the jury only such degrees of the crime as find support in the evidence. While this is a correct statement of the law, it lends no support to the contention here advanced. Instructing a jury that murder in the first degree and murder in the second degree have been withdrawn from their consideration because of an insufficiency of the evidence to support them is far different from an attempt to dismiss a part of a single offense, or to direct a verdict of acquittal on one or more degrees of a single offense. A trial

court has no such power and his attempt to so do will be construed merely as a withdrawal of that issue from the jury for the reason that the evidence then before the court would not warrant the submission of those degrees to the jury. *Montgomery v. State,* 136 Wis. 119, 116 N. W. 876. But when the jury disagrees and a second trial is required, the case must be tried in the same manner as if the former trial had not been had.

It is then urged that if this be true the defendant would be placed in jeopardy a second time. The general rule is that when a person has been placed on trial on a valid information or indictment before a court of competent jurisdiction, has been arraigned and his plea entered, and a jury has been impaneled and sworn, he has been placed in jeopardy. But when the jury fails to agree on a verdict for any of the reasons stated in section 29-2023, R. S. 1943, the whole proceeding is nullified and nothing remains which can benefit the defendant. See *Shaffer v. State,* 123 Neb. 121, 242 N. W. 364; *Sutter v. State,* 105 Neb. 144, 179 N. W. 414; 22 C. J. S., sec. 260, p. 398. The discharge of the jury under such circumstances is without prejudice to the prosecution under the aforesaid statute. See *Gragg v. State,* 112 Neb. 732, 201 N. W. 338. We conclude that the provisions of the Nebraska Constitution inhibiting against double jeopardy have not been violated.

It is urged that such procedure is violative of the due process provisions of the Fourteenth Amendment to the Constitution of the United States. This question has been decided contrary to the contention of defendant. In *Palko v. Connecticut,* 302 U. S. 319, 58 S. Ct. 149, it appears that defendant was indicted for murder in the first degree, found guilty of murder in the second degree, and sentenced to imprisonment for life. The state appealed pursuant to a statute authorizing appeals by the state on all questions of law in criminal cases. The judgment was reversed by the supreme court of Connecticut and a new trial ordered for errors of law. On the second trial defendant's objection that the effect of the trial was to place him twice in jeopardy for

the same offense was overruled, and he was found guilty of murder in the first degree and sentenced to death. On appeal to the Supreme Court of the United States it was held that the statute of Connecticut authorizing appeals by the state was constitutional because the due process clause of the Fourteenth Amendment to the United States Constitution does not protect a defendant against double jeopardy in a prosecution by a state. We necessarily conclude that the procedure contended for by the state and herein approved by this court is not violative of the due process provisions of the Fourteenth Amendment to the United States Constitution or of similar provisions of our state Constitution.

We are of the opinion that the order of the trial judge in the first trial dismissing the charges of murder in the first degree and murder in the second degree should be construed as nothing more than a withdrawal of those degrees of the crime of homicide from the consideration of the jury because of an insufficiency of the evidence to support them. Such action does not operate as an acquittal or discharge of the defendant of any offense, but operates only as a matter of instruction to the jury as in any other case where the evidence is found insufficient as a matter of law to sustain a finding of the existence of a pleaded fact.

We conclude also that the trial and trial proceedings placed the defendant in jeopardy on the charge of first degree murder and all the lesser degrees of the crime contained therein. When the jury disagreed, however, the proceedings were completely nullified and a plea of former jeopardy was not available at the second trial. *Montgomery v. State, supra.*

We conclude likewise that the trial judge at the second trial erred in sustaining the plea in bar as to first and second degree murder. These questions should have been submitted again at the second trial provided the evidence was sufficient to go to the jury on those questions. All three questions posed by defendant in error must therefore be answered in the negative.

The right of the attorney general to bring the case to this court on exceptions is challenged. The statute, section 29-2314, R. S. 1943, recites in part: "The county attorney may present to the Supreme Court any bill of exceptions taken under the provisions of this code," no mention being made of the attorney general therein. However, it is provided by section 84-204, R. S. 1943: "The Attorney General and the Department of Justice shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties." It seems to us that this latter section authorizes the attorney general to do anything in connection with the instant case which the county attorney for Douglas county could do. He is authorized therefore to prosecute exceptions to this court as provided for in section 29-2314, R. S. 1943.

EXCEPTIONS SUSTAINED.

IN RE ESTATE OF IDA HAEFFELE.
MARY HARTMAN ET AL., APPELLANTS, V. WILLIAM HAEFFELE, APPELLEE.

18 N. W. 2d 228

FILED MARCH 30, 1945. No. 31914.

1. **Executors and Administrators.** Under the provisions of section 30-302, R. S. 1943, the court is under mandatory duty to appoint the person or persons named by the deceased as executor or executors of his estate when the will is proved and allowed to probate, unless such person or persons named are expressly disqualified by statute, or are, for good cause shown, not legally competent within the provisions thereof.
2. **Case Overruled.** The opinion in the case of *In re Estate of Cachelin*, 124 Neb. 556, 247 N. W. 422, is overruled.

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

Paul P. Chaney, for appellants.

Harold L. Gurske, John C. Mullen and *Henry F. Schepman, contra.*

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

WENKE, J.

This is a controversy over the appointment of an executor to administer upon the estate of Ida Haeffele, deceased. In her probated will William Haeffele, a son of the testatrix, was nominated as executor. Objections were filed to his appointment by Clara Hartman, Mary Hartman, Henry Hartman and Edna Eickhoff, devisees and legatees under the will of deceased, on the ground that the nominee's personal interests conflict with and are antagonistic to his duties as executor and will prevent an impartial performance of the duties of said office. The county court of Richardson county sustained the objections and appointed Archibald J. Weaver as administrator with the will annexed. Appeal therefrom was taken to the district court.

Upon appeal the nominee, William Haeffele, was found to be qualified and the objections to his appointment were overruled, and he was appointed executor. The appointment of Archibald J. Weaver as administrator with the will annexed was set aside. From this order the objectors have appealed to this court.

Did the trial court err in appointing the nominee as executor of the estate, he being willing to accept the trust and give bond as required by law?

The record discloses that Henry Haeffele, husband of Ida Haeffele, died testate on June 11, 1934, seized of the east half of the northwest quarter of section 14, township 1 north, range 17, in Richardson county and the east half of lots 20-21-22-23-24, block 88, Hutchings and Maust addition to Falls City, Richardson county, which passed under the following provisions of his will: "I give, devise and bequeath to my beloved Wife, Ida Haeffele all of the Real Estate and personal property of whatsoever nature and kind and wheresoever situate, to be hers absolutely, to do with

as she may think best and proper. After the death of my said wife I desire that the remainder of my property shall be divided in equal shares between my son William Haeffele and my daughters, Clara Hartman and Mary Hartman, with this exception, that my son William shall have $1000.00 more than my said daughters, from said remainder."

In the will of Ida Haeffele, deceased, she disposes of whatever interests she has in this real estate as follows:

"I devise my real estate consisting of the following property: The farm located in 'Jefferson Precinct' described as 'The E½ of the N.W.¼ of Section 14, Township 1, North of Range 17, of the 6 Principal M. The lots located on West 15th Street, Falls City, Nebraska, described as 'The E½ of Lots 20-21-22-23-24 block 88, Hutchings and Maust Addition. My home located at 312 East 18th Street, between Lane and Morton Streets, in Falls City, Nebraska.

"The above real estate is to be divided as follows:

"William Haeffele,	my son	one third (1/3)
"Mary Hartman	my daughter	one third (1/3)
"Henry Hartman	my grandson	one sixth (1/6)
"Edna *Eichoff*	my granddaughter	one sixth (1/6)"

In the county court the nominee, after conferring with his counsel, gave the opinion that Ida Haeffele had only a life estate in this property, although the record does not disclose he has ever taken any action to assert that position.

From an examination of the provisions of these two wills it can readily be seen that the rights of the nominee and also of the estate of Ida Haeffele would be different, depending on whether she took the property from her husband in fee or otherwise.

With reference to the appointment of executors, our statute, section 30-302, R. S. 1943, provides: "When a will shall have been duly proved and allowed, the county court shall issue letters testamentary thereon to the person named executor therein, if he is legally competent, and he shall accept the trust and give bond as required by law."

In construing a like statute the supreme court of Minnesota in *In re Estate of Betts,* 185 Minn. 627, 240 N. W. 904,

held: "The authorities appear to support appellant's contention that when the will is allowed the court must appoint the executor named in the will if legally competent. *Kidd v. Bates,* 120 Ala. 79, 23 So. 735, 41 L. R. A. 154, 74 A. S. R. 17; *In re Estate of Bauquier,* 88 Cal. 302, 26 P. 178, 532; *Clark v. Patterson,* 214 Ill. 533, 73 N. E. 806, 105 A. S. R. 127;*Garitee v. Bond,* 102 Md. 379, 62 A. 631; *Breen v. Kehoe,* 142 Mich. 58, 105 N. W. 28, 1 L. R. A. (N. S.) 349, 113 A. S. R. 558; *Bujac v. Wilson,* 27 N. M. 337, 201 P. 1051, 18 A. L. R. 575; *In re Bergdorf's Will,* 206 N. Y. 309, 99 N. E. 714; *Hartnett v. Wandell,* 60 N. Y. 346, 19 Am. R. 194; *Saxe v. Saxe,* 119 Wis. 557, 97 N. W. 187; * * * . The statutes in Illinois, Michigan, and Wisconsin are almost word for word like section 8768 above quoted. * * * We deem said section 8768 mandatory. It is not necessary to refer to the reasons, since they are so well set forth in the decisions cited." The rule is stated in 95 A. L. R. 828, as follows: "The rule is well settled that ordinarily courts have no discretion in respect to the issue of letters to the persons nominated in the will, unless such persons are expressly disqualified or such discretion is created by statute; and that the person appointed by the will cannot be rejected by the court except where the law expressly so provides."

Our only statutory disqualification is section 30-308, R. S. 1943, as to nominees under age but that is not applicable here.

In the case of *In re Estate of Blochowitz,* 124 Neb. 110, 245 N. W. 440, we defined the term "legally competent" within the statute as follows: "The lawmakers did not define the term 'legally competent,' but left the interpretation thereof to the courts. In a judicial proceeding an executor of a probated will is not only an officer of the court but is a trustee for the persons entitled to share decedent's estate. The legislature recognized the relation of trustee and beneficiary by providing that letters testamentary shall be issued to the person named executor in the will, 'if he is legally competent, and he shall accept the trust and give bond as required by law? In the sense used by the lawmakers,

the term 'legally competent' means fit or qualified to act as officer of the court and as trustee in administering upon the estate of testator according to judicial standards essential to the proper course of justice in the judicial department of government."

Under our laws a person has the right to dispose of his property as he chooses, subject only to such limitations as are expressly declared by law, and the nomination of such parties as he chooses to act as executor or executors to carry out such provisions after he has gone and, under the provisions of section 30-302, R. S. 1943, the court is under mandatory duty to appoint the person or persons named by the deceased as executor or executors of his estate when the will is proved and allowed to probate, unless such person or persons named are expressly disqualified by statute, or are, for good cause shown, not legally competent within the provisions thereof. See *In re Estate of Miller,* 92 Ia. 741, 61 N. W. 229; *In re Estate of Doolittle,* 169 Ia. 639, 149 N. W. 873.

However, in the case of *In re Estate of Cachelin,* 124 Neb. 556, 247 N. W. 422, we held that the statutory grounds upon which the court might remove an executor, section 30-309, Comp. St. 1929, now section 30-310, R. S. 1943, was applicable to the qualifications of an executor under section 30-302, R. S. 1943, and that, " * * * the court, in the exercise of a sound judicial discretion, determines that such applicant for appointment is 'incapable or unsuitable to discharge the trust,' such appointment should not be made." On further consideration, we think we were wrong in so holding. These two statutes are separate acts. Section 30-302, R. S. 1943, is a mandatory statute dealing with the appointment of persons named as executors and their qualifications. Section 30-310, R. S. 1943, is a permissive statute dealing with the removal of executors after they have qualified and the grounds therefor. See *Will of Zartner,* 183 Wis. 506, 198 N. W. 363; *In re Estate of Betts, supra.* In so far as *In re Estate of Cachelin, supra,* holds that section 30-310, R. S. 1943, is a statutory basis for the disqualifica-

tion of the person named as executor, the same is overruled.

Under this right the testatrix nominated the appellee as her executor and he is entitled to qualify unless good cause is shown to prevent him from doing so. In considering what constitutes good cause the court should be careful and not, by too liberal an interpretation of what constitutes legal incompetency, disregard the wishes of the deceased.

Do the facts in this case show a good cause for refusing to appoint the nominee? If the nominee claims that Ida Haeffele died seized of only a life estate in the property she received from her husband's estate, then he would be taking a position adverse to the best interests of her estate and in conflict with his duties as executor, but he has taken no such action.

We recognize the principle that, where an executor's personal interests conflict with or are antagonistic to his duties as executor, he is not a proper person to act as such, and the application thereof in those cases refusing to appoint a named executor who, by his actions, has taken a position contrary to the interests of the estate and his duties as such nominee, as in *In re Estate of Blochowitz, supra*; *In re Estate of Van Vleck*, 123 Ia. 89, 98 N. W. 557, or for the same reason caused his removal, as in *In re Elder's Estate*, 160 Or. 111, 83 Pac. 2d 477; *Farnsworth v. Hatch*, 47 Utah 62, 151 Pac. 537; *In re Estate of Marconnit*, 119 Neb. 73, 227 N. W. 147.

However, as stated in *Farnsworth v. Hatch, supra*, at p. 73: "It is quite true that, as a general rule, those who are directly interested in the estates are usually selected and appointed as administrators or executors. Even a creditor is a proper person to act in such capacity. Again, a person may not be disqualified merely because he claims property which is also claimed by the estate. But when the claims of the representative are resisted by the estate, and litigation ensues, then the interest between the estate and the representative may become so conflicting and so serious that it is no longer proper for the representative to remain in office."

That the named executor is interested in the estate and

that his interests may become hostile to that of the others interested therein as legatees, devisees or otherwise does not necessarily render him legally incompetent. If he accepts and gives the bond required he may so conduct the administration of the estate that no cause for removal on account of his personal interests may arise. If, however, in the course of the administration litigation or improper conduct or action of the executor should give cause for removal the county court has authority under section 30-310, R. S. 1943, to protect the interests of all by his removal. Courts should not anticipate such action on the part of the executor. See *In re Estate of Betts, supra*; *Will of Zartner, supra.*

For the reasons stated, the action of the district court is affirmed.

AFFIRMED.

JOHN W. SWANSON, APPELLANT, V. ALFRED MADSEN ET AL., APPELLEES.

18 N. W. 2d 217

FILED APRIL 6, 1945. No. 31824.

1. **Contracts.** The terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof and the consideration for the original agreement is sufficient to sustain the new agreement.
2. ———. Where a written contract has been breached, a subsequent parol agreement purporting to modify or change such contract requires a new consideration to be enforceable as a valid agreement.
3. **Statute of Frauds.** A subsequent parol agreement purporting to modify or change a contract required to be in writing by the statute of frauds is not enforceable unless there is a new consideration or unless the new agreement has been fully executed.
4. **Compromise and Settlement.** Where a vendee of a contract for the sale of real estate is in default, an agreement to pay less than the amount due under the contract is unenforceable when no new consideration for such agreement exists and it has not been fully performed.

5. **Vendor and Purchaser:** FORECLOSURE. A court of equity will grant a strict foreclosure of a real estate contract where in the exercise of a sound judicial discretion it would be inequitable or unjust to refuse to do so.
6. ———. In granting a strict foreclosure, a court of equity should give the party in default a reasonable time to avoid its consequences by performing the contract.

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

Ritchie & Swenson, for appellant.

Smith & Schall, Edward Garvey and *Richard E. Robinson, contra.*

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

CARTER, J.

This is an action for the strict foreclosure of a real estate contract dated September 15, 1934. The defendants cross-petitioned for the specific performance of an alleged subsequent contract for the sale of the real estate to them at a lower price. The trial court denied plaintiff's claim to a strict foreclosure and sustained defendants' claim for specific performance. The plaintiff appeals.

The record shows that on August 29, 1928, Ellna Swanson and John A. Swanson contracted in writing to sell the real estate in question, together with certain personal property not particularly described in this suit, to Alfred Madsen, who will hereinafter be referred to as the defendant, for the sum of $42,000, $10,000 of which was paid in cash and the balance to be paid in installments as provided in the contract. The installments provided for in this contract became delinquent and on September 15, 1934, a new contract was executed by Ellna Swanson, then a widow, and Alfred Madsen. The amount remaining unpaid at that time under the original contract was $29,520. By the new agreement defendant agreed to pay $720 in cash and $250 a month for two years, $350 a month for the following two

years and $450 a month thereafter until the amount due was paid. The defendant made payments totaling $2,767.26 on this contract, after which he was continuously in default.

On June 22, 1938, a further agreement was entered into in writing purporting to modify the agreement of September 15, 1934, in which it was agreed that all payments due were to be suspended until March 1, 1940. The contract then provided that if defendant desired to complete the purchase on March 1, 1940, he should notify Ellna Swanson not less than 30 days prior thereto and upon receipt of the notice three appraisers were to be appointed to determine the value of the property, which amount thus determined, Ellna Swanson agreed to accept as a full payment under the contract. In case of failure to make payment by March 1, 1940, in the manner agreed upon, defendant was to yield possession of the premises and execute a quitclaim deed to Ellna Swanson as of that date. The defendant failed to give any notice more than 30 days prior to March 1, 1940, of any intention on his part to acquire the property in the manner prescribed in the supplemental agreement of June 22, 1938.

Defendant testifies that a few days before March 1, 1940, he went to the office of the plaintiff's attorney and offered $10,000 in full satisfaction of the remainder of the purchase price. Plaintiff's attorney agreed to submit the offer to his client. Defendant was notified about a month later that the amount was not acceptable. On April 18, 1940, plaintiff's attorney inquired of defendant by mail as to his intentions in the matter. A day or two later defendant went to the attorney's office and offered $11,000 in full settlement. This amount was not accepted. Defendant requested that legal proceedings be held up pending another offer on his part. On or about August 15, 1940, defendant offered $12,000 to plaintiff's attorney in full settlement. On January 21, 1941, plaintiff's attorney advised defendant that Ellna Swanson would accept $12,000 cash in full settlement under the contract, provided it was paid by February 15, 1941, and that unless it was paid on or before that date defendant would be expected to vacate the property in accordance with the

1934 contract. Defendant testifies that he took the matter up with two loan agencies and received promises for the money to pay the $12,000. On February 12, 1941, he went to the attorney's office to inform him of the arrangements made and to secure the abstract of title, but found the attorney out of town. He again called the attorney's office on February 15, 1941, but the attorney had not returned. On February 17, 1941, defendant found the attorney in his office and was informed by the attorney at that time that Ellna Swanson was dissatisfied in that she had advanced $2,000 to defendant which had not been paid and that she wanted it returned in addition to the $12,000. On March 8, 1941, it was ascertained to the satisfaction of the parties that the $2,000 had been repaid to Ellna Swanson and that item was withdrawn from the negotiations. Nothing further was done until March 20, 1941, when defendant was informed that Ellna Swanson would accept nothing less than $15,000 as full settlement of the contract. It is the contention of the defendant that he is entitled to the specific performance of the alleged agreement of Ellna Swanson to accept $12,000 in full settlement of the amounts due under the contract dated September 15, 1934. The trial court so held and plaintiff, the assignee of Ellna Swanson's interest in the contract, appeals from the district court's decree requiring plaintiff to accept $12,000 as full settlement of the amount due under the contract.

The record is clear that on January 21, 1941, the date Ellna Swanson offered to accept $12,000 as a full settlement, defendant had breached his contract by failing to comply with the supplemental agreement of June 22, 1938, or to make the payments required by the agreement of September 15, 1934. Defendant's offer to pay $12,000 in full settlement of the amounts due under the contract was nothing more than an offer of settlement which Ellna Swanson accepted provided it was paid by February 15, 1941. It was not paid or tendered by that date. It appears that plaintiff's attorney was absent from his office on February 15, 1941, and for a few days prior thereto, but we fail to see

how this can avail the defendant anything in view of the fact that he did not pay or tender the $12,000 after the attorney's return. It seems clear, therefore, that defendant's offer was conditionally accepted by Ellna Swanson and defendant, having failed to meet the condition imposed, can claim no rights under it. We conclude that the offer of settlement was never complied with by the defendant and consequently no rights can grow out of it. The modification agreement of June 22, 1938, was not complied with by defendant, with the result that the liability of defendant under the terms of the modification agreement itself was again fixed by the contract of September 15, 1934.

Defendant contends that a contract required to be in writing by the statute of frauds can be altered or modified by parol agreement and that the consideration for the original agreement is sufficient to sustain the new. We think this is true where there has been no breach of an executory contract, but where, as here, the contract had been breached at the time of the modification, a new consideration must be shown. *Bowman v. Wright,* 65 Neb. 661, 91 N. W. 580; *Prime v. Squier,* 113 Neb. 507, 203 N. W. 582; *Personal Finance Co. v. Hynes,* 130 Neb. 547, 265 N. W. 541. The rule is also clear that a contract required to be in writing by the statute of frauds can be modified by a new agreement only when such new agreement is supported by a new consideration, or where it has been fully executed. *Bowman v. Wright, supra; Hylton v. Krueger,* 138 Neb. 691, 294 N. W. 485. The evidence is clear that no new consideration existed for the agreement to accept $12,000 in full settlement of the amount due under the contract. The rule is that an agreement to pay a smaller sum in discharge of a larger matured obligation does not constitute any consideration for an agreement to forego the residue. *Fitzgerald v. Fitzgerald & Mallory Construction Co.,* 44 Neb. 463, 62 N. W. 899; *Canadian Fish Co. v. McShane,* 80 Neb. 551, 114 N. W. 594. The evidence further shows that such new agreement was never performed. It further shows that defendant had breached his contract and that he was in default at the time

of the purported settlement agreement. Under such circumstances, under the authorities cited, the agreement evidenced by plaintiff's letter of conditional acceptance dated January 21, 1941, is not enforceable and creates no new rights of which the defendant can avail himself. Consequently, the trial court erred in granting specific performance of such agreement.

The question next presented is whether plaintiff is entitled to a strict foreclosure of the contract dated September 15, 1934. The record shows that at the time the contract was made the sum of $29,520 was due thereon. The total amounts paid thereon amount to $2,767.26. After crediting this amount there was due on the contract at the time of the trial in August, 1943, the sum of $38,282.74. The evidence indicates that the property was not worth to exceed $24,000 at the time of the trial. The rental value of the property from 1933 to 1943 inclusive was approximated at $9,453.33. It is quite evident that the defendant has no equity in this property under the record made. In our opinion, the failure of defendant to make any payment thereon since June 1, 1938, or to comply with the supplemental agreement of June 22, 1938, constitutes an abandonment of the contract. His attempts to purchase the property at a reduced price after such abandonment are not in conflict with this view. They in fact indicate an attempt to negotiate a new contract after an abandonment of the old.

We think the rule is that a contract for the purchase of real estate may be strictly foreclosed where it is clear that the property is of less value than the contract price and that it would not bring a surplus over and above the amount due if a sale were ordered, and where such procedure would not offend against justice and equity. Courts of equity will decree a strict foreclosure only under special circumstances where it would be inequitable and unjust to refuse them. Whether or not such a decree will be granted is dependent upon the facts of the particular case being considered and is necessarily addressed to the sound judicial discretion of the court. *Harrington v. Birdsall,* 38 Neb. 176, 56 N. W. 961.

But where such a decree is entered, the defaulting party is entitled to a reasonable time to avoid its consequences by performing the contract. *Patterson v. Mikkelson,* 86 Neb. 512, 125 N. W. 1104. The evidence shows that the present case falls within this rule and that plaintiff is entitled to have the contract of sale strictly foreclosed. It is the order of this court, therefore, that unless the defendants pay the amounts due under the contract of September 15, 1934, within 60 days from the issuance of the mandate of this court, the defendants, and each of them, be decreed to have no right, title or interest in and to the real estate herein involved by virtue of any or all of the contracts contained or referred to in the pleadings of the parties to this suit.

REVERSED.

SIMMONS, C. J., dissenting.

I am in disagreement with the majority as to the issues presented here, as to the construction of the evidence, and as to the law to be applied. For purposes of clarity, I use the term "plaintiff" to include also Ellna Swanson, plaintiff's predecessor in interest. For further purposes of identification, the use of the word "defendant" in the singular applies to the defendant, Alfred Madsen. I shall also follow in the order advanced the discussion and holding of the majority.

The majority, in setting out the issues, state: "It is the contention of the defendant that he is entitled to the specific performance of the alleged agreement of Ellna Swanson to accept $12,000 in full settlement of the amounts due under the contract dated *September 15, 1934. The trial court so held* and plaintiff, the assignee of Ellna Swanson's interest in the contract, appeals from the district court's decree requiring plaintiff to accept $12,000 *as full settlement of the amount due under the contract.*" (Emphasis supplied.) This is not a correct statement of the issue nor the decree. The defendant specifically pleaded that he offered and plaintiff agreed to accept "the sum of $12,000 as the value of said real estate on March 1, 1940, in lieu of determining the value thereof by an appraisal, * * * ." The evidence, as the

majority recognize, supports this allegation. Defendant's case rests upon the obligation of the plaintiff to perform the 1938 contract, as modified as to manner of determining what price should be paid, and the agreement upon the price to be paid under the 1938 contract. The trial court so recognized the issue. Contrary to the statement of the majority, the trial court held and decreed "that said Ellna Swanson's agreement of June 1, 1938, as supplemented by her said agreement of January 21, 1941, be specifically performed, * * * ."

The majority also state: "The trial court *denied plaintiff's claim to a strict foreclosure* and sustained defendants' claim for specific performance." (Emphasis supplied.) After decreeing specific performance to the defendant, and specifying the terms of the order, the trial court decreed that if the defendant, Alfred Madsen, failed to make the payment within the time specified "defendants and each of them be forever barred of their rights to specific performance" and defendant Alfred Madsen's "purchase agreements be cancelled and annulled and defendants and each of them and all persons claiming through or under them be forever barred and foreclosed of all rights and claims in and to said real estate, and forthwith surrender possession of said premises to plaintiff." The parties construe the decree as one of strict foreclosure in the alternative. As a result of the appeal, plaintiff making no assignments of error as required by Rule 14 a 1 (d), the only questions presented for determination here go to that part of the decree granting specific performance to the defendant.

The majority in their brief summary of the evidence make two statements that I consider material and erroneous. They state that defendant testified that a few days before March 1, 1940, he offered $10,000, "in full satisfaction of the remainder of the purchase price." Defendant's testimony on direct examination was that he talked to plaintiff's attorney to see "if there wasn't a way to get together on the settlement, rather than an arbitration on this, and he asked what was on my mind and I told him that I could raise

$10,000.00 if it would take care of it, * * * ." On cross-examination, he testified: "I asked you if there wasn't a chance to arrange it some way rather than go to the expense of having some appraisal made and I offered you the $10,000.00 * * * ." So there can be no question but that the offer was made in lieu of a price which the 1938 contract provided should be determined by arbitration.

The majority further state: "Defendant requested that legal proceedings be held up pending another offer on his part." The written evidence, consisting of a letter from plaintiff's attorneys, shows that legal proceedings were held up at the request of Mr. W. O. Swanson, speaking for Ellna Swanson, the then titleholder of the land.

There are two conflicting theories advanced by the parties in this case. The defendant's theory is that the provision calling for the completion of the purchase on or before March 1, 1940, was waived by the parties; that thereafter they were negotiating a price to be paid as of March 1, 1940, in lieu of determining the price by appraisal; that the price was subsequently agreed upon by the parties; and that defendant is entitled to specific performance of the 1938 agreement as so modified. The plaintiff's theory is that when the defendant failed to complete the purchase on March 1, 1940, the defendant's rights and duties were controlled by the 1934 contract; and that the negotiations subsequent to March 1, 1940, and the agreement of January 21, 1941, were negotiations for and the making of a separate, independent agreement.

The majority dispose of the question of breach with the brief statement that "The record is clear that on January 21, 1941, the date Ellna Swanson offered to accept $12,000 as a full settlement, defendant had breached his contract by failing to comply with the supplemental agreement of June 22, 1938, or to make the payments required by the agreement of September 15, 1934." I submit that the record is not "clear" that defendant had breached his 1938 contract and on the contrary establishes that there was no breach available to plaintiff.

What was the 1938 contract, and was there an actionable breach? Plaintiff there agreed to convey the property to the defendant at a price to be agreed upon by appraisers. The 30 days' notice was not given, nor were the appraisers appointed. That notice and that method were waived by the parties when they substituted direct negotiation for determining the price. Obviously as a result of the pendency of those negotiations, performance was not expected nor required by March 1, 1940. Obviously also the parties did not consider the 1938 contract as breached on March 1, 1940. Every bit of evidence in this record shows that the parties considered the 1938 contract in force and effect thereafter, and were amicably negotiating as to the price to be paid. The letter of April 18, 1940, was written 49 days after March 1, 1940, and clearly upon the supposition that the 1938 contract was in force, for it refers to that contract, its terms, and asks the defendant to drop in and see what should be done. The letter of August 3, 1940, calls upon the defendant to "live up to" his "agreement of June 1, 1938," or suffer litigation. As a result of that letter, which most certainly considered the 1938 contract as still in effect, the offer to pay $12,000 was made, which was accepted on January 21, 1941. The plaintiff, in writing, has recognized that there was no breach of the 1938 contract prior to January 21, 1941, and that extensions of time for performance had been granted, for, in the letter of that date, plaintiff said: "No further extensions in the matter will be granted * * * ."

The refusal to accept $12,000 on February 21, 1941, was not based upon either a breach, or inadequacy of tender or amount, but upon plaintiff's insistence that defendant owed her $2,000 on another item and she wanted that paid at the same time. It was still being treated as in effect on March 7, 1941, when plaintiff, in writing, called upon the defendant to take care of taxes which were delinquent. The first indication in this record that the plaintiff considered the 1938 agreement breached was when this action was brought in January, 1943.

Now then, what is the rule of law that is applicable here?

Assuming that plaintiff, as he argues here, had the right to consider time of the essence and to declare the 1938 contract terminated because of failure of the defendant to give the required notice and to perform punctually, he clearly elected not to do so. In that sense his election constituted a waiver. 3 Williston, Contracts (Rev. ed.), sec. 679, p. 1960. The rule is: "While he may not waive stipulations in favor of the other party, a party to a contract may waive its provisions for his benefit and may elect not to take advantage of a breach. So, although there may have been repeated violations of a contract by either party, yet, if either party elects to consider it unbroken and proceeds under it, the other cannot be considered as having been in default." 17 C. J. S., sec. 491, p. 992. See, also, 13 C. J., sec. 764, p. 670; 12 Am. Jur., sec. 354, p. 919. "Election as a term in the law is properly applied to a case where a person has the choice of one or two alternative and inconsistent rights or remedies. In choosing the one, he necessarily surrenders the other. This principle is not out of harmony with the general rule that the surrender of a right requires a sealed release or consideration, because the choice made by election gives the one making it an advantage which he could not otherwise have had. Though he surrenders one right, he gains or keeps by so doing another and inconsistent right. Thus where a contract is broken in the course of performance, the injured party has a choice presented to him of continuing the contract or of refusing to go on. If he chooses to continue performance he has doubtless lost his right to stop performance; but in the nature of the case he could not exercise the two inconsistent rights of which he had the choice." 3 Williston, Contracts (Rev. ed.), sec. 683, p. 1969. See, also, 1 Restatement, Contracts, sec. 309, p. 456. "The principle is general that wherever a contract not already fully performed on either side is continued in spite of a known excuse, the defense thereupon is lost and the injured party is himself liable if he subsequently fails to perform, unless the right to retain the excuse is not only asserted but

assented to." 3 Williston, Contracts (Rev. ed.), sec. 688, p. 1983. See *Emigrant Industrial Savings Bank v. Willow Builders, Inc.*, 290 N. Y. 133, 48 N. E. 2d 293.

This court has held that "'A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.' *Fairbanks Morse & Co. v. Nelson*, 217 Fed. 218." *Advance-Rumely Thresher Co. v. Bartzat*, 114 Neb. 35, 206 N. W. 7. This rule has been applied by this court to a situation somewhat similar to the one at bar. See *Alpirn v. H. Epstein & Son*, 138 Neb. 311, 293 N. W. 103.

The majority next state that defendant did not comply with the agreement as evidenced by the letter of January 21, 1941, and hence has no rights under it. This is bottomed on the proposition that defendant did not pay or tender the $12,000 on February 15, 1941. I think they are in error.

The January 21, 1941, letter of the plaintiff did not require the defendant to pay or tender the $12,000 on February 15, or any fixed date. The language of the letter is: "* * * if you will pay $12,000 cash for the place, she (plaintiff) prefers to sell, rather than to have further trouble with it. You indicated sometime ago you would raise this amount of money and I am giving you until February 15th to get this done." Get what done? Raise the money. That the defendant did before February 15. He was prevented from so advising plaintiff's attorney by reason of the latter's absence. He so advised the attorney's office prior to that date. Obviously it was contemplated that a reasonable time would elapse thereafter during which the transaction would be completed. There is no indication that the parties contemplated that the transaction would be completed on that day.

It also is to be remembered that it was not a one-sided agreement that was to be performed on that date. It was not an "I owe you $5,000 and will pay $1,000" agreement. Plaintiff held the abstract to this property. By the con-

tracts, plaintiff was obligated to furnish that abstract to the defendant. The 1938 contract provided that the plaintiff " * * * shall deliver to the second party (defendant) abstract of title brought down to the date of completion of said transaction, showing merchantable title in her, * * * ." Defendant, prior to February 15, had gone to the attorney's office and asked for the abstract; the attorney had asked the plaintiff for it, so that he could give it to defendant, and had not received it; and on February 17 the attorney was unable to deliver it and so stated. Not only was plaintiff required to deliver the abstract, but plaintiff knew that delivery was necessary in order that defendant could secure the funds with which to make the payment. Plaintiff not only did not have a deed ready for delivery, but, demanding more money, she was unwilling to deliver a deed. Plaintiff had obligations of performance as well as defendant. This court dealt with such a situation in *Frenzer v. Dufrene,* 58 Neb. 432, 78 N. W. 719, wherein it was held: "Where stipulations of parties are dependent, and to be performed concurrently, mutual readiness to perform is an essential prerequisite to performance." And "The doctrine of tender, as understood in cases where the relation of debtor and creditor exists, is not applicable to mutual and concurrent promises. In this class of cases a party who has signified his readiness and willingness to perform has done all that he is required to do, until the other party is also ready and willing to perform his part of the agreement." In the case of *Prime v. Squier,* 113 Neb. 507, 203 N. W. 582, a case cited and relied upon by the majority later in their opinion, error was assigned in that the party seeking rescission "did not produce and hand him any money." It was insisted that this was not a sufficient tender. This court said it was " * * * unnecessary to press the thing tendered upon a party when the party declares that he will not receive it. * * * That which the attitude of the party to whom tender is due unmistakably shows to be vain and useless may be dispensed with * * * ."

The furnishing of the abstract and a readiness to convey

obviously was required before payment could be exacted. In *Householder v. Nispel,* 111 Neb. 156, 195 N. W. 932, this court quoted and followed the principle of law taken from *Williams v. Bank of the United States,* 2 Pet. (U. S.) *96, that "If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act of his own, prevent, the performance, the opposite party is excused from proving a strict compliance with the condition." Attention also is called to the rule that "In a suit for specific performance of a contract for the sale or purchase of land, considerable delay in tendering performance does not preclude enforcement of the contract where the delay can be compensated for by interest on the purchase money or otherwise, unless (i) the contract expressly states that performance at or within a given time is essential, or (ii) the nature of the contract, in view of the accompanying circumstances, is such that enforcement will work injustice." 1 Restatement, Contracts, sec. 276, p. 407.

And further it may be said that the plaintiff did not consider the contract breached then or thereafter because of the manner or sufficiency of the tender. Plaintiff argues here, however, that defendant did not have the promise of sufficient money, a question of fact which the majority resolve against the plaintiff. Under these circumstances a breach, because of failure to tender $12,000 in cash, is not sustained.

I therefore submit that the defendant did comply with the terms of the letter of January 21, 1941, made the necessary tender and was prevented from concluding that agreement because of the unwillingness of the plaintiff to perform. Plaintiff should not now be permitted to profit by her own wrong.

The majority take up a contention of the defendant that " * * * a contract required to be in writing by the statute of frauds can be altered or modified by parol agreement and that the consideration for the original agreement is sufficient to sustain the new"; and hold that the contention

" * * * is true where there has been no breach of an executory contract, but where, as here, the contract had been breached at the time of the modification, a new consideration must be shown." They then state: " * * * a contract required to be in writing by the statute of frauds can be modified by a new agreement only when such new agreement is supported by a new consideration, or where it has been fully executed."

I am unable to reconcile the two rules so announced. If the first rule is correct and is to be applied, then the parol agreement established by the evidence and the letter of January 21, 1941, is sustained by the unquestioned consideration of the 1938 agreement, provided there was no breach at the time the parol agreement was entered into. For the reasons herein stated, I submit there was no breach at that time or later, available to the plaintiff.

If the second rule is correct and applicable, then a new consideration must be shown whether there is a breach or not. The statute of frauds provides: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is to be made." R. S. 1943, sec. 36-105.

This court has said: " * * * the general rule prohibiting the subsequent oral modification of contracts required by the statute to be in writing applies only with respect to those provisions which the statute expressly requires to be contained in the writing in order to make it valid." *Hecht v. March,* 105 Neb. 502, 181 N. W. 135.

Was the contract one required to be in writing? The 1938 contract was in writing, as required by the statute of frauds. The acceptance of the modification was in writing, although the offer was oral. So the precise question is whether or not the modification of 1941 went to a provision of the 1938 contract, which the statute of frauds requires be in writing.

It is not claimed here that the 1938 contract did not com-

ply with the statute, nor is it claimed that it did not express the true intent of the parties. Obviously, it was supported by a valuable consideration. The price was not stated in the 1938 contract, because when that contract was made, the price had not been agreed upon. It is not necessary that the price be stated in the writing. *Rank v. Garvey,* 66 Neb. 767, 92 N. W. 1025. There is no contention here that the time of performance must be stated in the writing. The method for determining the price had been agreed upon and was stated in the writing. The modified method was for the parties themselves to agree upon the price. They did that. Certainly, if it is not necessary that the price be stated in the contract in order to meet the terms of the statute, then the method for determining the price need not be so stated. The statute does not expressly require that it be contained in the writing. In *Hetzel v. Lyon,* 87 Neb. 261, 126 N. W. 997, a written contract provided that it should terminate " * * * at the end of 60 days from date, unless an extension of time is made in writing and attached hereto." It was extended by parol. It was there held that " * * * the statute does not require that the time for the existence of the agent's authority to sell must be stated in the written contract, and therefore that is one of the provisions that may be modified by parol. This disposes of the principal question in the case."

The 1938 agreement was supported by a valuable consideration, other than the promise to pay and accept a sum which was to be later determined. The parties were " * * * at liberty to modify by parol such portion of the contract as the statute does not require should be in writing." *Rank v. Garvey, supra.* That they did here. Hence, that rule stated by the majority has no application. I have been cited to no authority holding that the statute of frauds is a bar under these circumstances, and the majority cite none.

The majority state: "The evidence is clear that no new consideration existed for the agreement to accept $12,000 in full settlement of the amount due under the contract." This is bottomed on the proposition that "an agreement to

pay a *smaller* sum in discharge of a *larger matured* obligation does not constitute any consideration for an agreement to forego the residue." (Emphasis supplied.) Obviously they consider the $12,000 a lesser sum, but they state no figure as to the amount of the "larger matured obligation." Nor do they state any yardstick upon which such a contention rests, nor do they refer to the contract provisions that would determine the matter.

The majority earlier state that " * * * the liability of defendant under the terms of the modification agreement itself (1938 contract) was again fixed by the contract of September 15, 1934." The majority overlook the fact here, and elsewhere in the opinion, that after the contract of 1938 was entered into, the 1934 contract was modified and remained in full force and effect, as "specifically modified" by the 1938 contract. Assuming that the payment permissible under the 1938 contract was not made and that defendant had breached it, the 1934 contract was still modified by the 1938 contract in a material way, and plaintiff's rights under the 1934 contract were subject to those express modifications. The rights and liabilities of both plaintiff and defendant must still be determined by reference, not to the one, but to the two contracts.

Assuming that the defendant had breached the contract by failure to put the appraiser provisions in motion, and failure to complete the purchase of the property on March 1, 1940, what then were the contractual obligation and rights of the plaintiff and the defendant? How much, if anything, did the defendant owe the plaintiff on March 1, 1940, or January 21, 1941, or any time between?

Three answers may be advanced. One, that which the plaintiff sets forth and the majority accept, without reference to the contracts, i. e., that all the delinquencies under the unmodified 1934 contract became immediately due and payable, and that on January 21, 1941, they exceeded $12,000 in amount. The 1938 contract makes no such provision. It does not provide that if the purchase was not completed on March 1, 1940, the entire delinquencies should be due and

payable. Nowhere in the contract is it even suggested that that is the defendant's obligation. The 1938 contract clearly negatives such a construction. It provides that the payments called for by the terms of the 1934 contract "shall be suspended until March 1, 1940." Clearly, the suspended payments were the monthly payments of a stipulated amount. The contract does not provide that they may be resumed after that date. But it may be argued that suspension gives the right to resume. From that it does not follow that delinquencies also must be paid. The 1934 contract provides that the monthly payments are to be applied first to interest and then to principal. The 1938 contract contained a provision intended to tie defendant to this land until March 1, 1940. It stated that the releasing of the defendant from liability to make the payments provided for in the 1934 contract was on the distinct understanding that defendant was to occupy the premises until March 1, 1940, and that if, prior thereto, he removed from the premises without plaintiff's approval, then "in such case the liability of the second party shall be governed by the terms" of the 1934 contract. That is the only provision I find in the 1938 contract that removes the 1934 contract from the 1938 modifications. Such a clause expressly removing the restrictions of the 1938 contract in one particular event negatives any intent that it should follow in any other event. It likewise negatives any claim that a failure to purchase on March 1, 1940, made the delinquencies under the 1934 contract immediately due and payable. Had they so intended they would so have stated. Such a contention is further negatived by a specific, clear provision as to what defendant's obligation will be. The contract contains this in paragraph VI: "In case second party shall for any reason fail to complete the purchase of said property on or before March 1, 1940, the second party shall, in consideration of the agreements herein contained to be performed by the first party, yield possession of said premises on March 1, 1940 and execute a Quit Claim Deed to her as of that date, relinquishing all rights in said property under the contract of September 15, 1934, upon his being reim-

bursed for any improvements placed upon the property by the second party with the consent of the first party, less depreciation thereon, as provided for in paragraph III supra." No alternative obligation or right is given the defendant. He "shall" yield possession; he "shall" quitclaim, upon being reimbursed for improvements, if any. I shall return to a discussion of this clause presently. I now point out that it negatives any obligation to pay the delinquencies under the 1934 contract.

So, there is no contractual basis that I can find to support the contention that either on March 1, 1940, or January 21, 1941, defendant was owing plaintiff a "matured obligation" of $12,000 or more. And hence, under the rule cited by the majority, the evidence does not show that there was a lack of consideration for the agreement to accept $12,000 for the land.

The second answer might be advanced that on March 1, 1940, when defendant failed to complete the purchase, he had the right and was obligated to resume the 1934 monthly payments that had been suspended. Save for paragraph VI, the cited clauses of the contracts might support that contention.

The 1934 contract provided for the payment of the purchase price and interest in monthly installments beginning at $250 and increasing to $450. It further provided that if any installment was not paid when it became due, then the plaintiff had the option to declare the whole of the indebtedness due and payable, and if not paid within 30 days after written demand, then the plaintiff had the right to maintain an action at law or in equity to recover the same, or to recover possession and terminate the rights of defendant in the premises.

Plaintiff might then claim that on March 1, 1940, the 1938 contract was self-executing; that by its terms the 1934 contract, as modified, was in force; and could demand that defendant resume payments of the monthly installments that had been suspended. Defendant did not resume the payments. Neither did plaintiff, then or thereafter, declare

the whole of the indebtedness due and payable. The first declaration of that kind is in plaintiff's petition in this action. Nor did plaintiff give the written notice demanding the payment that was a contractual condition precedent to plaintiff's right to maintain an action at law or in equity to recover possession, or to terminate defendant's rights. In lieu of the contractual action required, the parties began the negotiations herein discussed, and under plaintiff's theory, after defendant had lost the right to pay the appraiser-fixed price. Those negotiations resulted in the agreement of January 21, 1941, which the defendant asks be specifically enforced. Was the sum of $12,000 a "smaller sum" than the "matured obligation" on either January 21 or February 15, 1941? Plaintiff had not exercised his option to declare all payments due. There were 12 monthly installments delinquent on February 15, 1941. The maximum monthly installment was $450, plus a small interest accrual. The matured obligation on January 21, 1941, was not in excess of $4,950 and interest for a few months, and on February 15, 1941, not in excess of $5,400 and interest for a few months.

On this theory, defendant was offering to pay $12,000 which was more than he was then obligated to pay, and plaintiff agreed to accept more than he then had a right to demand and more than he had any chance of receiving except by voluntary action of defendant in the manner outlined in the settlement. That I submit is an adequate consideration, under the rule announced by the majority.

The third answer, and the one which to me should be accepted, is that we apply the plain, clear, explicit language of paragraph VI above quoted, which fixes the rights and duties of the parties in the event the defendant failed to complete the purchase on March 1, 1940. Plaintiff then was obligated to pay defendant the value of the improvements, if any, placed thereon as provided in the 1938 contract, and defendant was obligated to surrender possession and give a quitclaim deed. That is the only provision in the contract dealing directly and explicitly with this question. Certainly under that provision defendant was not obligated to pay

plaintiff anything, matured or otherwise, on March 1, 1940, or on January 21, 1941, when plaintiff accepted defendant's offer to pay $12,000 and agreed to sell the land for that amount. From this it follows that when the offer to pay $12,000 was accepted by plaintiff the agreement was to pay and to accept an amount not otherwise payable and a consideration is shown.

Further, it may be pointed out that the only agreement to accept a lesser amount in payment of a larger matured obligation, which this record shows, is contained in the 1938 contract. That contract was in writing and was supported by a valuable and adequate consideration.

The rule of law cited by the majority that an agreement to pay a lesser sum in lieu of a larger matured obligation is not a sufficient consideration is one not favored, and is one limited to a mere part payment or promise of part payment of a larger matured obligation. 1 Williston, Contracts (Rev. ed.), sec. 120, p. 416; 17 C. J. S., sec. 114, p. 469; 12 Am. Jur., sec. 89, p. 583; 1 Restatement, Contracts, sec. 83, p. 94.

On the basis of this record as to consideration, there is another basic rule of contract law that is applicable here. Where mutual promises are made, the one furnishes a sufficient consideration to support an action on the other, provided the promises are mutually advantageous or detrimental. This court and other courts have repeatedly followed that rule and applied it to contracts of sale and purchase of land. 17 C. J. S., sec. 97, p. 440; 13 C. J., sec. 170, p. 328; 1 Williston, Contracts (Rev. ed.), sec. 103F, p. 347; 66 C. J., sec. 91 p. 549; 66 C. J., sec. 92, p. 550; *Pryor v. Hunter*, 31 Neb. 678, 48 N. W. 736; *Turner v. Hall*, 128 Va. 247, 104 S. E. 861; *Hoagland v. Murray*, 53 Colo. 50, 123 Pac. 664; *Johnson v. Lennox*, 55 Colo. 125, 133 Pac. 744; *Neola Elevator Co. v. Kruckman*, 185 Ia. 1254, 171 N. W. 743; *Flannery v. Wessels*, 244 Pa. St. 321, 90 Atl. 715; *Harper v. Bronson*, 104 Fla. 75, 139 So. 203; *Rodman v. Robinson*, 134 N. C. 503, 47 S. E. 19; *Larrabee v. Bjorkman*, 79 Or. 467, 155 Pac. 974; *Craig v. Dumars*, 7 Tex. Civ. App. 28, 26 S. W. 743; *Midkiff v. Glass*, 139 Va. 218, 123 S. E. 329;

Jennings v. Dexter Horton & Co., 43 Wash. 301, 86 Pac. 576; *Crowley v. Vaughan*, 88 W. Va. 223, 106 S. E. 539.

There is another rule that has a particular application here, which this court has recognized and followed. It is stated in 1 Restatement, Contracts, sec. 90, p. 110: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." See 1 Williston, Contracts (Rev. ed.), sec. 140, p. 503, for a discussion of this rule.

Not only was the plaintiff's promise reasonably expected to induce action on the part of defendant, but action in the raising of the money was requested, and it did induce action of a definite and substantial character. Defendant made application for a land bank loan; he paid the required application fee of $20; he negotiated the loan; he negotiated and secured the promise of an additional personal loan; he did everything that he could do up to the point where plaintiff had to act, and so notified and advised plaintiff well within the time set by the agreement. Injustice can be avoided only by enforcing the promise.

In *Fluckey v. Anderson*, 132 Neb. 664, 273 N. W. 41, we construed and followed the above rule from Restatement, and said this: "It will be noted that the Restatement doctrine is not related to pleading but is a statement of substantive law. As applied to the facts in the instant case, it supplies sufficient consideration, or the equivalent of it, to assure the validity of the transaction involved. Whether proper terminology would require it to be designated as conventional consideration may be a question for the textwriters, but a careful analysis of the entire situation discloses that beyond question it amounts to a technical consideration because of the necessary detriment to the promisee involved."

I submit that there was a consideration for the agreement, no matter from what angle it is approached.

I would grant specific performance to the defendant.

I further submit that if we are going to ignore the issues here on this appeal and determine plaintiff's right to strict foreclosure, he has not shown a right to that relief and that for two reasons.

Under the provisions of paragraph VI, above quoted, of the 1938 contract, plaintiff was obligated to reimburse defendant for improvements, if any, placed upon the property. He then had a right to demand possession and a quitclaim deed. The 1938 contract was written by plaintiff, so that defendant was tied to the property until March 1, 1940, and then if he did not complete the purchase, he had no equity in the land and was to get off, get out, and quitclaim any claim under the 1934 contract. Defendant was not obligated to pay, and was not given the right to pay, the amounts due under the 1934 contract, as plaintiff in this action prays and the majority now order him to do.

Neither is plaintiff entitled to strict foreclosure under the 1934 contract. That contract provides: " * * * if said purchase price * * * or any part or instalment thereof, * * * is not paid when the same becomes due, * * * then, * * * the party of the first part (plaintiff) shall have * * * the option of declaring the whole of the indebtedness * * * due and payable * * * and if the whole of said indebtedness * * * is not paid within thirty (30) days after written demand * * * is made * * * then party of the first part (plaintiff) shall have the right to maintain an action at law or equity to recover the same, or to recover said premises and terminate all rights * * * " of the defendant.

Plaintiff pleads in this action that he does now "declare the entire balance of said purchase price due and payable." Obviously, he did not previously do so, nor had he given the notice or allowed the defendant the 30 days' waiting time to make the payment.

The rule in the case of mortgages having an acceleration clause is stated as follows: "If the mortgage allows grace after notice, the mortgagee cannot foreclose before the period expires; * * * ." 1 Glenn, Mortgages, sec. 51, p. 334,

citing *Railway Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554; *Batchelder v. Council Grove Water Co.*, 131 N. Y. 42, 29 N. E. 801; *Potomac Mfg. Co. v. Evans*, 84 Va. 717, 6 S. E. 2. See 5 Tiffany, Real Property (3d ed.) sec. 1513, p. 581, and 41 C. J., sec. 1036, p. 851, 1 C. J. S., sec. 26, p. 1067; 1 Am. Jur., sec. 35, p. 428.

Plaintiff has not complied with the contractual conditions precedent to maintain an action, if any he has, for strict foreclosure.

RAYMOND HANSEN, APPELLEE, V. THE VILLAGE OF RALSTON, APPELLANT.

18 N. W. 2d 213

FILED APRIL 6, 1945. No. 31879.

1. **Trover and Conversion.** Where the defendant has come into the possession of property lawfully or without fault, it is generally necessary to make demand of possession of him before suit will lie since there is no conversion until there has been a refusal to surrender such possession.
2. ———. A *bona fide* reasonable detention of property by one who has assumed some duty respecting it, for the purpose of ascertaining its true ownership, or of determining the right of the demandant to receive it, will not sustain an action for conversion.
3. ———. It is ordinarily for the jury, under proper instructions, to pass upon the existence of the qualified refusal and whether it was reasonable and made in good faith.
4. **Evidence.** One who is shown to be acquainted with property and its fair and reasonable value in the market is competent to testify as to such value.

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

L. B. McDonald and *Webb, Beber & Kelly*, for appellant.

Gross, Crawford & Welch, contra.

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

WENKE, J.

This action, commenced in the district court for Douglas county by Raymond Hansen against the Village of Ralston, a municipal corporation, is in trover to recover damages for the conversion of personal property. From a verdict directed in favor of the plaintiff, in which the jury determined his damages to be the sum of $5,166.66, the village appeals.

The plaintiff and appellee will be referred to as Hansen; the defendant and appellant as the village.

The record discloses that in 1937 the village created a project, under the Works Project Administration, to develop a public park. For this purpose it obtained the Cudahy Packing Company's lake and the Lakewood Country Club's grounds, which were developed as Ralston Park. In February of 1937 the village entered into an agreement with George L. Berger to operate it as a public park, golf course and bathing beach. Under this agreement Berger was to purchase, pay for and own all equipment necessary for that purpose.

In order to finance the purchase of the necessary equipment, Berger, on July 15, 1937, entered into an agreement with Henry J. Beal whereby Beal was to and did furnish the money to buy the equipment. Under their agreement the title to the equipment was to be in Beal, subject to Berger's right to purchase for one dollar after the money advanced had been repaid. This is further evidenced by a bill of sale to all this equipment from Berger to Beal, dated August 15, 1938. Berger never repaid the money advanced by Beal.

After Berger had equipped the park it was opened to the public on May 15, 1938. Berger continued to operate it until August 4, 1939. The village became dissatisfied with his management and canceled his contract on that date.

In order that the village could keep the park operating and that Beal might get back the money he had invested in the park and the equipment, it was then agreed by Despecher, the mayor of the village, Berger and Beal, that

Beal would leave the equipment in the park and a balance due on the P. B. Buller account would be paid. This balance was in the form of a conditional sales contract by P. B. Buller with the Ralston Amusement Company. At this time a complete inventory of all the equipment was taken by Berger and Despecher.

It is not entirely clear from the record but apparently the Ralston Amusement Company, a corporation, came into existence at or about this time. It consisted of Despecher, the mayor, as president, Henry J. Beal, as secretary, and Melvin Bekins. The village leased the park to this company. The company leased it, in turn, to King George, Coschka, Linder, Schuhart and Sklenicka. None of these parties were successful in the operation thereof and as a consequence the village took over. During this time Beal left the equipment in the park and the Ralston Amusement Company paid out its balance on the conditional sales contract with Buller. In August of 1941 the village purchased and had tags placed on the equipment with the following inscription: "The Property of the Village of Ralston."

During this period, and up until in January of 1943, Beal had a key to the park and he and Berger were given the right to remove any of the equipment upon giving Shields, the village marshal, a receipt therefor. During 1942 a truck, paint gun, two boats, a table and four chairs and 126 lockers were removed and a boat was sold under this arrangement. On or about January 2 or 3 of 1943 some locker room benches were taken out.

By this time the village board had completely changed its membership from what it had been in 1938. Although it had been permitting Berger and Beal to take equipment out of the park and it had been orally passed down by the members of the board that Beal was the owner of the equipment, nevertheless, after the lockers and benches were taken out the board decided that no more equipment should be removed until it had decided who were the rightful owners thereof. The board caused the locks on the buildings to be changed and, through the town marshal, Berger and Beal

were notified of its action. After Shields had notified him, Beal wrote to the village board asking that an inventory be taken of the equipment. Thereupon McDonald, the village's attorney, called on Beal. Beal told McDonald he owned the equipment and wanted an inventory taken before he would take any action. Thereafter he wrote McDonald to that effect. Beal then received a letter from the mayor of the village dated March 8,.1943, which is in part: "Henry J. Beal, Ralston, Nebraska. The Village Board has assumed that the fixtures and equipment in the clubhouse and bathhouse belong to the village. However, if our assumption is without grounds, we would like to have this clarified. We would be pleased to meet with you in the near future, backing your claim. You can doubtless produce evidence as to the ownership of equipment and for fixtures at the club grounds and if so, we will gladly relinquish our claim. * * * ."

Thereafter Beal transferred all his interest in the equipment to Hansen by a bill of sale dated March 10, 1943. When Hansen appeared to get the equipment he was advised by the village mayor he could not get it unless he appeared before the village board and was able to establish his right thereto. Neither Hansen, Berger, Beal, nor any one in their behalf ever responded to the board's request that they appear before it for the purpose of establishing their ownership to the equipment.

The records of the village were very poorly kept and contain no information as to the ownership of the equipment outside of the Berger contract. The evidence establishes that whatever equipment Berger put in the park belongs to Hansen. However, there is some evidence that equipment was purchased for the park through other sources, including $12,000 used for that purpose from the drainage funds.

The village's principal complaint is to that part of instruction No. 4 given by the court which directs a verdict for Hansen and the court's refusal to give the instruction it requested.

That part of instruction No. 4 complained of is as fol-

lows: "There is no competent evidence on the part of the defendant to disprove the foregoing statements, and you are instructed that the plaintiff is entitled to recover from the defendant whatever amount you may find is the fair and reasonable market value of the property in question as of January 16, 1943, * * * ."

The instruction requested by the village is as follows: "You are instructed that 'Bona fide reasonable detention of property by one who has assumed some duty respecting it, to ascertain its true ownership, or to determine right of demand*men*t to receive it, will not sustain action for conversion.' "

It is the duty of the court to direct a verdict on an issue when the evidence which has been offered is not sufficient in law to make out the case of the party who has offered it. However, in reviewing such an issue, on which the trial court directed a verdict in favor of the plaintiff, this court will assume the existence of every material fact favorable to the defendant, which competent evidence tends to establish, and give him the benefit of all logical inferences to be drawn therefrom and if the evidence presents any conflict of a material fact as to the issue, send it back to be submitted to a jury.

Where the defendant has come into the possession of property lawfully or without fault, it is generally necessary to make demand of possession of him before suit will lie since there is no conversion until there has been a refusal to surrender such possession. See 2 Cooley, Torts (4th ed.), sec. 335, p. 517; note, 24 Am. St. Rep. 807; 38 Cyc. 2032. However, a demand and refusal are not essential when it is clear that a demand would have been useless or unavailing. See 65 C. J., sec. 67, p. 47.

The undisputed evidence established that demand was made on the village before suit was brought.

In *Farming Corporation v. Bridgeport Bank.* 113 Neb. 323, 202 N. W. 911, we held: "A *bona fide* reasonable detention of property by one who has assumed some duty respecting it, for the purpose of ascertaining its true ownership, or

of determining the right of the demandant to receive it, will not sustain an action for conversion." See 61 A. L. R. 622, and authorities there cited; 26 R. C. L., sec. 28, p. 1117; *Sutton v. Great Northern Ry. Co.*, 99 Minn. 376, 109 N. W. 815; 38 Cyc. 2029. This is more fully discussed in 26 R. C. L., sec. 34, p. 1124, as follows: "Though an absolute refusal to deliver property creates an inference in law that there has been a conversion, a qualified refusal to deliver property is not, per se, a conversion thereof, and one sued for conversion should be permitted to show that his refusal to deliver the property was not unconditional, but was accompanied by a reasonable qualification or requirement. Hence, declarations made by a party, at the time, in response to a demand for the possession of property, may be received in evidence in his favor, to show that his refusal was qualified and reasonable, and not of a character to render him liable for a conversion. Moreover, a refusal of goods after demand is no conversion, if the circumstances show that it is caused by a reasonable apprehension of the consequences, in a doubtful matter. In many instances, a qualified refusal to deliver the goods in question, on demand, has been held not to constitute a conversion, when such qualification is reasonable and stated in good faith."

Did the village have a right to refuse the demands of Beal and Hansen for the purpose of determining who was the owner of the equipment and entitled thereto? This would be true if its qualified refusal was reasonable and in good faith. There is no question but what the evidence is sufficient to sustain a finding by the jury that the qualified refusal of the village was not reasonable and in good faith and that the village had converted the property to its own use. However, there is evidence that the personnel of the village board changed completely during the period from 1938 to January of 1943; that outside of the Berger contract of 1937 there was nothing in the records of the village to show who owned this equipment; that the only information the board had was from its dealings with Berger and Beal and from some of its members; that after Berger was

discharged and while the village was operating the park some equipment was bought; that the Buller conditional sales contract, covering part of the property, was in the name of the Ralston Amusement Company; and that money from the drainage funds was used to buy equipment. From the record as a whole we cannot say, as a matter of law, that the position taken by the board was not reasonable and in good faith. There is evidence from which the jury could have found that the qualified refusal of the village board was reasonable and in good faith under all of the facts and circumstances and that there had been no conversion of the equipment by the village. As stated in *Sutton v. Great Northern Ry. Co.*, *supra*: "It is ordinarily for the jury, under proper instructions from the court, to pass upon the existence of the qualification and its reasonableness." We find the trial court erred in directing a verdict for the plaintiff on the issue of conversion and that it should have been submitted to the jury on the issue here discussed.

The village further complains of the court admitting the testimony of Berger and Buller as to the value of the equipment.

The evidence shows Berger purchased much of the equipment, was in charge thereof during the time he operated the park, helped make the inventory shortly after August 4, 1939, saw it at various times, observed its condition up until in April of 1943 and kept himself informed as to the value of such equipment.

Buller's business was the buying and selling of fixtures and supplies. He sold much of the equipment that Berger placed in the park and in April of 1943 observed what equipment was left there and its condition. He was generally posted and familiar with equipment of this kind.

While it is true that a witness who knows nothing about the goods in question does not become competent to testify to their value merely by examining inventories and invoices, see *Dyer v. Rosenthal*, 45 Mich. 588, 8 N. W. 560, however, the opinion of a witness who is shown to be acquainted with the property and its value in the market is competent to tes-

tify as to such value, see *Daly v. W. W. Kimball Co.*, 67 Ia. 132, 24 N. W. 756, and the credibility of the witness and the weight of his testimony are questions for the jury.

For the reasons stated, the verdict and the judgment thereon are reversed and set aside and a new trial ordered.

REVERSED.

ALBERT H. POLENZ, APPELLEE, V. CITY OF RAVENNA ET AL., APPELLANTS.

18 N. W. 2d 510

FILED APRIL 20, 1945. No. 31893.

1. **Taxation.** By statute general taxes on real property are a first lien.
2. ———. By statute special assessments on real property are a lien inferior to the lien of general taxes.
3. ———. Where property is sold at a tax foreclosure to satisfy the lien of general taxes, it cannot be sold subject to special assessments which are a junior lien.
4. ———. Where title passes to a purchaser by such a sale, it is free and clear of all special assessment liens.

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

O. A. Drake and *H. L. Blackledge,* for appellants.

C. L. Mingus, contra.

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

SIMMONS, C. J.

Plaintiff is the owner of two city lots purchased at a tax foreclosure sale. Defendants are the City of Ravenna and the County of Buffalo, and certain of their officers. Plaintiff brought this action seeking a decree that certain paving assessments were not a lien against the real property involved, and asking that defendants be enjoined from collecting or attempting to collect the same. The trial court so

decreed. Defendants appeal. We affirm the judgment of the trial court.

With one exception to be noted hereinafter, all the facts are stipulated. In 1921 and 1922 the city of Ravenna created paving districts, improved the property and levied special assessments upon the property involved in the amount of $948.70. The amounts became a lien against said premises from the date of the levy in accordance with the provisions of section 4283, Comp. St. 1922, now section 17-514, R. S. 1943. One-twentieth of the total levy became due annually and, if not paid when due, delinquent. The city did not certify the total of said assessments to the county clerk, but rather, as annual installments became delinquent, they were certified to the county clerk, and thereafter appeared upon the tax records in the office of the county treasurer.

Thereafter, general taxes and special assessments upon the property involved became delinquent, and in 1937 the county became the purchaser of a tax sale certificate covering both the general taxes and special assessments. In September, 1939, the county brought an action to foreclose the same. The action, when brought, involved such general taxes and special assessments as were then delinquent and unpaid. When the action was determined, the decree included general taxes in the amount of $572.18, and special assessments in the amount of $1,027.50. The property was sold to satisfy the amount of said decree and costs. Plaintiff bid therefor the amount of $200, purchased the property at that price and received a sheriff's deed.

At the date of the decree, the last three of the special assessments were not delinquent and had not then been certified to the county authorities. They have since been so certified, now appear on the tax records as apparent liens, and the city and the county are demanding payment.

The dispute in the evidence is in this: The county and city offered evidence to show that at the sale it was orally announced the property was being sold subject to the three unpaid and not delinquent assessments. The plaintiff offered evidence denying that such an announcement was made.

The question here is: Are these three installments liens upon the property after title has passed to the purchaser at the foreclosure sale?

The defendants' argument is that these three assessments were not included in the foreclosure proceedings and decree, and were not ordered canceled of record in the confirmation of the sale; and that the plaintiff purchased with the record notice of that fact and with the actual notice given at the time of the sale.

The general taxes involved in this action are those for the years 1931 to and including the first half of 1940. The legislative acts during this period provided: "Taxes on all real property shall be a first lien thereon * * * ." Comp. St. 1929, sec. 77-203; "Taxes on real property shall be a first lien thereon * * * ." Laws 1933, ch. 134, sec. 1, p. 514; Laws 1935, ch. 151, sec. 1, p. 558; Laws 1937, ch. 167, sec. 2, p. 637; Laws 1939, ch. 98, sec. 2, p. 422; Laws 1941, ch. 157, sec. 2, p. 608. The present provision is: "All general real property taxes * * * shall be a first lien * * * ." R. S. 1943, sec. 77-203.

It further was provided: "All general taxes due the state and its governmental subdivisions shall be a first lien on the real estate on which levied, and takes priority over all other encumbrances and liens thereon." Comp. St. 1929, sec. 77-206. At present the provision is: "The first lien upon real estate under section 77-203 shall take priority over all other encumbrances and liens thereon." R. S. 1943, sec. 77-208.

The special assessments involved in the foreclosure are for the years 1927, 1928, and 1931 to and including 1939. They were levied and became a lien in 1921 and 1922, the exact date not being shown.

The applicable statute as of 1913 was: "All special assessments, regularly assessed and levied by any county or municipality, duly authorized, shall be a lien on the real estate on which assessed, as provided by the statute authorizing the same, but shall be subject to the general taxes mentioned in the last preceding section." R. S. 1913, sec. 6306. The legislature in 1921 provided: "All special assessments,

regularly assessed and levied as provided by law, shall be a lien on the real estate on which assessed, but shall be subject to the general taxes mentioned in the last preceding section." Laws 1921, ch. 133, art. II, sec. 7, p. 548.

The above provision became section 5826, Comp. St. 1922, and section 77-207, Comp. St. 1929. This provision now is: "All special assessments, regularly assessed and levied as provided by law, shall be a lien on the real estate on which assessed, and shall take priority over all other encumbrances and liens thereon except the first lien of general taxes under section 77-203." R. S. 1943, sec. 77-209.

It thus appears that the legislature has at all times involved herein consistently declared that all general real property taxes are a first lien on the real estate; that they take priority over all other encumbrances and liens; and that all special assessments are a lien, subject to the lien of general taxes, and superior to all other encumbrances and liens.

In 1903 the legislature passed a comprehensive act providing for a system of public revenue. Section 231, ch. 73, p. 475, Laws 1903, gave the several counties a lien for taxes, authorized their foreclosure in the same manner as though the lien were a mortgage, and authorized the sale of the property to satisfy the lien, and a delivery of a deed to the purchaser. See R. S. 1913, sec. 6559. The legislature in 1919 amended this act to provide, among other things, that "The delivery of such deed shall pass title to the purchaser free and clear of all liens of every nature whatsoever, and the interest of all persons over whom the court had jurisdiction." Laws 1919, ch. 59, sec. 1, p. 165. This section then became section 6087, Comp. St. 1922, and later section 77-2039, Comp. St. 1929. Section 77-2039, *supra,* was amended in 1935 (Laws 1935, ch. 162, sec. 1, p. 590), again in 1937 (Laws 1937, ch. 167, sec. 14, p. 644), again in 1939 (Laws 1939, ch. 98, sec. 14, p. 430), and again in 1941 (Laws 1941, ch. 157, sec. 14, p. 615). The language above quoted was retained throughout these amendments. In 1943, section 77-2039, as amended, and other sections were

repealed and a new act passed. Laws 1943, ch. 176, p. 614. Section 14 of this act, on page 618, provided: "The delivery of the sheriff's deed shall pass title to the purchaser, free and clear of all liens of every nature whatsoever and the interest or interests of all persons over whom the court had jurisdiction." This provision now is found in section 77-1914, R. S. 1943.

Section 77-2040, Comp. St. 1929, as amended, had to do with a separate foreclosure procedure. It cannot be held that the legislature intended that a purchaser in an action brought under section 77-2039, *supra*, would receive a better title than a purchaser who buys at a sale brought under section 77-2040, *supra*.

We think it clear from the provisions of the statutes that general taxes are a first lien, special assessments are a lien inferior thereto; that where property is sold at a tax foreclosure to satisfy the lien of general taxes, it cannot be sold subject to the lien of special assessments; and that, when title passes to a purchaser by such a sale, it is free and clear of all such liens.

In the very nature of things a sale under a foreclosure of a first lien cannot be made subject to any other lien, for to do so would be to make the junior lien a senior lien. It would destroy the very purpose of the legislative provisions making general taxes a first lien. They are made a first lien in order that the funds which support the general functions of government may be secured. The lien for general taxes can only be realized by the sale of the property. If the special assessments remain a lien against the land, after sale to satisfy the paramount lien, then it is obvious that the sale value of the property is reduced by the amount of the junior lien. Such a result was not intended. If the special assessments remain a lien after title passes under the foreclosure proceedings, the result would be that the junior lien could then come forward and destroy the title based on the superior lien. Such a result would nullify the very purpose of the tax foreclosure laws.

To make the first lien of general taxes fully effective, the

title must pass, as the legislature declares it shall pass, free and clear of all other liens. Anything short of that would nullify the purposes of the law and the foreclosure proceedings.

This court has held that "The title conveyed under a tax sale is not derivative, but a new title, and the purchaser, if his deed is valid, takes free from any incumbrance, claims or equities connected with the prior title." *Topliff v. Richardson,* 76 Neb. 114, 107 N. W. 114. See, also, *Coffin v. Old Line Life Ins. Co.,* 138 Neb. 857, 295 N. W. 884.

The rule is stated: "It is competent for the legislature to make the lien of taxes on real estate paramount to all other existing liens and encumbrances; and when this is done, and particularly when the tax sale is considered as creating a new and independent title, it is generally held that the tax title destroys and extinguishes all existing liens, charges, and encumbrances, and that the purchaser may acquire a clear and unencumbered title, without regard to their number and variety." 61 C. J., sec. 1831, p. 1310. See, also, 51 Am. Jur., sec. 1019, p. 891, sec. 1074, p. 934, and sec. 1079, p. 938.

Other courts have considered this same problem and have come to a like conclusion. See *White v. Thomas,* 91 Minn. 395, 98 N. W. 101; *Iowa Securities Co. v. Barrett,* 210 Ia. 53, 230 N. W. 528; *Western Securities Co. v. Black Hawk Nat. Bank,* 211 Ia. 1304, 231 N. W. 317; *Warren v. Blackman,* 62 S. D. 26, 250 N. W. 681; *Pennsylvania Co. v. City of Tacoma,* 36 Wash. 656, 79 Pac. 306; *Western Beverage Co. v. Hansen,* 98 Utah 332, 96 Pac. 2d 1105.

The judgment of the district court is affirmed.

AFFIRMED.

HERMAN M. ELLINGSON, APPELLANT, V. THE SUPERINTENDENT OF THE STATE INDUSTRIAL SCHOOL FOR GIRLS, APPELLEE.

18 N. W. 2d 299

FILED APRIL 20, 1945. No. 31928.

Infants. The courts are without authority under the provisions of section 43-208, R. S. 1943, to commit to the state industrial school a child who is over 16 years of age and who has not pleaded guilty to or been convicted of a crime.

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

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

Walter H. Smith and *Robert Waring, contra.*

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

SIMMONS, C. J.

This is an action in habeas corpus, wherein the relator seeks the release of his daughter from the Girls' Industrial Home. The trial court denied the writ. The relator appeals. We reverse the judgment of the trial court.

November 10, 1944, the county attorney of Cass county filed a petition in the county court for that county, in which he alleged that Evelyn Ellingson, age 16 years, was a delinquent child; that she refused to obey her parents or accept direction from them and was conducting herself in such a manner that she was incorrigible. The petition prayed that she be found to be a delinquent child, in accordance with sections 43-201 and 43-408 (sic), Comp. St. 1929; and that she be committed to the care of some suitable institution or to the care of some reputable citizen of good moral character. A waiver of the issuance and service of summons and notice was signed by the parents, in which they requested the court to enter an order in accordance with the prayer of the petition.

Thereafter, on the same day, a hearing was had and the court found that Evelyn Ellingson was 16 years of age and

a fit subject for commitment to the Girls' Industrial Home at Geneva. She was ordered committed and thereafter delivered to that institution and accepted as an inmate.

The father, on November 21, 1944, filed his petition in the district court for Fillmore county, wherein he alleged, so far as material here, the age of his daughter as being past 16 and under 18 years, and the proceedings in the county court for Cass county. He further alleged that the order and warrant of commitment were null and void for the following reasons: (1) It was not shown that the judge of the district court was absent from the county and that the county court did not have jurisdiction, citing section 43-202, Comp. St. 1929, now section 43-202, R. S. 1943; (2) no summons was issued on the filing of said petition, as required by section 43-206, Comp. St. 1929, now section 43-206, R. S. 1943; (3) said minor had not pleaded guilty to and had not been convicted of a crime and was not subject to be committed to the industrial school under section 43-208, Comp. St. 1929, now section 43-208, R. S. 1943; (4) the petition did not state facts sufficient to justify the arrest and commitment of the child.

The respondent by answer admitted the age of the girl, her custody as a result of the county court proceedings, alleged that the custody was legal, and prayed that the writ be dismissed and the child remanded to the custody of the institution.

A hearing was had at which the relator introduced a transcript of the proceedings in the county court, and rested. Respondent offered no evidence. The trial court denied the writ and remanded the girl to the custody of the superintendent of the institution.

The relator here assigns error based on the second, third and fourth grounds which he alleged in his petition.

As we view this matter, the county court was without authority to commit the child to the industrial school and the other assignments need not be considered.

There was an apparent error in the citation to the statute in the petition in the county court. It is clear that the pro-

ceedings in the county court were based on section 43-208, *supra*. The question submitted in the petition for the writ and by error assignment here is whether or not the county court had jurisdiction to commit the child to the industrial school under the provisions of that section.

The pertinent provisions of the statute are: "When any child under the age of eighteen years shall be found to be delinquent, dependent or neglected within the meaning of this act, the court may make an order committing the child to the care of some suitable institution, or to the care of some reputable citizen of good moral character, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent or neglected children, which association shall have been accredited as hereinafter provided, or, if under the age of sixteen years, or if he pleads guilty to or is convicted of any crime, to the care of the State Industrial School." R. S. 1943, sec. 43-208.

The relator's contention is that the statute does not authorize the commitment to the industrial school of a child over the age of 16 years who has not pleaded guilty to or been convicted of a crime. The respondent's contention is that the industrial school is a "suitable institution" and that the court, under the facts shown, had the power to commit thereto a child under the age of 18.

In 1887 the Constitution provided: "The legislature may provide by law for the establishment of a school or schools for the safe keeping, education, employment, and reformation of all children under the age of sixteen years, who, for want of proper parental care, or other cause, are growing up in mendicancy or crime." Laws 1887, art. VIII, sec. 12, p. 43. The legislature in 1887 provided: "When a boy or girl of sane mind under the age of eighteen years shall, in any court of record in this state, be found guilty of any crime except murder or manslaughter, committed under the age of sixteen years, or who for want of proper parental care is growing up in mendicancy and vagrancy, or is incorrigible and complaint thereof is made and properly sus-

tained, the court may, if in its opinion the accused is a proper subject therefor, instead of entering judgment, cause and order to be entered that said boy or girl be sent to the State industrial school in pursuance of the provisions of this act, and a copy of said order under the seal of said court, shall be sufficient warrant for carrying said boy or girl to the school and for his or her commitment to the custody of the superintendent thereof." Laws 1887, ch. 74, sec. 5, p. 592. This act was before this court in *Scott v. Flowers*, 60 Neb. 675, 84 N. W. 81. It there was held that the constitutional provision was a limitation on the power of the legislature which prevented the legislature "from providing for the commitment to the industrial schools of children of any class, either of an incorrigible nature or criminals in fact if beyond the age of sixteen years"; and that section 5, *supra*, was unconstitutional and void.

Upon rehearing (*Scott v. Flowers*, 61 Neb. 620, 85 N. W. 857) reference was made to the prior decision and it was stated: "This decision was rendered on the theory that section 5 of the act of 1887 (Session Laws, 1887, ch. 74), to the extent that it assumes to authorize the commitment of children of any age who are incorrigible, but who have not been convicted of crime, is unconstitutional and void." It further was said: "The legislature did not, as was shown in the former opinion, possess the power to authorize the commitment of children over the age of sixteen years who have not been convicted of crime, and consequently the courts are without jurisdiction in such cases." This decision was filed in April, 1901.

The legislature in 1905 enacted a bill to regulate the treatment and control of dependent, neglected and delinquent children. Section 7 of that act provided, so far as pertinent here: "When any child under the age of sixteen (16) years shall be found to be delinquent, dependent or neglected within the meaning of this act, the court may make an order committing the child to the care of some suitable institution or to the care of some reputable citizen of good moral character, or to the care of an industrial school, as provided

by law; or to the care of some association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent or neglected children, which association shall have been accredited as hereinafter provided." Laws 1905, ch. 59, sec. 7, p. 309.

The legislature in 1907 amended this section by changing the age from 16 to 18 years in the opening clause, by striking out the clause "or to the care of an industrial school, as provided by law", and inserting at the end after the word "provided" the words "or, if under the age of sixteen (16) years, to the care of a state industrial school." Laws 1907, ch. 45, sec. 3, p. 187.

In the opinion in *State ex rel. Tuttle v. Birdsall,* 88 Neb. 587, 130 N. W. 108, filed February 28, 1911, this court held that the county court had jurisdiction to try and determine misdemeanor cases, and that in such cases it had jurisdiction to commit the offender, if under the age of 18 years, to the industrial school if a girl, or to the reform school if a boy. On the same day that opinion was filed, there was introduced in the legislature Senate File No. 358, which became chapter 41, Laws 1911. By this 1911 act, the legislature again amended the section by inserting therein the words, "or if he pleads guilty to or is convicted of any crime * * * ." Laws 1911, ch. 41, sec. 1, p. 207. The act again was amended in 1913 by the addition of a provision authorizing payment to parents in certain cases. Laws 1913, ch. 38, sec 1, p. 133. As so amended, it became section 43-208, Comp. St. 1929, and now section 43-208, R. S. 1943.

It appears clearly that when the legislature enacted the 1905 act, it recognized the limitations upon its power as declared in *Scott v. Flowers, supra.* It also made a distinction between a "suitable institution" and "an industrial school." That distinction becomes further apparent in the 1907 act, wherein commitment of a child under the age of 18 years to a "suitable institution" is authorized, and if under the age of 16 years, commitment to the care of a "state industrial school" is authorized. That distinction again is recognized in the 1911 act and is carried forward into the provisions of the act applicable here.

This legislative intent further is shown by the provisions of section 9 of the act of 1905, *supra,* dealing with delinquent, neglected and dependent children, which provided that "the court may commit such child, if a boy, to an industrial school for boys, or if a girl, to an industrial school for girls; * * * ." Laws 1905, ch. 59, sec. 9, p. 310. This language was changed in the 1907 act, *supra,* to provide: "or the court may commit such child, if under the age of sixteen (16) years, if a boy, to the State Industrial School for Boys, or if a girl, to the State Industrial School for Girls; * * * ." Laws 1907, ch. 45, sec. 4, p. 188. In the 1911 act the last quoted language was retained and the provision inserted: "or if he pleads guilty to or is convicted of any crime, * * * ." Laws 1911, ch. 41, sec. 2, p. 208. This section again was amended in 1923 and this language used: "or the court may commit such child, if under the age of sixteen years, or if he pleads guilty to or is convicted of any crime, if a boy, to the state industrial school for boys, or if a girl, to the state industrial school for girls." Laws 1923, ch. 180, sec. 1, p. 421. This language has been retained and the amended section now appears as section 43-210, R. S. 1943.

The constitutional provision above quoted was amended in 1920 to provide: "The Legislature may provide by law for the establishment of a school or schools for the safe keeping, education, employment and reformation of all children under the age of eighteen years, who, for want of proper parental care, or other cause, are growing up in mendicancy or crime." Laws 1919, art. VII, sec. 12, p. 24.

It is to be noted that the legislature has not, since said amendment, changed the age provisions of section 43-208, *supra,* and that since said amendment of the Constitution it reenacted in 1923 the provision retaining the age limit at 16 years in section 43-210, *supra.*

To construe the act as the respondent would have us do would be to hold that the legislature did a useless act when it put the language "or if under the age of sixteen (16) years" in the 1907 act, and retained it. It would make that

language in the act redundant. The applicable rule is: " 'In construing a statute, an imperative rule is that effect, if possible, must be given to every clause and part of the statute.' *Mills v. Bundy*, 105 Neb. 470, 181 N. W. 184." *Drainage District v. Kirkpatrick-Pettis Co.*, 140 Neb. 530, 300 N. W. 582.

It necessarily follows that the legislature has not conferred jurisdiction upon nor given authority to the courts to commit to the state industrial school a child over 16 years of age, who comes within the provisions of section 43-208, *supra*, and who has not pleaded guilty to or been convicted of any crime. It further follows that the order of the county court committing Evelyn Ellingson to the Girls' Industrial School was without authority and void, and that the trial court erred in denying the writ and remanding the child to the custody of that institution. See *Rose v. Vosburg*, 107 Neb. 847, 187 N. W. 46.

The judgment of the district court is reversed and the cause remanded with directions to issue a writ in accordance with this opinion, releasing and discharging the said Evelyn Ellingson from said institution.

REVERSED, WITH DIRECTIONS.

CHARLES L. YOUNG, APPELLEE, V. LEE CARD ET AL., APPELLANTS.

18 N. W. 2d 302

FILED APRIL 20, 1945. No. 31896.

1. **Attorney and Client**: TRUSTS. When an attorney receives a deed of the land in settlement of a mortgage he is foreclosing for a client the grantee named in such deed should be the mortgagee and not the attorney for the mortgagee, even though the attorney at that time has not been paid his attorney's fee.
2. **Judgment**: EQUITY. In an equity action the court may properly in its decree make a general finding for the plaintiff on the prayer in his petition and yet, on the accounting feature of the case, find that a certain amount is still due the defendant, and

direct that the defendant shall pay the costs, where the demands of equity require such an order.

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

Charles A. Fisher and *Lee Card,* for appellants.

Edwin D. Crites, contra.

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

PAINE, J.

Plaintiff brought an action for an accounting and to have defendant Lee Card, an attorney, adjudged a trustee for real property conveyed to him, and for an injunction against sale of this property. The defendants filed answer, in which they prayed that the petition be dismissed, and in their cross-petition asked for a judgment for $1,500 attorneys' fees. The reply was a general denial. The decree found generally on all the issues for the plaintiff, but that there was a balance due defendant Lee Card on the accounting of $253.84, and taxed the costs to the defendants, and also directed that the undelivered deed executed by defendants should be delivered to the plaintiff, Charles L. Young.

The evidence discloses that the plaintiff formerly lived in Dawes county, and employed defendant Lee Card about 1935 as an attorney to collect certain real estate mortgages. One mortgage was given by George W. Hebbert and foreclosed and proceeds remitted; the other was given by T. C. Grantham. Defendant Card testified that plaintiff told him he did not want the land, but the money. The Grantham loan was finally refinanced, and the plaintiff got some money and a second mortgage back, which finally being in default, defendant Card began a foreclosure on this second mortgage.

The mortgagors' attorneys delayed foreclosure and secured moratorium stays in the state court, and then initiated Frazier-Lemke proceedings in the federal court. Thereafter they filed an amended petition, and mortgagor was adjudged a bankrupt, and altogether they secured a stay in the federal court of some three years, with hearings at Al-

liance, Rushville and Valentine. Thereafter the bankruptcy proceedings were dismissed upon mortgagor giving a deed to certain real estate, with a lease back for one year, as there was a crop in at the time.

Mr. Card had paid an attorney who had assisted him in the federal court proceedings the sum of $100 attorney's fee, and had claimed that he had this foreclosure of the plaintiff for collection on a contingent fee basis, and was entitled to a fee of $1,500. For these and other reasons, attorney Card took this deed from the mortgagor in his own name instead of in that of his client, the owner of the mortgage he was foreclosing.

Defendants' exhibit No. 10 is the letter of Lee Card reporting this matter to Charles L. Young, plaintiff, under date of May 21, 1942, which reads in part as follows:

"In the above matter and in relation to your latest letter and my response thereto, this is to report that in the last term of the United States District Court, I took a warranty deed from Grantham and wife for the 3 quarters embraced in your mortgages. He was given back a lease of the premises until November of this year.

"Accordingly, I am now able to deliver you a deed and the lease of said premises and close up our relations in the matter.

"I have not released the mortgages."

In a second letter, defendants' exhibit No. 11, dated June 3, 1942, Mr. Card adds this postscript:

"P. S. I can take you out to the Grantham place and have Grantham acknowledge your rights as landlord at end of his lease in November, after we close up between us regarding my professional services in the matter."

The letters from plaintiff to Lee Card of June 3 and June 10, 1942, do not indicate that the plaintiff had any other thought than that the deed to the property had been taken in his name, and further indicate that there should be some $500 or $600 rent held some place to his credit.

It was true that, during the moratorium and Frazier-Lemke proceedings, the mortgagor had to pay in rents to

the clerks of the courts, in the sum of $111.50 to the clerk of the district court and $157.89 to the clerk of the federal court, to which amounts, in the statement of their account as found in exhibit No. 51, Mr. Card adds $310 cash as received from the plaintiff. In said account Card charges $1,565 for foreclosure fees, and shows a balance due him of $1,388.11, upon payment of which he agrees to turn over title to the property and all papers to his client.

As soon as the trial court decided this case, the plaintiff paid in to the clerk of the court the sum of $253.84, but defendants appealed to this court.

In the supplemental brief filed by defendants, they set out the following assignments of error: (1) That the court erred in deciding that an oral contingent fee contract between the parties was not established by the evidence; (2) that the court erred in its decision as to the amount due defendant under his oral contract for professional services; (3) that the court erred in not holding that defendant was entitled to retain possession of plaintiff's documents and property, and entitled to a retaining lien thereon until fully paid; (4) that the court erred in finding generally in favor of the plaintiff, which is inconsistent with its special findings and against the weight of the evidence; (5) that the court erred in not finding generally for defendants in accordance with its specific findings, and in not finding that defendant Lee Card was entitled to an accounting, and that the evidence does not show fraud or deceit in the performance of professional duties.

The defendants contend that an attorney has a possessory lien upon property of any sort belonging to a client. This court has held in the case brought by Lee Card against Anna Rose George and others, found in 140 Neb. 426, 299 N. W. 487, that an attorney has no lien for services performed by him except such as provided by statute, and that section 7-108, R. S. 1943, does not provide for an attorney's lien on real estate owned by his client. See, also, *Marshall v. Casteel*, 143 Neb. 68, 71, 8 N. W. 2d 690, 11 N. W. 2d 818, in both of which cases the defendant in the instant case appeared.

In the last case cited, we held that an attorney's lien would not follow land after it was sold under a decree. It appears to us that if section 7-108, R. S. 1943, does not give an attorney a lien upon any real estate belonging to his client, it certainly would give him no right to take title to land belonging to his client in his own name because his client owed him a fee for foreclosing a mortgage. Plaintiff's exhibit No. 10 was a quitclaim deed, dated May 22, 1942, executed by Lee Card and Nellie M. Card, the defendants, to the plaintiff, but it was never delivered, and the decree of the court properly directed that defendants should deliver it to plaintiff.

The evidence of J. E. Porter is to the effect that the usual contingent fee would be one-half of the proceeds to the attorney if the attorney paid all the expenses, and one-third if the client paid expenses. However, on cross-examination he said he had never handled a mortgage foreclosure on the basis of a contingent fee, and a careful examination of the evidence in this case leads us to the conclusion that it does not sustain the defendant in his contention that he was employed by the plaintiff to foreclose this mortgage on that kind of an attorney fee.

The defendant charges in his last assignment of error in his supplemental brief "that the evidence does not show deceit or fraud in the performance of appellant's professional duties towards him in the foreclosure of said mortgages or accountings to Young thereon." An examination of the decree does not disclose any reference by the court whatever to any deceit or fraud in this case, and at no place does the decree cast any reflection upon the defendant's character or standing.

In so far as taxing the costs in this case against the defendant, to whom the court has allowed an attorney's fee, we do not see any error as charged by the defendant. This was an accounting case, and in going over all of these many exhibits, and considering all of the evidence, the court fixed a balance due on attorney's fee of $253.94, but considering the fact that plaintiff was compelled to bring this action to

get a deed from his attorney to his own land, the trial court was justified in taxing the costs against the defendants.

Finding no prejudicial error in the decree in this case, the same is hereby affirmed.

AFFIRMED.

CARL RYDER, SHERIFF, APPELLANT, v. DANIEL W. LIVINGSTON, APPELLEE.

18 N. W. 2d 507

FILED APRIL 20, 1945. No. 31909.

1. **Constitutional Law**: TAXATION. The self-executing provision of the Constitution exempting from taxation household goods of the value of $200 to each family, contained in section 2, art. VIII thereof, does not have the effect of exempting such property from sale for the payment of taxes properly assessed on other property of the tax debtor not exempt from taxation.
2. **Taxation.** There is no exemption of any kind or class of personal property from distress or seizure for taxes in this state, and it is immaterial that it is exempt from taxation by constitutional provision or statutory enactment.

APPEAL from the district court for Otoe county: WILLIAM A. ROBERTSON and THOMAS E. DUNBAR, JUDGES. *Reversed.*

Bernard M. Spencer and *Harvey A. Neumeister*, for appellant.

Lloyd E. Peterson and *Betty Jean Peterson, contra.*

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

CARTER, J.

This is an appeal from a judgment of the district court for Otoe county holding that personal property exempt from taxation is exempt from sale for the payment of delinquent taxes assessed against nonexempt property.

The record shows that the county treasurer of Otoe county issued a distress warrant for the collection of personal

taxes against the defendant for the years 1931 to 1942, inclusive, in the total sum of $351.45. Defendant was advertising his property for public sale and, in order to avoid a levy and sale by distress, entered into a stipulation permitting the public sale, but impounding the proceeds amounting to $214.04 in the hands of the sheriff until the proper disposition thereof could be ascertained. It is agreed that the property sold was household goods and that it was exempt from taxation to the extent of $200 as provided by section 2, art. VIII, Constitution, and section 77-202, R. S. 1943. Some complaint is made as to the regularity of the assessment of the taxes and the sufficiency of the levy of the distress warrant upon the property. We think these objections have been waived by the defendant by entering into the stipulation providing for the disposition of the matters involved. The only question for our consideration, and it appears to be one of first impression in this state, is whether property exempt from taxation is exempt from sale for taxes assessed against other taxable property.

"Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs." 1 Cooley, Taxation, sec. 1, p. 61. The same authority defines taxation as follows: "Taxation is a mode of raising revenue for public purposes. The term is ordinarily used to express the exercise of the sovereign power to raise a revenue for the expenses of the government." 1 Cooley, Taxation, sec. 7, p. 72. For the purposes of the present case these definitions are adequate. It must be borne in mind, also, that the power to tax is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent government. It being a sovereign power, constitutional provisions relating to the power of taxation do not operate as grants of the power of taxation to the government, but are limitations merely upon a power which would otherwise be unrestricted. Consequently, it is a general rule that the power of taxation is all inclusive except as restricted by constitutional limitations, express or implied.

The exemption of household goods of the value of $200 is therefore a constitutional limitation upon the power to tax. Section 77-205, R. S. 1943, provides that personal property taxes levied shall be due and payable on November 1 next following the date of levy thereof, and from that date shall be a first lien upon the personal property of the person to whom assessed until paid. We have construed this section of the statute and held that the statutory first lien for taxes upon the personal property of the person to whom assessed is not confined to the specific article of personal property assessed, as it is in the case of real property, but that it attaches to every variety of personalty, including that subsequently acquired and belonging to the tax debtor on November 1 next following the date upon which the same are levied and until paid. This has been held to apply even where the property would be exempt from levy and sale to satisfy a judgment creditor. *Landis Machine Co. v. Omaha Merchants Transfer Co.*, 142 Neb. 397, 9 N. W. 2d 198.

It is evident that the applicable provisions of section 2, art. VIII of the Constitution limits the taxing power only to the extent of exempting from taxation household goods of the value of $200 to each family. Such limitations upon the power to tax, it being a sovereign power, must be strictly construed. No other statutory or constitutional provision is pointed out which purports to expressly exempt such household goods from seizure and sale for the payment of delinquent taxes assessed against other property not exempt from taxation. It is argued that the use of the term "shall be exempt from taxes" in section 77-202, R. S. 1943, implies a different meaning than the term "shall be exempt from taxation" contained in section 2, art. VIII of the Constitution. The latter section of the Constitution further states that "No property shall be exempt from taxation except as provided in this section." We think this provision, when considered with the fact that the exemption of household goods is a self-executing provision, implies that the same meaning was meant by both expressions.

We do not think that any form of exemption either in the

assessment and levy of taxes or from the sale of property for their payment can be sustained unless constitutional or statutory provisions clearly so provide. This seems to be the general rule announced in the few cases found upon the subject. In *Ring v. Williams,* 13 Tex. Civ. App. 609, 35 S. W. 733, the court said: "The exemption mentioned in the first article quoted is from taxation, not from liability for taxes due, and the right granted by the article is consistent with the liability created by article 5176. Exempting this property from the burden of taxation did not have the effect of exempting and relieving it from liability in other respects created by law." In *Reams v. McHargue,* 111 Ky. 163, 63 S. W. 437, it was said: "The fact that $250 worth is exempt from taxation does not at all imply or provide that it shall be exempt from sale for such taxes as the owner may in fact owe." In 61 C. J., sec. 1354, p. 1041, it is said: "The personal property of the taxpayer is the primary fund out of which all his taxes are to be collected, and for this purpose almost every variety of personal property is subject to compulsory process, provided it is found within the district in which the collector's authority runs, and he is not restricted to those particular articles on which the particular assessment was laid or on which a particular tax lien rests. Except as specifically provided for by statute, as a general rule there is no exemption of any class or kind of personalty from distress or seizure for taxes; and it is immaterial that the property in question may be by law exempt from levy and sale on ordinary executions, or even that it was exempted by statute from taxation, or otherwise was not subject to taxation at the time of the assessment, * * * ." This interpretation is so fundamentally sound that the citation of further authority is not required. It seems to be borne out by the legislature itself when it provided in article 15, chapter 25, R. S. 1943, covering the subject of Executions and Exemptions, that "Nothing in this chapter shall be considered as exempting any real or personal property from levy and sale for taxes." R. S. 1943, sec. 25-1555.

We conclude therefore that the trial court was in error in

holding that the self-executing provision of section 2, art. VIII of the Constitution, or the legislative incorporation of such provision into our statutes by section 77-202, R. S. 1943, exempting from taxation household goods of the value of $200 to each family, has the further effect of exempting such exempt property from sale for the payment of delinquent taxes properly assessed on other property of the tax debtor.

REVERSED.

IN RE ESTATE OF MERTON E. HOUSE.
ANNA COLE LEFLANG, APPELLEE, V. W. ROLLIN SMITH, ADMINISTRATOR, APPELLANT.

18 N. W. 2d 500

FILED APRIL 20, 1945. No. 31812.

1. **Witnesses.** An interested party is competent, if otherwise qualified, to testify to the genuineness of the signature or handwriting of a deceased person notwithstanding section 25-1202, R. S. 1943, since such testimony involves a matter of opinion and not a personal transaction or conversation between the witness and decedent.
2. ———. When a claim is filed against the estate of a deceased person upon a promissory note it is not error for the trial court to permit the interested party over proper objections to testify that an endorsement on the back thereof is in his own handwriting.
3. **Appeal and Error.** Section 25-1141, R. S. 1943, operates to preserve error in the admission of evidence only when appropriate objection is interposed and there is an erroneous ruling thereon by the court.
4. **Witnesses.** When a person. who is precluded by the provisions of section 25-1202, R. S. 1943, from testifying against the representative of a deceased person, is permitted, without objection, to testify to a conversation or transaction had with such deceased person, it is a waiver of the benefit of the statute.
5. ———. When objection to the admission of evidence as to transactions or conversations with deceased has been properly made by the representative of a deceased person and erroneously overruled, the party making such objection does not waive his rights

under the statute by cross-examining the witness on the same matters or offering direct evidence thereon to meet that erroneously admitted.

6. ———. On the other hand, if either on cross-examination or by direct examination the representative goes beyond the scope of the inquiry to which his objection was properly made and as to which it should have been sustained, and introduces evidence of other matters in regard to the original transaction or conversation which is not admissible under the provisions of the statute, then the representative thereby waives the benefit of the statute and any erroneous rulings of the court.
7. **New Trial.** Matters of opinion and arguments of jurors in the jury room are considered as inhering in the verdict, and not such matters of misconduct as can be proved by the jurors themselves.
8. **Cases Distinguished.** *Warnick v. Warnick*, 107 Neb. 747, 187 N. W. 51, and *Banking House of F. Folda v. Higgins*, 122 Neb. 279, 240 N. W. 300, distinguished.

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

Frank M. Johnson, for appellant.

Cook & Cook, contra.

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

CHAPPELL, J.

This appeal is from allowance of the claim of Anna Cole Leflang, hereinafter called plaintiff, against the estate of Merton E. House, deceased, of which W. Rollin Smith, Objector, referred to herein as defendant, is the representative as administrator with the will annexed. The claim was based upon a promissory note for $4,000 with interest at 6 per cent, dated January 26, 1932, due January 26, 1936, upon which no payment had been made unless, as plaintiff alleges, the sum of $200 was voluntarily paid on December 23, 1941, the endorsement of which appears as a credit upon the instrument. From allowance of the claim in the county court defendant appealed to the district court interposing objections that the note was without consideration and void; also that the alleged payment was not in fact ever made,

hence the claim was barred by the statute of limitations.

Trial of the issues to a jury in the district court resulted in a verdict and judgment for plaintiff. Defendant's motion for new trial was overruled and he appeals to this court. In the first four assignments of error, which will hereinafter appear verbatim, it is contended that the trial court, over appropriate objections, erroneously permitted plaintiff to testify to certain transactions or conversations with deceased, in violation of section 25-1202, R. S. 1943. Other assignments are that the trial court erred in admitting the note in evidence, in overruling defendant's motion for directed verdict at the conclusion of plaintiff's case, and in the giving and refusal of certain instructions. It is also contended that the verdict is contrary to law and the evidence, and not a fair and deliberate verdict awarded by twelve competent and unprejudiced jurors. The record discloses that none of these assignments of error can prevail.

Prefacing decision of the first four assignments of error, attention is directed to section 25-1202, R. S. 1943, which provides in part: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless * * * such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." The first two assignments of error relating thereto will be disposed of by decision that they were not transactions or conversations with the deceased, the two latter by finding that defendant by his own acts opened the door and waived the benefit of the statute and any erroneous ruling of the court.

The first assignment is that, "The court erred in permitting the claimant to identify the signature of M. E. House

to Exhibit 1 (B. of Ex., Qs. 20-22)". In this connection, it should be noted that plaintiff testified in her own behalf by deposition taken by her attorney in Omaha, Nebraska, whereat counsel for defendant cross-examined at length. The deposition *in toto* was offered in evidence by plaintiff without objection generally but subject as a matter of course to the right of the parties to except to questions and answers during the trial on the ground of incompetency or irrelevancy as provided by section 25-1264, R. S. 1943. *Bentley v. Estate of Bentley*, 72 Neb. 803, 101 N. W. 976. Without objection plaintiff was permitted to testify in her direct evidence that Dr. Merton E. House, deceased, formerly a dentist at Lexington, Nebraska, was her sister's husband whom she had known and treated as a brother for half a century, she having been in his home and he in hers on numerous occasions, particularly throughout the years after the death of her husband and the death of her sister, the wife of deceased, during which period plaintiff had business transactions with the deceased.

The following evidence was then received over objection that it was "in violation of the Statute providing for the exclusion of all transactions and conversations with deceased". No objection was made as to foundation. "Q. 20. And calling your attention to the instrument which the Notary has identified as Exhibit No. 1, I will ask you if you know the signature attached to that instrument? A. Yes; that is Dr. Merton House's signature." The following questions were then asked and answered without objection. "Q. 21. You mean the Merton E. House we have been talking about? A. Yes. Q. 22. And you would say that it is his genuine signature? A. Yes." However, as provided by section 25-1141, R. S. 1943, the former objection having been made and overruled by the court it was unnecessary to repeat the same objection to the latter testimony of the same nature by the same witness in order to save errors if any. See *Zediker v. State*, 114 Neb. 292, 207 N. W. 168; *Triplett v. Western Public Service Co.*, 129 Neb. 799, 263 N. W. 229.

Whether the evidence above recited was erroneously ad-

mitted depends upon whether it was a transaction or conversation with deceased. In this connection, it was held in *Clark v. Fleischmann*, 87 Neb. 609, 127 N. W. 914, that, "Exceptions to the statutory rule that 'every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases' (Code, sec. 328) (now sec. 25-1201, R. S. 1943), should not be extended by construction beyond the import of the terms used by the legislature." As was said in *Harnett v. Holdrege*, 5 Neb. (Unof.) 114, 97 N. W. 443, reaffirmed in 73 Neb. 570, 103 N. W. 277, "Under our present statute, to require the evidence of an interested party to be excluded, it must appear that the testimony relates to something of a personal nature passing between the witness and the deceased." In *In re Estate of Baker*, 144 Neb. 797, 14 N. W. 2d 585, we approved the general rule that, "the adverse party may testify to any fact which is not either a transaction, a communication or a statement of the deceased or incompetent person, even if it is material to the case, unless the statute expressly makes him incompetent as to facts equally within the knowledge of the deceased or incompetent person." The statute of this state does not so provide. See *Scharmer v. McIntosh*, 43 Neb. 509, 61 N. W. 727. This court held in *Hlavaty v. Blair*, 101 Neb. 414, 163 N. W. 330, that, "A transaction or conversation within the meaning of section 7894, Rev. St. 1913, (now sec. 25-1202, R. S. 1943), is an action participated in by witness and decedent and to which, if alive, decedent could testify of his personal knowledge." See, also, *Nelson v. Janssen*, 144 Neb. 811, 14 N. W. 2d 662.

In discussing the question of the competency of a witness to prove the genuineness of the signature of deceased in cases similar to the one at bar, it is said in 3 Jones on Evidence, Civil Cases, (4th ed.) sec. 786, p. 1441: "A number of the authorities hold that the adverse party may not prove the genuineness of the signature of a deceased or incompetent person to an instrument in which he is interested. The weight of authority, however, is to the contrary." A majority of the courts hold generally that an interested par-

ty is competent, if otherwise qualified, to testify to the genuineness of the signature or handwriting of a deceased person, notwithstanding the statutory rule excluding transactions or conversations with a decedent, since such testimony involves a matter of opinion and not a personal transaction or conversation between the witness and decedent. Most of the recent cases are in accord with this rule, which we hereby affirm and adopt. *Johnson v. Bee,* 84 W. Va. 532, 100 S. E. 486, 7 A. L. R. 252; *Klein v. York,* 149 Tenn. 81, 257 S. W. 861, 31 A. L. R. 452; Annotation, 31 A. L. R. 460; *Poole v. Beller,* 104 W. Va. 547, 140 S. E. 534, 58 A. L. R. 207; Annotation, 58 A. L. R. 210; *Leffek v. Luedeman,* 95 Mont. 457, 27 Pac. 2d 511, 91 A. L. R. 286; 70 C. J., sec. 436, p. 334. Of course, the interested party would be incompetent to testify to the act of signing. Therefore, *In re Estate of Parvin,* 131 Neb. 853, 270 N. W. 470, relied upon by defendant, is clearly distinguishable from the case at bar although it may be said that it supports the majority view above stated. The evidence in the *Parvin* case, which we held to have been a transaction with deceased and erroneously admitted over proper objection, related entirely to the act of signing. As a matter of fact, however, in that case defendant upon direct examination offered evidence testing the genuineness of the signature of deceased which we held to be simply circumstantial and not evidence of a transaction which would waive the benefit of the statute or cure the previous erroneous ruling of the court in admitting the evidence of the act of signing.

The second assignment of error, which is legally related to the first, is that, "The court erred in permitting the claimant to testify in whose handwriting the endorsement had been made (B. of Ex., Q. 36)." Over appropriate objection the witness was permitted to testify. "Q. 36. And calling your attention to the endorsement on the back of this note, do you know in whose handwriting that is? A. Yes." The following questions and answers thereafter appear without objection. "Q. 37. And in whose handwriting is that? A. Mine. Q. 38. All of the endorsement? A. All of it is

mine." Clearly this evidence was properly admitted, since it could not be held in any manner to be a transaction with deceased under the definitions and applicable law heretofore set forth.

The record discloses that plaintiff did thereafter testify both as to the act of signing and the placing of the endorsement on the note. It will be noted, however, that when this was first attempted proper objection was made thereto by defendant, and sustained by the court. Nevertheless, immediately following plaintiff was permitted to testify at length concerning both of these transactions without any objection interposed and overruled by the court. Defendant made but four objections to testimony relating to the act of signing, and five objections to the act of placing the endorsement on the note, all of which were sustained. Under such circumstances, defendant could not assume that such evidence would be erroneously admitted over objection, make none, and then claim the benefit of the statute, sec. 25-1141, R. S. 1943, which operates to preserve error only when there is an erroneous ruling upon proper objection made. As to such evidence the applicable rule is that, "When a person, who is precluded by the provisions of said section (sec. 25-1202, R. S. 1943) from testifying against the representative of a deceased person, is permitted, without objection, to testify to a conversation or transaction had with such deceased person, it is a waiver of the benefit of the statute." *Parrish v. McNeal,* 36 Neb. 727, 55 N. W. 222. See, also, *Hansen v. Estate of McDougal,* 126 Neb. 538, 253 N. W. 674. We, therefore, decide that defendant's first and second assignments of error are without merit.

Assignments of error three and four are, respectively, that, "The court erred in permitting the claimant to testify how the $1100 automobile payment had been made (B. of Ex., Q. 225)" and, "The court erred in permitting the claimant to testify as to conversations taking place between she (her) and the decedent in connection with the alleged $4000 indebtedness (B. of Ex., Qs. 230-235)". These assignments relate directly to the consideration given for the

note by the plaintiff and the manner in which the plaintiff and decedent arrived at the amount, $4,000, the total of which is composed of many payments of money to or for deceased and his wife. The questions and answers which we do not deem it necessary to recite appear in the deposition taken by plaintiff as re-direct evidence following an exhaustive cross-examination by defendant, all of which cross-examination was offered in evidence by plaintiff and received without any objection by defendant, who himself read it to the jury, whereby he opened the door and waived the incompetency of the witness as to such matters.

Bentley v. Estate of Bentley, supra, relied upon by defendant, is distinguishable upon the ground that in that case the defendant not only objected to the direct evidence offered in the deposition where it called for transactions and conversations with deceased, but defendant therein also interposed proper objections to his own cross-examination of the witness when it was offered in evidence by the plaintiff. In the case at bar defendant made no objection to any of the cross-examination when offered. It is a rule in this jurisdiction that, "It is incumbent on one, not wishing to be bound by evidence made incompetent by statute, to make timely objection when it is offered. It is too late to raise the objection for the first time in the appellate court." *Anderson v. Walsh,* 109 Neb. 759, 192 N. W. 328.

The cross-examination by defendant received in evidence without any objection by him went far beyond the direct evidence of plaintiff and covered every possible matter or circumstance involved in the note transaction, including in detail its execution, consideration, instruments given to secure payment, conversations between the witness and deceased, their financial condition, possession and ownership of the note, demands for payment from deceased, and the details of the $200 payment made upon the note, together with its endorsement thereon. The defendant even went farther than cross-examination of plaintiff in the case at bar. After trial in the county court plaintiff's deposition was taken by defendant, in which searching inquiry was

made in detail as to every possible part of the transactions involved, including a résumé of all business transactions which plaintiff ever had with deceased which might have the remotest connection, if any, with the primary transactions. This deposition and every part of it, including plaintiff's cross-examination by her attorney, which in part is substantially the same as that to which assignments three and four are directed, was offered by defendant and received in evidence without reservation or objection as a part of his own defense.

The applicable rules of law are, that when objection to the admission of evidence has been properly made by the representative of a deceased person, under the provisions of section 25-1202, R. S. 1943, and erroneously overruled, the party making such objection does not ordinarily waive his rights under the statute by cross-examining the witness on the same matters or offering direct evidence thereon to meet that erroneously admitted. On the other hand, if either on cross-examination or direct examination the representative goes beyond the scope of the inquiry to which his objection was properly made and as to which it should have been sustained, and introduces evidence of other matters in regard to the original transaction or conversation which are not admissible under the provisions of the statute, then the representative thereby waives the benefit of the statute and any erroneous rulings of the court. In other words, when the representative thus voluntarily opens the door for the purpose of obtaining what he affirmatively desires, he thereby waives the benefit of the statute and gives the interested party the right to further testify in his own behalf and fully explain such transaction or conversation.

An exposition of these principles citing cases from many jurisdictions will be found in Annotation, 64 A. L. R. 1148-1184. See, also, 3 Jones on Evidence, Civil Cases (4th ed.), beginning at section 780, p. 1426. Their application will also be found in several cases from this jurisdiction. See *American Savings Bank v. Estate of Harrington*, 34 Neb. 597, 52 N. W. 376; *Parrish v. McNeal, supra*; *Taylor v.*

Ainsworth, 49 Neb. 696, 68 N. W. 1045; *Kroncke v. Madsen*, 56 Neb. 609, 77 N. W. 202; *Bangs v. Gray*, 60 Neb. 457, 83 N. W. 680; *Dickenson v. Columbus State Bank*, 71 Neb. 260, 98 N. W. 813; *Cline v. Dexter*, 72 Neb. 619, 101 N. W. 246; *Fitch v. Martin*, 83 Neb. 124, 119 N. W. 25; *Russell v. Estate of Close*, 83 Neb. 232, 119 N. W. 515; *In re Estate of Peterson*, 104 Neb. 574, 178 N. W. 187. In this connection, however correct the conclusions may be in *Warnick v. Warnick*, 107 Neb. 747, 187 N. W. 51, and *Banking House of F. Folda v. Higgins*, 122 Neb. 279, 240 N. W. 300, we find that the rules as stated in the syllabi thereof apply only to the particuluar case and are too broad for general application. An application of the rules stated herein to the case at bar clearly demonstrates that defendant's third and fourth assignments of error cannot be sustained.

Defendant's fifth assignment is that, "The court erred in admitting Exhibit 1 as a part of the evidence in said case." The defendant having waived, by his own acts heretofore set forth, the evidence of plaintiff that she was the owner and holder of the note which was executed by deceased for a valuable consideration, and that $200 was paid thereon by him on December 23, 1941, the endorsement of which plaintiff then wrote on the back of the note, cannot now complain of its admission in evidence. We also call attention to the fact that a disinterested witness for plaintiff not only identified the signature of deceased as maker of the note but testified that he was present when the deceased made the $200 payment and saw the plaintiff make the endorsement thereof on the note. Plaintiff was also entitled to the benefit of the *prima facie* presumption that the note was issued for valuable consideration as provided in section 62-124, R. S. 1943. See *Cozad State Bank v. McLaughlin*, 128 Neb. 87, 258 N. W. 36; *Plumbly v. Harvard State Bank*, 133 Neb. 630, 276 N. W. 385; *In re Estate of Tynan*, 142 Neb. 671, 7 N. W. 2d 628. Every element necessary as a foundation for its admission clearly appears in the evidence and we find that Exhibit 1 was properly admitted. It follows as a matter of course that the trial court did not err in refusing to

direct a verdict for defendant at the conclusion of plaintiff's case, which without further discussion disposes of defendant's assignment of error upon that question.

Defendant contends that the court erred in giving instructions numbers 5, 6, and 8, and in refusing to give certain proffered instructions. An examination of instructions numbers 6 and 8 reveals that they correctly state applicable law and could not be prejudicially erroneous. It is argued that instruction No. 5 is a complete instruction, and erroneous, not only because it treats "as established a disputed fact as to which there is a conflict in the evidence", in violation of the rule in *Levy v. Cunningham*, 56 Neb. 348, 76 N. W. 882, but also that it is erroneous because of the rule stated in *Sanders v. Chicago, B. & Q. R. Co.*, 138 Neb. 67, 292 N. W. 35: "An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous, unless it includes every fact necessary to sustain a verdict in favor of such party, unless the omitted facts are conclusively established." With this in mind we have examined instruction No. 5 and find that it does not treat as established a disputed fact, and that it does include every fact necessary to sustain a verdict. It has the virtue of brevity, and considered alone its clarity to the layman might be questioned. However, when read in connection with all the other instructions given, its clarity is manifest without any doubt. After examining all of the instructions given by the trial court, we are persuaded that they presented the issues to the jury in a manner which could not be prejudicial to any rights of defendant, and since defendant's proffered instructions were substantially included in the instructions given it cannot be said that the court erroneously refused any of them.

Defendant's last assignment is that the verdict and judgment thereon are contrary to law and the evidence, and that the verdict is not a fair and deliberate one awarded by twelve competent and unprejudiced jurors. The latter contention was presented to the trial court by affidavit of attorney for defendant, and the affidavits and counter-affidavits

of jurors in support of and opposing defendant's motion for new trial.

Defendant first insists that two of the jurors were seriously ill and thereby prevented from deliberating upon the issues in the case, thus inducing an ill-considered and hurried verdict justifying a new trial. An examination of the affidavits presented by the parties demonstrates that this contention lacks any substantial foundation in fact. Defendant cites no applicable authority of law sustaining his position, and we decide that it is without merit.

Defendant's contention that a juror while considering the verdict stated to fellow jurors that he had voted for claimant because of certain facts within his personal knowledge but not appearing in the evidence, which influenced the jurors, is more serious but not fatal to the verdict under the facts presented. There is no allegation that plaintiff herself was guilty of any misconduct. In giving consideration to this contention we have examined the entire record, including the conflicting affidavits presented, some of which were made for each of the parties by the same jurors.

We do not believe it necessary to set forth the statements alleged to have been made by the juror charged with misconduct. Suffice it to say, that some of such statements are legitimately reflected by facts and inferences from facts appearing in the record. They could therefore of necessity be properly made by the juror without being guilty of any misconduct. As to the others, it is apparent they are mere expressions of opinion and not statements of fact. As stated in *Egan v. State,* 97 Neb. 731, 151 N. W. 237, and approved in *In re Estate of Keup,* decided March 16, 1945, *ante,* p. 729, 18 N. W. 2d 63, "Matters of opinion and arguments of jurors in the jury room are considered as inhering in the verdict, and as not such matters of misconduct as can be proved by the jurors themselves." See, also, *Schindler v. Mulhair,* 132 Neb. 809, 273 N. W. 217. It follows that the court properly refused to grant a new trial because of any alleged misconduct of jurors.

We conclude that the verdict and judgment thereon are

in conformity with the law and amply supported by the evidence, much of which is without any dispute; and, therefore, the judgment is affirmed.

AFFIRMED.

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Abatement and Revival.

If a decree of foreclosure is obtained during the lifetime of the mortgagor, an order of sale, sale, and confirmation thereof, after his death without revivor against his representatives, are voidable only and not subject to collateral attack. *Wendt v. Jones* 667

Acknowledgments.

1. The certificate of an officer having authority to take acknowledgments cannot be impeached by showing merely that such officer's duty was irregularly performed. *Fisher v. Standard Investment Co.* 80
2. Where party executes an instrument before an officer having authority to take acknowledgments, with knowledge thereof and intent to make instrument effective, the official certificate of the officer, in absence of fraud, is conclusive in favor of those who rely on it in good faith. *Fisher v. Standard Investment Co.* 80

Actions.

When a statute commands or prohibits a thing for benefit of a person, he has a remedy upon the statute for the thing enacted for his benefit or for the wrong done him contrary to its terms, but it must be affirmatively shown that the person suffered injury as result of failure of other party to comply with statute. *Smith v. Morton Motor Co.* 396

Appeal and Error.

1. On review of appeal in equity action, Supreme Court is required to reach an independent conclusion without reference to findings of trial court, but where there is irreconcilable conflict in the evidence, will consider the fact that the trial court observed the witnesses and their manner of testifying. *Fisher v. Standard Investment Co.* 80
2. Prejudice to a party as a result of an amendment to pleadings must appear from the record to constitute reversible error. *Robinson Outdoor Advertising Co. v. Wendelin Baking Co.* 112
3. Equitable action is triable de novo in Supreme Court, subject to the condition that when the evidence is in irreconcilable conflict, consideration will be given to the

fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. *Rettinger v. Pierpont* 161

4. In reviewing a directed verdict for defendant at close of all the evidence, the Supreme Court will assume the existence of every material fact favorable to plaintiff which competent evidence tends to establish, and give plaintiff the benefit of every logical inference therefrom. *Wessel v. City of Lincoln* 357
5. When a jury is waived, the Supreme Court accords to a finding of fact by the trial court, when there is sufficient evidence to support it, the same weight and credence, and indulges the same presumptions in favor thereof, as it would in favor of verdict of jury rendered on same evidence. *In re Estate of Donlen* 370
6. A finding of the trial court, in a law action tried to the court, will not be disturbed except when clearly wrong. *In re Estate of Donlen* 370
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10. Where the jury arrived at the only conclusion that the evidence would sustain and trial court should have directed a verdict for the prevailing party, Supreme Court will not consider alleged errors with respect to the giving or refusal of instructions. *Howerter v. Olson* 507
11. Where proper objection has been made to the admission of testimony and overruled, it is unnecessary to repeat the same objection to further testimony of the same nature by the same witness in order to claim error on appeal. *In re Estate of Vanicek* 531
12. Trial court is required to consider as evidence any com-

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13. While law requires Supreme Court on appeals in equity to reach an independent conclusion, Supreme Court will, where there is an irreconcilable conflict in the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying. *Columbian Steel Tank Co. v. Vosika* 541
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15. The dismissal of an appeal, without an examination of the case upon its merits, operates as an affirmance of the judgment from which the appeal is attempted to be taken. *In re Estate of Marsh, Messecar v. Marsh* 559
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17. An order of the court confirming or refusing to confirm a judicial sale constitutes a final and appealable order. *Federal Farm Mortgage Corporation v. Ganser* 589
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19. Where the court's instructions to the jury are erroneous and the evidence is insufficient to sustain a verdict under the instructions given, a new trial is required although the evidence is sufficient to sustain a verdict under proper instructions. *Long v. Railway Mail Assn.* 623
20. Misconduct of counsel in argument to jury cannot be properly shown by affidavit, and to preserve error the statements must be taken by the court reporter, together with the objections made thereto and the court's ruling thereon. *In re Estate of House* 670
21. One may not complain of misconduct of counsel, if with knowledge of such misconduct, he does not ask for a mistrial. *In re Estate of House* 670
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23. Findings of fact based on an inspection by trial judge are not entitled to any weight and may not be considered upon appeal unless the record contains competent evidence to support the findings. *Bize v. Bize* 722
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25. Erroneous instructions will not cause a reversal of a case unless they are prejudicial to the complaining party. *In re Estate of Keup* 729
26. The giving of erroneous instructions to the jury is not cause for reversal if the instructions are more favorable to the complaining party than he is entitled to under the law. *In re Estate of Keup* 729
27. When prejudicial error is not shown by the record, a verdict of a jury on conflicting evidence will not be disturbed. *Ingersoll v. Sullivan* 761
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Where a perpetual easement is granted to the owner of a dominant tenement, his heirs and assigns, charging the owner of the dominant tenement with annual payments to the owner of the servient tenement, his heirs, successors and assigns, there is a right of severance to receive annual payments. Such right may pass by inheritance or conveyance. *Frye v. Sibbett* 600

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2. In action for disbarment of an attorney the presumption of innocence applies and his culpability must be established by a clear preponderance of the evidence. *State ex rel. Nebraska State Bar Assn. v. Gudmundsen* 324
3. The degree of proof in a disbarment proceeding being higher than that required to sustain a judgment in a civil action, the finding and judgment of culpability of an attorney in a civil action are not conclusive in a disbarment proceeding. *State ex rel. Nebraska State Bar Assn. v. Gudmundsen* 324
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5. Where exceptions to report of referee in disbarment proceedings have not been filed, the Supreme Court may either consider the findings of the referee final and conclusive or may enter such order as the evidence and law require. *State ex rel. Nebraska State Bar Assn. v. Gudmundsen* 324
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2. Order to show cause was sufficient as complaint to apprise carrier of charges constituting basis for revocation or suspension of certificate of convenience and necessity. *In re Application of Hergott* 100
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5. Statutory authorization to State Railway Commission to attach conditions upon issuance of certificates of convenience and necessity does not permit suspension or revocation without notice and hearing as required under separate statutory provision. *In re Application of Hergott* 100
6. Where statute provides for suspension or revocation of certificate of convenience and necessity for willful failure to comply with statutes or regulations issued thereunder, order of suspension or revocation entered by State Railway Commission must include finding of willful violation or it will be set aside on appeal. *In re Application of Hergott* 100

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1. In the absence of proof to the contrary, the laws of a sister state will be presumed to be the same as the laws of this state. *Howerter v. Olson* 517
2. Under laws of Wyoming the issue of negligence or contributory negligence is ordinarily for the jury, and this is even so where the testimony is undisputed if different minds may fairly arrive at different conclusions. *Howerter v. Olson* 517

Conspiracy.

1. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. *Rettinger v. Pierpont* 161
2. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another, and it involves some mutual mental action coupled with an intent to commit the act which results in injury. *Rettinger v. Pierpont* 161

Constitutional Law.

1. A judicial hearing in equity to determine the amount or legality of special assessments for drainage improvement benefits, accruing to streets and alleys of a village located in the drainage district, is constitutional. *Drainage District No. 1 v. Village of Hershey* 138
2. The policy or impolicy of statutory provisions is the exclusive function of the lawmaking body and not of courts. *State ex rel. Herman v. City of Grand Island* 150
3. 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. *Wessel v. City of Lincoln* 357
4. 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. *Wessel v. City of Lincoln* 357
5. The fact that a corporation is organized under a statute does not operate to estop it to deny the constitutionality

of an independent and separable provision of the same legislative act. *May v. City of Kearney* 475
6. The appointment by the Supreme Court of district judges to serve as appraisers in condemnation proceedings is not in violation of the Constitution. *May v. City of Kearney* 475
7. A legislative act which provides for notice and hearing before an impartial tribunal on the question of just compensation, with a right of appeal limited to the record made before such tribunal, does not violate the due process clauses of the state and federal Constitutions. *May v. City of Kearney* 475
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9. A condemnation statute does not offend against the due process clauses of the state and federal Constitutions in failing to provide for notice and hearing on the question of the right to or the regularity of the taking. *May v. City of Kearney* 475
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11. Constitutional questions will not be decided in a mandamus proceeding unless they are necessary to a determination of the case and the protection of some right, nor will they be decided before the time the statute becomes operative to affect the rights of parties who question its constitutionality. *State ex rel. Nelson v. Butler* 638
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13. Constitutional guaranties of right to counsel under state and federal Constitutions do not extend to preliminary hearing before magistrate. *Roberts v. State* 658
14. In a regulatory act enacted under the police power, the legislature cannot invade the right of contract, impair rights of property, or restrict the courts in the consideration of evidence and the determination of title and ownership of property and contractual rights and obligations. *Blixt v. Home Mutual Ins. Co.* 717
15. When a jury in a criminal case disagrees and is properly discharged, a second trial upon the original charge, even though one or more degrees of the offense may have been

withdrawn from consideration of the jury on the first trial, does not constitute double jeopardy and does not violate due process clauses of state and federal Constitutions. *State v. Hutter* 798

16. Constitutional exemption from taxation of household goods of the value of $200 does not have the effect of exempting such property from sale for the payment of taxes assessed on other property of the tax debtor not exempt from taxation. *Ryder v. Livingston* 862

Contempt.

A prosecution for civil contempt is in the nature of a prosecution for crime, and where evidence relied upon is wholly circumstantial it must be such that it is susceptible of explanation upon no reasonable hypothesis consistent with innocence of person charged. *Gross v. Garfield County* 414

Contracts.

1. The cardinal rule in interpretation of contract is to ascertain the intention of the parties and give effect to that intention if it can be done consistently with legal principles. *Shepard v. Shepard* 12
2. Mutuality of contract consists in obligation on each party to do, or to permit something to be done, in consideration of the act or promise of other. *Garsick v. Dehner* 73
3. Ordinarily a unilateral mistake affords no ground for avoiding a contract, although it may do so where it results in a complete difference in subject matter so as to preclude existence of consideration, or where it is caused by or known to the other party. *Garsick v. Dehner* 73
4. Courts will not permit a party to avoid a contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form. *Garsick v. Dehner* 73
5. Under statute, where the pleading of performance of a condition precedent in a contract is controverted, the party pleading the performance of such condition precedent is required to establish the facts showing such performance. *Robinson Outdoor Advertising Co. v. Wendelin Baking Co.* 112
6. Under advertising contract, periodic painting of sign was a condition precedent to the right to exact payments. *Robinson Outdoor Advertising Co. v. Wendelin Baking Co.* 112
7. Value of property is a matter of judgment, and a contract based upon inadequate consideration will not be set

aside for that reason alone, unless the inadequacy is so great as to furnish of itself convincing evidence of fraud. *Rettinger v. Pierpont* 161

8. The terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof and the consideration for the original agreement is sufficient to sustain the new agreement. *Swanson v. Madsen* 815
9. Where a written contract has been breached, a subsequent parol agreement purporting to modify or change such contract requires a new consideration to be enforceable as a valid agreement. *Swanson v. Madsen* 815

Corporations.

1. In legal effect, a stockholder's suit is one by the corporation conducted by the stockholder as its representative, and the stockholder is only a nominal plaintiff, the corporation being the real party in interest. *Rettinger v. Pierpont* 161
2. A stockholder's suit is always one in equity, unless otherwise provided by statute. *Rettinger v. Pierpont* 161
3. A stockholder cannot sue, as a representative of the corporation, by bringing an action at law, notwithstanding the corporation could have recovered in an action at law. *Rettinger v. Pierpont* 161
4. Within the limits of their authority officers and directors of a corporation possess full discretionary power and, in the honest and reasonable exercise of such power, they are not subject to control by the stockholders or by the courts, at the instance of a stockholder. *Rettinger v. Pierpont* 161
5. In the absence of usurpation, fraud, or gross negligence, courts of equity will not interfere at the suit of dissatisfied stockholders, merely to overrule and control the discretion of directors on questions of corporate management, policy or business. *Rettinger v. Pierpont* 161
6. In action brought by corporation, or the shareholders on behalf of the corporation, against its directors or officers for misconduct, the necessary proof is of the same character as in an action brought by an individual against his agents, servants or employees for the misconduct. *Rettinger v. Pierpont* 161
7. An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders and is treated by courts of equity as a trustee. *Rettinger v. Pierpont* 161

8. Where the personal interests of corporate officers conflict with that of the corporation in a transaction, burden rests on officers to show transaction was fair and free from fraud and to account for trust funds traced into their hands. A third person in possession of alleged corporate assets does not have this burden unless some fraud is imputable to him. *Rettinger v. Pierpont* 161
9. An audit is made from the records of a company as shown by its books and, unless some special reason is shown therefor, an appraisal of the assets is no part of such audit. *Rettinger v. Pierpont* 161
10. Ordinarily the officers and directors are entitled to rely on the records of the company as reflecting its true condition. *Rettinger v. Pierpont* 161
11. A depreciation charge is an estimate of the average loss in value that a certain class of property will sustain over a fixed period of time. *Rettinger v. Pierpont* 161
12. A depreciation charge does not contemplate meeting the exact date when each item of a class of property will not longer be usable, but it is an estimate of what the average of all property of that class will depreciate. *Rettinger v. Pierpont* 161
13. Transactions between corporations having common officers and directors are presumptively fraudulent and the burden is upon such parties to sustain the transactions by clear and convincing evidence that they were fair. *Rettinger v. Pierpont* 161
14. Many factors have to be considered in fixing the value of property for sale purposes, for anything that will affect the selling price in the market enters into the term "value." *Rettinger v. Pierpont* 161
15. Articles of incorporation or bylaws which impair or destroy the obligations of contracts, or rights thereunder or vested rights, are invalid and unenforceable against a person whose contractual rights are materially impaired or destroyed thereby. *Hueftle v. The Farmers Elevator* 424
16. A majority of stockholders of a corporation cannot, by amending the articles or bylaws of the corporation, deprive the minority without their consent of their contractual rights to dividends under the articles and bylaws in effect when their stock was purchased. *Hueftle v. The Farmers Elevator* 424
17. A purchase of stock in corporation at time when a method is prescribed for amending the articles and bylaws does not confer authority to make amendments consti-

tuting a fundamental change in nature, purposes, and objects of the corporation, or to impair contract rights of minority stockholders. *Hueftle v. The Famers Elevator* 424

Costs.

1. Generally, a representative of an estate is personally liable for costs when he appeals unsuccessfully in his own interest, or when an appeal results from his own fault or misconduct. *In re Estate of Jurgensmeier* 459
2. The litigant to whom fee for services of guardian ad litem should be taxed depends upon the circumstances of each particular case and the discretion of the court. *In re Estate of Jurgensmeier* 459

Counties.

1. County authorities are prohibited by the Constitution from assessing taxes in any one year the aggregate of which exceeds fifty cents for each one hundred dollars valuation unless authorized to do so by a vote of the people. *Warren v. County of Stanton* 220
2. It is unlawful for the county board of any county to issue warrants for any amount exceeding the aggregate of eighty-five per cent of the amount levied by tax for the current year, except there be money in the treasury to the credit of the proper fund for the payment of the same. *Warren v. County of Stanton* 220
3. County boards cannot issue certificates of indebtedness, make contracts for or incur indebtedness in any form in payment of any account or claim, or make contracts for or incur indebtedness against the county in excess of the tax levy for county expense during the current year. *Warren v. County of Stanton* 220
4. A county is prohibited from making any expenditure, and the county board is prohibited from contracting for indebtedness to be paid out of the funds of the county, in excess of the amount levied for the particular fund. *Warren v. County of Stanton* 220
5. Where warrants have been issued in violation of statute, the county is not liable thereon, but action may be had against the county board or any member thereof. *Warren v. County of Stanton* 220
6. Warrants issued by a county in excess of the limitation fixed by law are void, no action may be maintained thereon, and their payment may be enjoined. *Warren v. County of Stanton* 220

Courts.

1. County courts have original jurisdiction in all matters of probate. *In re Estate of Donlen* 370
2. The term "court" means a permanent organization for the administration of justice, and does not include those special tribunals that are occasionally called into existence by particular exigencies and cease to exist with such exigencies. *May v. City of Kearney* 475
3. County court has original and exclusive jurisdiction in all matters of probate and the only jurisdiction which the district court can acquire with reference thereto is by appellate procedure. *In re Estate of Marsh, Messecar v. Marsh* 559
4. Appeals in probate matters confer upon the district court the same power possessed by the county court. *In re Estate of Marsh, Messecar v. Marsh* 559
5. After an appeal has been taken in probate matters to the district court, the county court has no further jurisdiction over the issues removed. After trial in the district court, the result, not the case itself, is certified back to the county court. *In re Estate of Marsh, Messecar v. Marsh* 559
6. Purpose of statute creating juvenile courts was not to provide additional courts for punishment of crime, but to establish special tribunals having jurisdiction of cases relating to the moral, physical and mental well-being of children to the end that they might be directed away from paths of crime. *State v. McCoy* 750
7. Juvenile courts do not have the sole or exclusive jurisdiction of children under eighteen years of age who have violated the law. *State v. McCoy* 750

Criminal Law.

1. If a plea in abatement raises an issue of fact it must be determined by a jury, but if it raises only a question of law, the court may properly determine it. *Cramer v. State* 88
2. A defendant cannot properly dispute the record made by an examining magistrate in a preliminary hearing by a plea of abatement in the district court. *Cramer v. State* 88
3. If the findings and judgment of an examining magistrate do not correctly reflect the record, proper steps should be taken to correct it in the court where it was entered. *Cramer v. State* 88
4. A plea in abatement is a dilatory plea, not favored by courts, which must be pleaded with strict exactness, and

any material variance between the pleading and proof is fatal to the plea. *Cramer v. State* 88

5. In a criminal case the trial court is invested with a broad judicial discretion in ruling on an application to require the state to produce documentary evidence for inspection of defendant's counsel before trial, and error may be predicated only for an abuse thereof. *Cramer v. State* 88
6. Admissibility in evidence of confession is for court to determine in first instance, and if the court determines as a matter of law that it was not voluntary, the confession should be rejected; and where the confession is received in evidence, the question of whether it was voluntarily made is still a fact question to be determined by the jury. *Cramer v. State* 88
7. A confession otherwise voluntary is not affected by the fact that improper inducements had been previously made, where it appears that such inducements were not operating when confession was made. *Cramer v. State* .. 88
8. An argument by a prosecuting attorney, which is based on evidence and inferences drawn therefrom, does not ordinarily constitute misconduct. *Cramer v. State* 88
9. In all criminal cases, including those where a specific intent is an element of the crime, the accused, if sane, is presumed to intend the necessary or natural and probable consequences of his unlawful voluntary acts, knowingly performed. *State v. McDaniels* 261
10. In cases where specific intent is an element of the crime charged, the presumption that the accused intended the natural and probable consequences of his act, although rebuttable, is sufficient to establish a prima facie case and sustain a conviction. *State v. McDaniels* 261
11. The constitutional right of accused to have the assistance of counsel may be waived and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him. *In re Application of Tail, Tail v. Olson* 268
12. The fact that a defendant in an information is in prison, serving a sentence for another crime, gives him no immunity from prosecution. *Hawk v. Olson* 306
13. Every person accused of crime should be afforded reasonable opportunity to marshal his witnesses and prepare for trial, but mere procrastination should not be tolerated. *Hawk v. Olson* 306
14. On exceptions by the state to rulings of district court in criminal case, Supreme Court will not decide question

presented until final order has been entered in the court below completely disposing of action. *State v. Hutter*.... 312

15. Objection that a preliminary hearing has not been had is waived unless the defendant raised that question before he enters plea of not guilty in district court. *Roberts v. State*.... 658
16. A preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of the Constitution guaranteeing a right of trial by jury. *Roberts v. State*.... 658
17. In the absence of statute, a person accused of crime is not entitled as of right to representation by counsel upon preliminary examination. *Roberts v. State*.... 658
18. Statute requiring assignment of counsel in certain cases to an accused person, who has not the ability to procure counsel, does not extend to the preliminary hearing. *Roberts v. State*.... 658
19. Plea of guilty on arraignment before a committing magistrate is admissible against accused as a confession on the trial of offense charged. *Roberts v. State*.... 658
20. It is highly improper for prosecuting attorney in criminal case to declare his personal belief in defendant's guilt unless such belief is given as a deduction from the evidence. *Roberts v. State*.... 658
21. In a criminal trial where the jury is discharged for failure to agree, such discharge is without prejudice to further prosecution. *State v. Hutter*.... 798
22. A defendant cannot successfully plead former jeopardy when the jury before whom he was first on trial was discharged with his consent. *State v. Hutter*.... 798
23. When a jury in a criminal case disagrees and is properly discharged, a second trial upon the original charge, even though one or more degrees of the offense may have been withdrawn from consideration of the jury on the first trial, does not constitute double jeopardy and does not violate due process clauses of state and federal Constitutions. *State v. Hutter*.... 798
24. Attorney General has same authority to cause criminal proceedings to be reviewed on exceptions in Supreme Court as county attorney. *State v. Hutter*.... 798

Damages.

When a statute commands or prohibits a thing for benefit of a person, he has a remedy upon the statute for the thing enacted for his benefit or for the wrong done him contrary to its terms, but it must be affirmatively shown

that the person suffered injury as result of failure of other party to comply with statute. *Smith v. Morton Motor Co.* 396

Deeds.

1. It is essential to the validity of a deed that there be a delivery, and burden of proof rests upon party asserting it to establish delivery by a preponderance of the evidence. *Lewis v. Marker* 763
2. To constitute a valid delivery of a deed there must be an intent on the part of the grantor that the deed shall operate as a muniment of title to take effect immediately. *Lewis v. Marker* 763
3. Where an unrecorded deed is found after death of grantor in a safety deposit box to which grantor and grantee had joint access, this of itself will not sustain a finding that deed was delivered when grantor retained control of property. *Lewis v. Marker* 763

Descent and Distribution.

1. Agreements for a family settlement of an estate are not contrary to public policy, and are enforceable. *In re Estate of Donlen* 370
2. Where an ancestor dies intestate his lands descend instantly to his heirs, and it does not require settlement of his estate or a probate order declaring heirship to vest title. *J. H. Melville Lumber Co. v. Maroney* 374
3. Where title to real estate descends and vests in heirs, the right to possession goes with it, except that administrator has the option to claim possession for the purposes indicated by statute. *J. H. Melville Lumber Co. v. Maroney* 374
4. By statute the legislature has safeguarded the rights of inheritance by married persons and provided the methods by which such rights may be barred. *Focht v. Wakefield* .. 568
5. Legislature has placed husband and wife on a parity with reference to right of inheritance and contracting with each other. *Focht v. Wakefield* 568
6. An heir stands in privity with an ancestor. *Focht v. Wakefield* 568
7. Where a husband or wife conveys property direct to the other, the right of inheritance attaches in the grantor concurrently with the vesting of the title in the grantee. *Focht v. Wakefield* 568
8. Where a perpetual easement is granted to the owner of a dominant tenement, his heirs and assigns, charging the owner of the dominant tenement with annual payments

to the owner of the servient tenement, his heirs, successors and assigns, there is a right of severance to receive annual payments. Such right may pass by inheritance or conveyance. *Frye v. Sibbett* 600

Disbarment.

1. In action for disbarment of an attorney the presumption of innocence applies and his culpability must be established by a clear preponderance of the evidence. *State ex rel. Nebraska State Bar Assn. v. Gudmundsen* 324
2. The degree of proof in a disbarment proceeding being higher than that required to sustain a judgment in a civil action, the finding and judgment of culpability of an attorney in a civil action are not conclusive in a disbarment proceeding. *State ex rel. Nebraska State Bar Assn. v. Gudmundsen* 324
3. Failure to file exceptions to report of referee in disbarment proceedings within time provided by rules of Supreme Court is not jurisdictional. *State ex rel. Nebraska State Bar Assn. v. Gudmundsen* 324
4. Where exceptions to report of referee in disbarment proceedings have not been filed, the Supreme Court may either consider the findings of the referee final and conclusive or may enter such order as the evidence and law require. *State ex rel. Nebraska State Bar Assn. v. Gudmundsen* 324

Divorce.

1. If requirements for residence within the state have been complied with, the district court has jurisdiction to hear and determine an action for divorce in any county in the state where the parties, or one of them, reside. *Burns v. Burns* 213
2. Residence in a community is determined by the intention of the parties. *Burns v. Burns* 213
3. Where the unity of the marriage relation is breached by the husband's misconduct, the wife may acquire a separate domicile. *Burns v. Burns* 213
4. Where residence of plaintiff was in this state at time he entered into military service, he did not lose residence by being required to live at army posts in other states or countries and was entitled to maintain suit for divorce in this state. *Means v. Means* 441
5. The matter of primary concern in awarding custody of child in divorce action is its welfare and best interests. *Means v. Means* 441
6. Where mother lives outside the jurisdiction of the court

at time of divorce action and has not shown herself willing or able to properly care for child, and father is a fit and proper person to have its custody, and during his service in army his mother will give child a good home, father will be given its legal custody. *Means v. Means*.... 441

7. In determining the question of alimony, the court will consider the respective ages of the parties, their earning ability and station in life, their health and physical condition, the duration of the marriage and the conduct of each during its existence, the circumstances and necessities of each, and whether the property was accumulated before or after marriage and from all such elements determine the rights of the parties. *Martin v. Martin*..... 655
8. The allowance of alimony in the form of an annuity, or requiring the husband to pay a fixed sum during the life of the wife or for an indefinite period, is generally not approved. *Martin v. Martin*..... 655
9. In allowing permanent alimony the court will consider the respective ages of the parties to the marriage, their earning ability, the duration of and the conduct of each party during the marriage, their station in life, the circumstances and necessities of each, their health and physical condition, whether the property was accumulated before or after the marriage, and all other circumstances bearing upon the question. *Lillie v. Lillie*..... 683
10. Alimony and maintenance of children, if included in same decree, should be separated into distinct items and not included in one sum. *Dunlap v. Dunlap*..... 735
11. An unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, constitutes an absolute judgment and is not subject to modification at will by the court. *Dunlap v. Dunlap*..... 735
12. In absence of unqualified allowance of alimony in gross, court has power, upon petition and showing, to revise and alter its awards of alimony as to future payments. *Dunlap v. Dunlap*..... 735
13. Basis for revising alimony payments in the future must be founded upon new facts which have occurred since decree was entered and, in the absence of such facts, the matter is deemed res adjudicata between the parties. *Dunlap v. Dunlap*..... 735
14. No specific words of reservation are necessary as a foundation for right to modify decree, and such right automatically exists unless decree defines and limits the

rights of the parties with such completeness and finality as to be capable of and intended as a present vesting. *Dunlap v. Dunlap* 735

15. Generally, the Supreme Court does not approve of allowing alimony in the form of an annuity, or requiring the husband to pay a fixed sum each month during the life of the other party, or for an indefinite period of time. *Dunlap v. Dunlap* 735
16. The judgment of the trial court fixing the amount of alimony will not be disturbed on appeal unless good cause is shown. *Krenzer v. Krenzer* 789

Domicile.

1. A person does not change his legal residence by removal to new dwelling place without intention to make new dwelling place his home. *Means v. Means* 441
2. One's legal residence is where he has his established home and to which, when absent, he intends to return. To effect a change there must not only be a change of residence, but an intention to permanently abandon former residence. *Means v. Means* 441
3. The residence of a person in military service is not affected by such service, and he does not abandon residence he had when he entered such service by being required to live elsewhere. *Means v. Means* 441

Drains.

1. The fundamental purpose of drainage improvement is that it will be conducive to health, convenience and welfare of the public, and, as such, is a subject of general public concern. *Drainage District No. 1 v. Village of Hershey* 138
2. The assessment of benefit units for drainage improvement to streets and alleys of a village within a drainage district cannot be ascertained to an exact nicety of apportionment. *Drainage District No. 1 v. Village of Hershey* 138
3. Assessment of benefit units to streets and alleys of village for drainage improvement was properly made and classified according to the relation the benefits to the village bore to the total benefit in the drainage district. *Drainage District No. 1 v. Village of Hershey* 138

Easements.

1. An "easement appurtenant" belongs exclusively to and passes with the land to which it is appurtenant. *Frye v. Sibbett* 600

2. An easement is the right in the owner of a parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner. *Frye v. Sibbett* 600
3. Where a perpetual easement is granted to the owner of a dominant tenement, his heirs and assigns, charging the owner of the dominant tenement with annual payments to the owner of the servient tenement, his heirs, successors and assigns, there is a right of severance to receive annual payments. Such right may pass by inheritance or conveyance. *Frye v. Sibbett* 600
4. Proper parties to bring action to enforce lien under instrument granting an easement are those who hold title to servient tenement at time of default if there has been no severance, and if there has been a severance, those who have succeeded to the right by reason of division or severance. *Frye v. Sibbett* 600
5. Where by the terms of the instrument granting an easement it is clear that the benefits belong to the servient tenement in its entirety, such intention is controlling notwithstanding the easement of the dominant tenement affects directly and adversely only a portion of the servient tenement. *Frye v. Sibbett* 600
6. Right to an easement for a road from an inside governmental subdivision over adjoining land to section line passes from grantor of deed to grantee although not specifically mentioned in the deed. *Dormer v. Dreith* 742
7. Easement for road which has been established by adverse user for over ten years must be limited in width to that actually proved by the evidence to have been so used. *Dormer v. Dreith* 742

Elections.

1. An action to contest the purported election of a municipal officer is a matter of state-wide concern. *McMaster v. Wilkinson* 39
2. An election contest is neither an action at law nor a suit in equity; it is a summary proceeding of a political nature. *McMaster v. Wilkinson* 39
3. If ballots and boxes which contain them, when produced in court, have been substantially kept as required by law, and the court is satisfied that they have not been tampered with, and are in same condition as to markings as when cast, they may be admitted in evidence. *McMaster v. Wilkinson* 39

4. If several members of council are present when absentee and disabled voters' ballots are canvassed, there is a substantial compliance with the law although only the mayor and two councilmen sign the poll book containing the names of such voters. *McMaster v. Wilkinson* 39
5. The right to an office by virtue of an election by the required number of votes cannot ordinarily be defeated by the mistakes or careless, but not willful, misconduct of a canvassing board. *McMaster v. Wilkinson* 39
6. Mere irregularities of city clerk in not keeping poll book of absent voters in form provided by law will not deprive bona fide elector of his right to have his vote counted, if elector has met all requirements on his part to be performed. *McMaster v. Wilkinson* 39
7. Laws regulating the privilege of absentee voting generally receive a strict construction. *McMaster v. Wilkinson* 39
8. Absentee voting is a privilege granted an elector, and is not an absolute right. *McMaster v. Wilkinson* 39
9. When the venue stated in the jurat to affidavit on envelope containing absent voter's ballot does not agree with the commission of the notary shown by the seal affixed to affidavit, the ballot contained in the envelope is illegal. *McMaster v. Wilkinson* 39
10. When illegal ballots have been cast, the loss due to such ballots should be so apportioned that each candidate shall have deducted a share of them, proportioned according to whole number. *McMaster v. Wilkinson* 39

Eminent Domain.

1. Under statute, issuance of revenue bonds for acquisition of electric light and power plant was required to be submitted to electors for approval. *May v. City of Kearney* .. 475
2. The appointment by the Supreme Court of district judges to serve as appraisers in condemnation proceedings is not in violation of the Constitution. *May v. City of Kearney* 475
3. A legislative act which provides for notice and hearing before an impartial tribunal on the question of just compensation, with a right of appeal limited to the record made before such tribunal, does not violate the due process clauses of the state and federal Constitutions. *May v. City of Kearney* 475
4. Eminent domain is an attribute of sovereignty and inherently exists in the state, and except as limited by the Constitution, the legislature may provide for its exercise in any manner it sees fit. *May v. City of Kearney* 475

5. There is no constitutional limitation on the right to take property for public use under the power of eminent domain except the payment of just compensation, and the extent, method and necessity of exercising the power presented by the legislature may not be interfered with by the other departments of government. *May v. City of Kearney* 475
6. In condemnation proceedings, an owner of property must be given his day in court on the question of payment of just compensation, but he has no right and the statute need not provide a day in court on the question of the right of the state to take the property. *May v. City of Kearney* 475
7. A condemnation statute does not offend against the due process clauses of the state and federal Constitutions in failing to provide for notice and hearing on the question of the right to or the regularity of the taking. *May v. City of Kearney* 475
8. Owner of property may be left to other appropriate remedies to contest whether or not the use is public or the statutory proceedings have been followed without violation of due process of law. *May v. City of Kearney* 475
9. Eminent domain is the right or power to take private property for public use. Although it may be exercised through the medium of municipalities or other agencies in the public interest, it is always subject to control and regulation by the state and is a matter of state-wide concern. *State ex rel. Nelson v. Butler* 638
10. While power of eminent domain may be delegated, legislature cannot divest itself of the power or deprive itself of the right to reclaim its primary prerogative to exercise the power as it sees fit within the limitations contained in the Constitution. *State ex rel. Nelson v. Butler* 638
11. Only those agencies to whom the legislature has delegated the power of eminent domain can exercise it and it must be exercised only on the occasions in the mode or manner, and by the agency prescribed by the legislature. *State ex rel. Nelson v. Butler* 638
12. If the right to exercise the power of eminent domain is delegated by the legislature to a municipality upon a contingency that it shall become operative when its governing body shall determine by resolution to exercise the power, such a resolution is executive or administrative in character and not subject to referendum. *State ex rel. Nelson v. Butler* 638

Equity.

1. Equity looks to the nature of the injury inflicted and its recurrence, rather than to the magnitude of the damage inflicted, as ground of affording relief. *Yocum v. Labertew* 120
2. Courts of equity are not restricted by the same rigid rules as courts of law in the investigation of fraud and in proof required to establish it. *Rettinger v. Pierpont* 161
3. When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction. *May v. City of Kearney* 475
4. Equity will not afford relief against a judgment if the complainant has an adequate remedy by statutory proceedings in the original action. *In re Estate of Marsh, Messecar v. Marsh* 559
5. Equity will not afford relief if the complainant has a remedy by statutory proceedings in the original action. *Bend v. Marsh* 780
6. When the laches of the plaintiff and the staleness of his claim are apparent, objection may be taken by demurrer. *Bend v. Marsh* 780
7. Independently of any statute of limitations, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done in the particular case by granting the relief asked. *Bend v. Marsh* 780
8. In an equity action, the court may properly in its decree make a general finding for plaintiff and yet, on an accounting feature of the case, find that a certain amount is still due the defendant, and direct that defendant shall pay the costs. *Young v. Card* 857

Escape.

A sentence committing a person to the penitentiary, even though it might be reversed on appeal or set aside on habeas corpus, is effective to sustain a conviction of breaking custody and escaping therefrom. *Stinehagen v. Olson* 653

Estoppel.

1. The doctrine of estoppel cannot be applied as against a county to validate a contract which it had no power to make or where it was made in express violation of a prohibitory law. *Warren v. County of Stanton* 220
2. Failure of municipal officers to perform their statutory

duty cannot estop the municipality to invoke the statute of limitations. *Chaffee v. City of Omaha* 418
3. A municipality may be estopped by its official acquiescence in and approval of acts originally unauthorized. *May v. City of Kearney* 475
4. Ordinarily equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where controversy is between one class of the public as against another class. *May v. City of Kearney* 475
5. The doctrine of estoppel is commensurate with the thing represented and operates to place the party entitled to its benefits in the same position as if the thing represented were true. *May v. City of Kearney* 475
6. An estoppel enforceable against the ancestor is likewise enforceable against the heir. *Focht v. Wakefield* 568

Evidence.
1. In an action on contract, burden rests on plaintiff to show fulfillment of a condition precedent to his right of recovery. *Robinson Outdoor Advertising Co. v. Wendelin Baking Co* 112
2. In the absence of pleading and proof to the contrary, the laws of another state will be presumed to be like those of Nebraska. *In re Application of Blackwell, Blackwell v. Pszanowski* 256
3. A nonexpert witness who is shown to have had an intimate acquaintance with a person may be permitted to state his opinion as to mental condition of such person, if such condition is a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based. *In re Estate of Witte* 295
4. A witness in giving his opinion as to mental capacity of testator to make a will must have in mind the quality of mental capacity essential to making of a valid will. *In re Estate of Witte* 295
5. An expert witness will be permitted to give his opinion as to mental capacity to make a will if it is predicated on a proper and sufficient foundation. *In re Estate of Witte* .. 295
6. The opinion of a medical expert must be predicated on examination and observation of the person who is the subject of inquiry, examination and history, or supposed facts of which there is evidence. *In re Estate of Witte* .. 295
7. Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses, will be sufficient, pro-

vided the subject is one proper for expert testimony. *Wessel v. City of Lincoln* 357
8. The evidence of an expert is ordinarily sufficient to sustain a verdict, providing the facts upon which it is based have been established. *Wessel v. City of Lincoln* 357
9. The value of the opinion of an expert witness is dependent on the facts on which it is predicated, and unless the premises upon which it is based are shown to be true, the opinion has no probative force. *Williams v. Watson Bros. Transportation Co.* 466
10. Tire tracks made on a highway by the collision of motor vehicles are circumstantial evidence to be considered by jury along with all the other evidence in the case. *Howerter v. Olson* 517
11. In the absence of proof to the contrary, the laws of a sister state will be presumed to be the same as the laws of this state. *Howerter v. Olson* 517
12. Whether the death of an insured resulting from cerebral thrombosis and a coronary occlusion was caused by accident or existing disease and infirmity was a proper subject of medical opinion. *Long v. Railway Mail Assn.* 623
13. If the testimony upon an issue is largely circumstantial, or enshrouded in doubt or ambiguity, any collateral fact or circumstance tending in any reasonable degree to establish the probability or improbability of the fact in issue is relevant evidence and proper for the consideration of the jury. *In re Estate of House* 670
14. In an action to recover for death by accident, when the causal connection between bodily injury and subsequent death is a scientific question, expert medical testimony may be relied upon by the jurors in arriving at their verdict. *McNaught v. New York Life Ins. Co.* 694
15. The opinions of medical experts are not conclusive upon the jury, but are to be weighed like all other evidence. *McNaught v. New York Life Ins. Co.* 694
16. Where an expert witness gives an opinion based upon facts established by the record upon a matter recognized as a proper subject of expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain a verdict. *McNaught v. New York Life Ins. Co.* 694
17. The opinion of an expert witness as to the condition of an injured or diseased person is not rendered incompetent because based upon the history of the case given by the patient to the expert witness on his examination of the patient, when the examination was made for the pur-

pose of treatment and cure. *McNaught v. New York Life Ins. Co.* 694
18. When the attending physician signs a death certificate, and on the trial of the case testifies to all the medical facts set forth therein, the admission in evidence of the death certificate is not prejudicially erroneous. *McNaught v. New York Life Ins. Co.* 694
19. One who is shown to be acquainted with property and its fair and reasonable value in the market is competent to testify as to such value. *Hansen v. Village of Ralston* 838

Executors and Administrators.
1. Where grantee in deed is named as the "Estate" of a deceased person instead of executor of the estate, as intended by grantors and grantee, such deed may be reformed in equity by inserting the name of executor as grantee and when thus reformed legal title vests in the executor. *Fisher v. Standard Investment Co.* 80
2. Neither guardian nor ward possesses the power to consent to purchase of property by executor, and guardian cannot ratify sale so as to bind ward. *In re Estate of Jurgensmeier* 459
3. In estate proceedings it is the duty of the court to protect all parties, whether actually before the court or not. *In re Estate of Jurgensmeier* 459
4. Generally, a representative of an estate is personally liable for costs when he appeals unsuccessfully in his own interest, or when an appeal results from his own fault or misconduct. *In re Estate of Jurgensmeier* 459
5. In a controversy over surcharging the account of the representative of an estate, an attorney's fee should be allowed when the account is upheld and denied where the account is not upheld. *In re Estate of Jurgensmeier* 459
6. An estate of a decedent is liable for an attorney's fee for services rendered at the request of a legatee when the services were beneficial to it. *In re Estate of Jurgensmeier* 459
7. The representative of an estate should be charged with interest from the date of any unauthorized act by which he has abused his trust and is surcharged by reason thereof. *In re Estate of Jurgensmeier* 459
8. County court has original and exclusive jurisdiction in all matters of probate and the only jurisdiction which the district court can acquire with reference thereto is by appellate procedure. *In re Estate of Marsh, Messecar v. Marsh* 559

9. Appeals in probate matters confer upon the district court the same power possessed by the county court. *In re Estate of Marsh, Messecar v. Marsh* 559
10. After an appeal has been taken in probate matters to the district court, the county court has no further jurisdiction over the issues removed. After trial in the district court, the result, not the case itself, is certified back to the county court. *In re Estate of Marsh, Messecar v. Marsh* 559
11. A probate proceeding is a proceeding in rem, and every one interested therein is a party in the probate court whether he is named or not. *In re Estate of Marsh, Messecar v. Marsh* 559
12. Parties to a probate proceeding, including contest of a will, do not have power to dismiss the proceeding, but county court, and district court on appeal, have such power and may, in their discretion, dismiss the same. *In re Estate of Marsh, Messecar v. Marsh* 559
13. By statute probate court is under mandatory duty to appoint the person or persons named by the deceased as executor of his estate when will is admitted to probate unless such person named is expressly disqualified by statute or is, for good cause shown, not legally competent. *In re Estate of Haeffele* 809

Fixtures.

1. Conditional sales contracts contemplate that property shall retain its character as personalty, but do not apply to such articles of personalty as are sold for the purpose of being incorporated in a building and becoming a part of realty. *Columbian Steel Tank Co. v. Vosika* 541
2. Where removal of property sold under conditional sales contract is sought, the vendor may exercise his right of ownership and obtain possession if such possession can be obtained and removal had without material injury to the realty. *Columbian Steel Tank Co. v. Vosika* 541

Fraud.

1. Fraud is never presumed, but must be clearly proved. *Rettinger v. Pierpont* 161
2. Courts of equity are not restricted by the same rigid rules as courts of law in the investigation of fraud and in proof required to establish it. *Rettinger v. Pierpont* 161
3. Proof of fraud in a court of equity must be sufficient to satisfy conscience of court, and to do this, it must be sufficient to overcome the presumption that men are honest and act from correct motives. *Rettinger v. Pierpont* 161

4. Inferences or presumptions of fraud may be drawn from facts and circumstances, but such inferences or presumptions must not be guess work or conjecture but must be rational and logical deductions from the facts and circumstances from which they are inferred. *Rettinger v. Pierpont* 161
5. Courts should content themselves with determining from the facts in each case whether fraud exists, for whatever satisfies the mind and conscience that fraud has been practiced is sufficient. *Rettinger v. Pierpont* 161
6. To be entitled to equitable relief against the enforcement of a judgment, the party seeking the relief must not have neglected to avail himself of a statutory remedy. *In re Estate of Marsh, Messecar v. Marsh* 559
7. To be entitled to equitable relief against the enforcement of a judgment procured by fraud, the party must not have neglected to avail himself of a statutory remedy. *Bend v. Marsh* 780

Frauds, Statute of.
1. In suit to enforce an oral agreement within the statute of frauds on the ground of part performance, the part performance must refer to, result from, or be in pursuance of the oral contract sought to be enforced, and not from some other relation. *Diez v. Rosicky* 242
2. To sustain an oral agreement within the statute of frauds on the ground of part performance, the evidence must be clear, satisfactory and unequivocal. *Diez v. Rosicky* 242
3. In order to enforce an oral contract for conveyance of real estate, the evidence of the contract and its terms must be clear, satisfactory and unequivocal, and the performance thereof must be such as is referable solely to the contract sought to be enforced. *Lintz v. Apking* 714
4. A subsequent parol agreement purporting to modify or change a contract required to be in writing by the statute of frauds is not enforceable unless there is a new consideration or unless the new agreement has been fully executed. *Swanson v. Madsen* 815

Fraudulent Conveyances.
1. Property which is exempt by law from liability for owner's debts is not susceptible of fraudulent alienation. *Bratrsovsky v. Nestor* 614
2. In an action by vendee of exempt property to quiet title against judgment creditors of vendor, fraud is an immaterial issue. *Bratrsovsky v. Nestor* 614

3. A conveyance from husband to wife of exempt property passes title unencumbered by judgments against the husband, although the purpose of such conveyance may have been to defraud creditors. *Bratrsovsky v. Nestor* 614
4. The question of fraudulent intent is to be considered as of the time when the conveyance is made with reference to the particular conveyance alleged to be fraudulent. *Bratrsovsky v. Nestor* 614
5. When an alleged fraudulent conveyance involves the homestead, the value of the property becomes an element and the value is to be determined as of the time the conveyance is made. *Bratrsovsky v. Nestor* 614

Gifts.

1. If a witness testifying to a gift inter vivos is creditable, and there is no evidence in opposition thereto, the question becomes one of sufficiency rather than the weight of the evidence. *In re Estate of Vanicek* 531
2. Postal savings certificates may be the subject of a valid gift inter vivos, and the transaction may be completed by the voluntary transfer of possession, even though they are nonnegotiable. *In re Estate of Vanicek* 531
3. A gift inter vivos from a father to a child is a natural one, and less evidence is required to establish such a gift than to a stranger. *In re Estate of Vanicek* 531
4. To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property as well as a delivery by the donor and an acceptance by the donee. *In re Estate of Vanicek* 531
5. A transfer inter vivos should be sustained if the facts and circumstances show the desire and the act completed, whatever may have been the method adopted. *In re Estate of Vanicek* 531

Guardian and Ward.

1. Before investing a ward's funds, a guardian should file written application with the probate court, and that court should give proper notice and enter a written order authorizing the specific investment. *In re Guardianship of Morris* 319
2. Where guardian has failed to comply with the law for the investment of his ward's funds, and has made an unauthorized loan, it is not necessary that such guardian shall have embezzled and converted to his own use the funds of his ward's estate, in order to charge the guardian with the legal rate of interest. *In re Guardianship of Morris* 319

3. Where a guardian fails to abide by law for investment of funds of his ward's estate and a loss ensues, he is chargeable with the full amount of the principal of the unauthorized loan and interest at the legal rate from date of making the loan until settlement is had thereon and approved by county court. *In re Guardianship of Morris* 319
4. Where a guardian is required to account for an unauthorized loan and interest thereon, the ward's estate is not liable for attorneys' fees to be paid to the guardian's attorneys. *In re Guardianship of Morris* 319
5. Neither guardian nor ward possesses the power to consent to purchase of property by executor, and guardian cannot ratify sale so as to bind ward. *In re Estate of Jurgensmeier* 459
6. The litigant to whom fee for services of guardian ad litem should be taxed depends upon the circumstances of each particular case and the discretion of the court. *In re Estate of Jurgensmeier* 459

Habeas Corpus.

1. Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant, and it cannot be used as a substitute for a writ of error. *In re Application of Tail, Tail v. Olson* 268
2. The right of a person to a writ of habeas corpus depends on the legality or illegality of his detention, and this in turn depends on whether the fundamental requirements of law have been complied with, and not on the guilt or innocence of the prisoner. *In re Application of Tail, Tail v. Olson* 268
3. A petition for writ of habeas corpus must set forth facts, not conclusions, sufficient to state the reason the detention is illegal. *In re Application of Tail, Tail v. Olson* 268
4. Where application for writ of habeas corpus states facts which, if true, would entitle petitioner to discharge, writ is a matter of right and petitioner should be produced for hearing to determine question of fact presented. *In re Application of Tail, Tail v. Olson* 268
5. Where application for writ of habeas corpus states facts which disclose that petitioner is not entitled to relief, the writ should be denied. *In re Application of Tail, Tail v. Olson* 268
6. The denial of an application and refusal to allow a writ of habeas corpus is a final order affecting a substantial

right made in a special proceeding which, in effect, terminates the action and is reviewable on appeal to the Supreme Court. *Williams v. Olson* 282
7. Principle of res adjudicata applies in cases of habeas corpus and bars relief sought in a subsequent action based upon the same facts and reasons set forth in prior action. *Williams v. Olson* 282
8. The final adjudication in a habeas corpus proceeding is conclusive in the matters there determined, as against a subsequent application. *Williams v. Olson* 282
9. If application for writ of habeas corpus states facts which, if true, would entitle petitioner to discharge, writ is a matter of right and should be issued to produce petitioner for a hearing. If application states facts showing that petitioner is not entitled to relief, writ should be denied. *Hawk v. Olson* 306
10. The guilt or innocence of one accused or convicted of a crime is not justiciable in habeas corpus. *Hawk v. Olson* 306
11. A writ of habeas corpus is not a writ for the correction of errors and will not be allowed to be used for that purpose. *Hawk v. Olson* 306
12. Habeas corpus is not recognized as a remedy to review a judgment and it cannot take the place of a writ of error. *Hawk v. Olson* 306

Homestead.
1. A homestead is the land and buildings occupied by the owner as a home for himself and family, protected by law from his creditors. *J. H. Melville Lumber Co. v. Maroney* 374
2. Statutory exemption of a homestead was intended for the benefit of the debtor, and should be liberally construed. *J. H. Melville Lumber Co. v. Maroney* 374
3. An undivided interest in real estate, accompanied by exclusive occupancy of the premises by the owner and his family as a home, is sufficient to support a homestead exemption. *J. H. Melville Lumber Co. v. Maroney* 374
4. Claimant of homestead exemption has a right to claim surplus money in lieu of his homestead exemption at any time before it is finally distributed. *J. H. Melville Lumber Co. v. Maroney* 374
5. Where a homestead is sold to satisfy a mortgage, the owner may have his homestead exemption set off to him from the surplus after payment of the mortgage, and before any of the proceeds are applied to debts which are

subject to the homestead exemption. *J. H. Melville Lumber Co. v. Maroney* 374
6. When an alleged fraudulent conveyance involves the homestead, the value of the property becomes an element and the value is to be determined as of the time the conveyance is made. *Bratrosovsky v. Nestor* 614

Homicide.
1. Evidence sustained conviction for murder in the first degree by administration of poison. *Cramer v. State* 88
2. Homicide constitutes one offense only, and the statutes defining first degree murder, second degree murder and manslaughter are gradations of the same crime devised for the purpose of adjusting the punishment to the atrocity of the offense. *State v. Hutter* 798
3. Ruling of trial court withdrawing from consideration of jury one or more degrees of homicide for the reason of insufficiency of evidence does not afford a basis for a plea of previous acquittal or former jeopardy when the jury disagrees and fails to reach a verdict. *State v. Hutter* 798
4. Where jury has been discharged for failure to agree on verdict, second trial should proceed under the original charge as if no previous trial had been had, and the defendant may be convicted, if the evidence warrants it, in any degree of homicide contained in the original charge. *State v. Hutter* 798
5. A dismissal of one or more degrees of homicide because of want of adequate evidence to support them will be construed as a withdrawal of such degrees from consideration by the jury. *State v. Hutter* 798
6. A plea in bar to a first degree murder charge, grounded on the fact that first and second degree charge was withdrawn from consideration on prior trial, is demurrable. *State v. Hutter* 798

Husband and Wife.
1. Right of husband and wife to contract with each other depends upon statute and instruction placed thereon by court. *Focht v. Wakefield* 568
2. Postnuptial contracts wherein rights of inheritance are settled are invalid. *Focht v. Wakefield* 568
3. Where husband and wife have entered into separation agreement wherein property rights are settled, and the agreement is fair and equitable and has been observed until the death of one of the parties, the survivor is estopped to assert the invalidity of the contract. *Focht v. Wakefield* 568

4. To assert estoppel against the invalidity of a postnuptial separation agreement, it is essential that there exist at the time of the separation agreement conditions upon which one of the parties could successfully institute divorce proceedings with the resultant allocation of property rights by the court. *Focht v. Wakefield* 568
5. A conveyance from husband to wife of exempt property passes title unencumbered by judgments against the husband, although the purpose of such conveyance may have been to defraud creditors. *Bratrsovsky v. Nestor* 614

Infants.
1. Purpose of statute creating juvenile courts was not to provide additional courts for punishment of crime, but to establish special tribunals having jurisdiction of cases relating to the moral, physical and mental well-being of children to the end that they might be directed away from paths of crime. *State v. McCoy* 750
2. Juvenile courts do not have the sole or exclusive jurisdiction of children under eighteen years of age who have violated the law. *State v. McCoy* 750
3. County attorney is not limited by Juvenile Court Act in any way in his duty to file proper complaints against wrongdoers and to prosecute the same. *State v. McCoy* .. 750
4. The courts are without authority to commit to the state industrial school a child who is over 16 years of age and who has not pleaded guilty to or been convicted of crime. *Ellingson v. Superintendent of State Industrial School for Girls* 851

Injunctions.
1. Injunction is proper remedy to prevent removal of impediment to flowage of water impounded by natural conditions. *Yocum v. Labertew* 120
2. A court of equity has jurisdiction to enjoin the maintenance of a nuisance, and, where the necessities of the case require, it may enjoin the operation of the business which occasions such nuisance. *State ex rel. Johnson v. Hash* 405
3. When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction. *May v. City of Kearney* 475

Insurance.
1. When certificate of insurance coverage is delivered to employee by the same insurance company that issued

master group policy to employer, the policy, application therefor, certificate delivered to employee, and all amendments and riders attached to each, constitute the entire contract between employee and insurer. *Uptegrove v. Metropolitan Life Ins. Co.* 51

2. A beneficiary of an insurance contract is the person who is entitled to the proceeds or benefits which accrue and become payable under contract. *Uptegrove v. Metropolitan Life Ins. Co.* 51
3. A policy providing for payment of disability benefits to the insured may be sued upon by representative of insured's estate where loss occurred before insured's death. *Uptegrove v. Metropolitan Life Ins. Co.* 51
4. A facility of payment clause is merely an appointment by agreement between the parties of persons who may receive payment of benefits or proceeds accruing under contract, give receipt therefor to insurer, in good faith discharge it from liability, and thereafter hold amount received for benefit of person ultimately entitled thereto. *Uptegrove v. Metropolitan Life Ins. Co.* 51
5. A facility of payment clause is for the benefit of insurer, to be exercised at its option, to enable it to make prompt payment without the expense of guardianship or administration proceedings, and remove a chance of litigation between claimants and insurer. *Uptegrove v. Metropolitan Life Ins. Co.* 51
6. A facility of payment clause does not change or modify the original contract with insured, or make the person therein designated to receive payment for him the beneficiary or owner of the proceeds, or give such person the right to maintain an action to compel insurer to make payment to him. *Uptegrove v. Metropolitan Life Ins. Co.* 51
7. A claim to proceeds of an industrial insurance policy is not affected by the facility of payment clause where insurer has failed to avail itself of the provision. *Uptegrove v. Metropolitan Life Ins. Co.* 51
8. A person having title to real estate not shared by anyone else and to which no condition is attached, even if title is voidable is the sole and unconditional owner within the meaning of a fire insurance policy. *Anderson v. Clay County Mutual Ins. Co.* 353
9. Where life insurance policy contains a clause providing for payment of total disability benefits and also a clause providing for cessation of payment of premiums during total disability, the cessation clause does not change the

liability created by the insuring clause. *Chard v. New York Life Ins. Co.* 429
10. Total disability, under policy of insurance providing for total disability benefits, means inability to do all the substantial and material acts necessary to the prosecution of the insured's business in his customary or usual manner. *Chard v. New York Life Ins. Co.* 429
11. Where different minds may reasonably draw different conclusions as to whether the facts establish liability for total disability, it is the duty of the trial court to submit the matter to the jury. *Chard v. New York Life Ins. Co.* 429
12. In insurance contracts, an accident includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550
13. Death is not effected by accidental means where insured brings an assault upon himself by his own wrongful acts, or voluntarily incurs an obvious hazard under such circumstances that he would be presumed to know that injury was likely to be inflicted. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550
14. Failure of accident policy to contain a clause excluding liability for violation of law is not always conclusive upon the question of liability. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550
15. If death results to an insured as the direct, natural and probable consequence of a violation of law criminal in nature, in which the insured was intentionally engaged at the time of his death, such death is not accidental. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550
16. In action on an accident insurance policy, it will not be presumed in any case that insured violated law but every such violation must be proved by competent evidence. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550
17. In suit on accident insurance policy, burden of proof rests upon plaintiff to show that death was accidental, but the law indulges in a presumption against suicide and murder, and against injuries resulting from a criminal assault or unlawful acts of the deceased. Such presumption is sufficient to establish a prima facie case. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550
18. Where plaintiff has made prima facie case with the aid of presumption against injuries resulting from criminal assault or unlawful acts of the deceased, defendant must go forward with evidence tending to overcome or

remove the presumption, and if competent evidence is adduced which is contrary or inconsistent to the presumption it disappears. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550

19. After evidence has been introduced by defendant to rebut presumption against injuries resulting from criminal assault or unlawful acts of deceased, plaintiff must again take the initiative and show by other evidence that death was accidental. However if defendant's evidence is consistent with or favorable to and supporting plaintiff's theory that death was accidental, plaintiff is entitled to benefit thereof. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550

20. An accident insurance policy insuring against death from accidental means alone, resulting directly, independently and exclusively of all other causes, and providing for no liability where disease, defect or bodily infirmity is a contributory cause of death, permits recovery when the accident is the active, efficient and precipitating cause which set in motion the agencies that resulted in death. *Long v. Railway Mail Assn.* 623

21. Where the evidence is conflicting as to whether an accident or existing disease caused the death of the insured, it is a question of fact to be determined by the jury. *Long v. Railway Mail Assn.* 623

22. A contributing cause of death from a medical standpoint is not necessarily the active, efficient and precipitating cause from a legal standpoint. *Long v. Railway Mail Assn.* 623

23. Whether the death of an insured resulting from cerebral thrombosis and a coronary occlusion was caused by accident or existing disease and infirmity was a proper subject of medical opinion. *Long v. Railway Mail Assn.* 623

24. If a disease be but a condition and an accident the active, efficient and precipitating cause, the accident will be deemed the cause of death within meaning of policy of insurance and the agencies set in motion by the accident will be treated as effects thereof. *Long v. Railway Mail Assn.* 623

25. In an action to recover for death by accident, when the causal connection between bodily injury and subsequent death is a scientific question, expert medical testimony may be relied upon by the jurors in arriving at their verdict. *McNaught v. New York Life Ins. Co.* 694

26. A provision in policy providing automatic insurance on newly acquired automobile is for benefit of insured, and

is effective from date of acquisition of automobile notwithstanding existence of infirmities in the title thereto. *Blixt v. Home Mutual Ins. Co.* 717

27. Ordinarily, it is within the power of an insurance agent to agree that insurance shall be in force after application is signed and premium paid and before a policy is actually written, unless the insured is apprised that the insurance will not be in force until application is approved at home office and the policy issued and delivered. *Schnell v. United Hail Ins. Co.* 768
28. An insurance company is bound by all acts and representations of its agent which are within the scope of his real or apparent authority, notwithstanding violation of private instructions or limitations upon his authority of which a person dealing with him and acting in good faith has neither actual nor constructive knowledge. *Schnell v. United Hail Ins. Co.* 768
29. Except as a right of cancellation is provided by statute or reserved in the policy, neither the insured nor the insurer can effect a cancellation without the consent of the other, and such cancellation can be effected only by strict compliance with the terms and conditions provided by contract and by statute. *Schnell v. United Hail Ins. Co.* 768
30. When an assessment hail insurance company is organized under laws of this state, the statute, articles of incorporation and the bylaws of the company, together with application for membership and the policy thereon, constitute the contract between the company and the insured. *Schnell v. United Hail Ins. Co.* 768
31. When insurance company, after receiving notice of loss, denies making of contract and all liability thereunder, or fails or refuses, within reasonable time, to proceed to take necessary steps required by statute for payment of loss, a right of action immediately accrues although contract provides all losses shall be payable 90 days after a date certain. *Schnell v. United Hail Ins. Co.* 768

Interest.

The representative of an estate should be charged with interest from the date of any unauthorized act by which he has abused his trust and is surcharged by reason thereof. *In re Estate of Jurgensmeier* 459

Judgments.

1. When a writ of mandamus is denied because it is not a proper remedy, the judgment rendered cannot be proper-

ly pleaded as res adjudicata. *Warren v. County of Stanton* 220
2. Domestic judgments cannot be collaterally impeached by the parties for collusion or fraud not going to the jurisdiction, and consent judgments are as conclusive on collateral attack as judgments rendered after a trial. *Warren v. County of Stanton* 220
3. In cases involving public interests, where the public was a party by representation only, the persons represented may show fraud or collusion in obtaining the judgment. *Warren v. County of Stanton* 220
4. If a judgment was collusive or by the consent of an officer as to a matter with respect to which he had no authority to bind the public, and it was not a decision by the court after a hearing on the merits, it is not res adjudicata as against the public interest involved. *Warren v. County of Stanton* 220
5. Principle of res adjudicata applies in cases of habeas corpus and bars relief sought in a subsequent action based upon the same facts and reasons set forth in prior action. *Williams v. Olson* 282
6. The final adjudication in a habeas corpus proceeding is conclusive in the matters there determined, as against a subsequent application. *Williams v. Olson* 282
7. Material facts or questions in issue in a former action which were there judicially determined are conclusively settled by a judgment rendered therein and become res judicata and may not again be litigated in a subsequent action. *In re Estate of Jurgensmeier* 459
8. The final judgment of a court of competent jurisdiction, adjudicating the right of any person to any sum deposited in a postal savings depository, is conclusive of the title thereto and a full discharge of the United States from the claim of any other person thereto. *In re Estate of Vanicek* 531
9. Equity will not afford relief against a judgment if the complainant has an adequate remedy by statutory proceedings in the original action. *In re Estate of Marsh, Messecar v. Marsh* 559
10. To be entitled to equitable relief against the enforcement of a judgment, the party seeking the relief must not have neglected to avail himself of a statutory remedy. *In re Estate of Marsh, Messecar v. Marsh* 559
11. To be entitled to equitable relief against the enforcement of a judgment procured by fraud, the party must

not have neglected to avail himself of a statutory remedy. *Bend v. Marsh* 780
12. In an equity action, the court may properly in its decree make a general finding for plaintiff and yet, on an accounting feature of the case, find that a certain amount is still due the defendant, and direct that defendant shall pay the costs. *Young v. Card* 857

Judicial Sales.
1. In the absence of abuse of judicial discretion, the district court on motion has power within the term to set aside an order confirming a judicial sale of real estate. *First Nat. Bank v. First Trust Co.* 147
2. An order confirming a judicial sale under mortgage foreclosure decree will not be reversed on appeal when there is no shocking discrepancy between the value and the sale price and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale. *Lincoln Trust Co. v. McDowell* 473
3. An order of the court confirming or refusing to confirm a judicial sale constitutes a final and appealable order. *Federal Farm Mortgage Corporation v. Ganser* 589

Juries.
1. The constitutional right to a trial by jury is confined to cases which were so triable under the common law, and an election contest, under provisions of statute, is not a suit in which such right is guaranteed. *McMaster v. Wilkinson* 39
2. Matters of opinion and arguments of jurors in jury room are considered as inhering in the verdict, and are not such matters of misconduct as can be proved by the jurors themselves. *In re Estate of Keup* 729
3. Matters of opinion and arguments of jurors in jury room are considered as inhering in the verdict, and are not such matters of misconduct as can be proved by the jurors themselves. *In re Estate of House* 866

Justices of the Peace.
1. In absence of statutory provision, proper manner of taking recognizance is to have magistrate repeat the terms of recognizance, have recognizors agree thereto, make a memorandum thereof which it is not necessary for the parties to sign, and from the memorandum draw up afterwards the recognizance in full form and certify it. *State ex rel. City of Sidney v. Bridd* 273

2. Where legislature requires written recognizance as condition to appeal, a written recognizance in the terms and conditions provided by statute, signed by proper parties, must be presented to the magistrate and in his presence acknowledged by the parties thereto in person and then certified by him. *State ex rel. City of Sidney v. Bridd*.... 273

Licenses.

A "profit á prendre" is the right exercised by one person in the soil of another accompanied by participation in the profits of the soil thereof. It does not embrace money to be paid for a use but only a profit to be obtained out of the produce of the land or out of some physical severance. *Frye v. Sibbett*.... 600

Liens.

1. Proper action to recover annual payments under instrument granting an easement is one to establish and enforce a lien against the lands described as the dominant tenement. *Frye v. Sibbett*.... 600
2. Proper parties to bring action to enforce lien under instrument granting an easement are those who hold title to servient tenement at time of default if there has been no severance, and if there has been a severance, those who have succeeded to the right by reason of division or severance. *Frye v. Sibbett*.... 600

Limitations of Actions.

1. Partial payments made on promissory note without the authority or consent of surety or joint obligor do not toll the statute of limitations as to such surety or joint obligor. *Meyer v. Linch*.... 1
2. Any promise to pay a debt or other existing liability in a cause founded on written contract, to prevent the running of the statute of limitations, must be in writing. *Meyer v. Linch*.... 1
3. Statute of limitations does not begin to run against county warrants until fund created for payment has failed and will continue to fail to provide payment, or until there is sufficient money in the fund upon which warrants are drawn, or until proper officers have had opportunity to provide funds but have refused or neglected to do so. *Warren v. County of Stanton*.... 220
4. A cause of action arises on municipal warrants when it appears that assessments of taxes levied to provide a fund for their payment have failed and will continue to fail to produce funds for such purpose, when there is

sufficient money in the fund for their payment, or when municipal officers have had reasonable opportunity to provide funds to pay them and have refused and neglected to do so. *Chaffee v. City of Omaha* 418

5. As a general rule, statutes of limitations run in favor of, as well as against, municipalities. *Chaffee v. City of Omaha* 418
6. Statute of limitations begins to run against warrants issued by a municipality at time cause of action arises thereon. *Chaffee v. City of Omaha* 418
7. The rule that statute of limitations does not begin to run against city warrants drawn on a special fund until fund is actually created applies only when such fund is the exclusive source of payment. *Chaffee v. City of Omaha* 418
8. Failure of municipal officers to perform their statutory duty cannot estop the municipality to invoke the statute of limitations. *Chaffee v. City of Omaha* 418
9. Where petition shows lapse of more than 40 years from time city warrants were registered for payment and date suit was commenced, statute of limitations will be deemed to have run against said suit in absence of a pleading of facts excusing such unconscionable delay. *Chaffee v. City of Omaha* 418
10. An action to recover annual payments required under an instrument granting an easement must be brought within five years from the date the payments become due. *Frye v. Sibbett* 600
11. Statute of limitations, statute of nonclaim and res adjudicata are ordinarily affirmative defenses, and it is only when they affirmatively appear to exist from the petition itself that they render the petition subject to general demurrer. *In re Estate of McCleneghan* 707
12. The accrual of a cause of action means the right to institute and maintain a suit, and whether in law or equity the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief. *Bend v. Marsh* 780
13. In the case of an implied trust, except where the trust is imposed on the ground of actual fraud which is not immediately discovered, or unless there has been a fraudulent concealment of the cause of action, the statute of limitations begins to run as soon as the trust relation is created or from the time the wrong is done, or the time when the beneficiary knew or ought to have known thereof and can assert his rights, and not from date of repudiation of trust. *Bend v. Marsh* 780

Mandamus.

1. The discretion of a public officer cannot be controlled by mandamus, but when a specific duty is made plain by statute and the officer is not given any discretion in the matter, one for whose benefit the duty is to be performed may compel its performance by mandamus. *State ex rel. Williams v. City of Grand Island* 150
2. Where a specific duty is provided by statute mandamus may be invoked to enforce it, if denied; and the party entitled to such relief may not be forced to pursue his remedy by a circuitous and dilatory action at law. *State ex rel. Herman v. City of Grand Island* 150
3. Mandamus is a proper remedy to require a city having a paid fire department to place a fireman upon the retired list and pay him a pension after he has served 21 years and elects to retire from active service. *State ex rel. Herman v. City of Grand Island* 150
4. Existence of remedy at law will not prevent issuance of writ of mandamus unless such other remedy is adequate to afford relief upon the very subject matter involved, is appropriate and effectual to enforce the right or compel performance of particular duty, and will at all times afford full relief against the party from whom the duty is owing as distinguished from one against third person. *State ex rel. Herman v. City of Grand Island* 150
5. By statute, intervention is permitted in mandamus cases by persons having an interest in the subject matter in litigation of such a direct and immediate character that they will gain or lose by the direct operation and effect of the judgment. *State ex rel. Nelson v. Butler* 638
6. Constitutional questions will not be decided in a mandamus proceeding unless they are necessary to a determination of the case and the protection of some right, nor will they be decided before the time the statute becomes operative to affect the rights of parties who question its constitutionality. *State ex rel. Nelson v. Butler* 638

Master and Servant.

1. Notwithstanding employer has been guilty of failure to comply with statutory duty imposed for benefit of employees, he can be held liable for injuries to employees only if there is a causal connection between his negligence and injury of which employee complains. *Smith v. Morton Motor Co.* 396
2. Employer is not an insurer of the safety of the place in which employee was working, but is required only to ex-

ercise ordinary care in furnishing him a safe place and to warn and instruct him as to such dangers or hazards of his occupation as are not obvious. *Smith v. Morton Motor Co.* 396

3. Among duties of employee is obligation to yield obedience to all reasonable rules, orders and instructions of employer. *Stoffel v. Metcalfe Construction Co.* 450
4. Generally any willful or intentional disobedience by employee of employer's reasonable rules, orders and instructions justifies rescission of contract and peremptory dismissal of employee. *Stoffel v. Metcalfe Construction Co.* 450
5. Where sufficiency of master's justification of dismissal of employee raises issue of fact, such issue should be submitted to jury. *Stoffel v. Metcalfe Construction Co.* 450
6. Discharged employee's measure of damages for breach of contract for personal services is amount of salary agreed for period involved, less amount which employee earned or with reasonable diligence might have earned from other employment during such period. *Stoffel v. Metcalfe Construction Co.* 450
7. Discharged employee must seek employment of a substantially similar character to that of which he has been deprived. *Stoffel v. Metcalfe Construction Co.* 450

Mechanics' Liens.

1. It is the purpose of the mechanics' liens statute to protect the diligent subcontractor if he acts in a specified and limited time. *Ideal Cement Stone Co. v. Dohse* 246
2. Where material has been furnished under distinct contracts, the claim for a mechanic's lien under each contract must be filed within the time limited by statute for that purpose. *Ideal Cement Stone Co. v. Dohse* 246

Mortgages.

1. Prior to 1941 amendment to statute, unrecorded written extension agreement was effective to continue priority over subsequent mortgagee who had notice thereof. *Franklin v. Zarmstorf* 21
2. Since 1941 amendment to statute, unrecorded written extension agreement is effective as between the parties, but is ineffective to continue priority over subsequent purchasers and encumbrancers even though they may have notice thereof. *Franklin v. Zarmstorf* 21
3. An order confirming a judicial sale under mortgage foreclosure decree will not be reversed on appeal when there is no shocking discrepancy between the value and the sale price, and where there is no satisfactory evi-

dence that a higher bid could be obtained in the event of another sale. *Lincoln Trust Co. v. McDowell* 473
4. Taking of stay in mortgage foreclosure proceeding waives all previous errors which may have occurred in appointing a receiver as well as in granting the foreclosure. *Federal Farm Mortgage Corporation v. Ganser* 589
5. When a party fails to appeal from a final order within the time prescribed by law, he cannot question such order in later proceedings. *Federal Farm Mortgage Corporation v. Ganser* 589
6. Where there is no irregularity in the proceedings, confirmation of sale will not be set aside on appeal unless the bid is so low as to produce the conviction of unconscionableness, and the inadequacy of the bid as such must be pleaded. *Federal Farm Mortgage Corporation v. Ganser* 589
7. There is no final order affecting the rights of titleholder of real estate with respect to rents collected by receiver until order is made for distribution. *Federal Farm Mortgage Corporation v. Ganser* 589
8. If a decree of foreclosure is obtained during the lifetime of the mortgagor, an order of sale, sale, and confirmation thereof, after his death without revivor against his representatives, are voidable only and not subject to collateral attack. *Wendt v. Jones* 667

Municipal Corporations.

1. The statute creating liability against a village for benefits to streets and alleys for drainage improvement within a drainage district is not in contravention of the Constitution which provides that the legislature shall not impose taxes on municipal corporations for corporate purposes. *Drainage District No. 1 v. Village of Hershey* .. 138
2. Where a city fireman, having served 21 years, resigns and requests that he be placed upon the retired list, such acts constitute an election to retire within meaning of statute authorizing payment of pension upon such event. *State ex rel. Herman v. City of Grand Island* 150
3. Fireman's election to retire from active service is optional on his part, but when exercised, it becomes the duty of municipality to put him upon the retired list and pay the pension to which he is lawfully entitled. *State ex rel. Herman v. City of Grand Island* 150
4. An ultra vires contract of a municipal corporation is one which the corporation has no power to make under any

circumstances or for any purpose. *Warren v. County of Stanton* 220

5. The maintenance and repair of streets by a city of the second class is a governmental function and the cost thereof must be paid from the general fund of the city. *Thomson v. City of Chadron* 316
6. A city of the second class cannot lawfully levy taxes in excess of five mills for general fund purposes on the actual property valuation and any amount levied in excess of that limitation is void. *Thomson v. City of Chadron* 316
7. Where the annual tax ordinance of a city contains an item for "Streets, alleys and sidewalks 2.83 mills" and the demand for refund described it as "Repair of streets 2.83 mills," there being no similar item contained in the ordinance, substantial compliance with the statute was had and the variance was not fatal. *Thomson v. City of Chadron* 316
8. The period of service, after which a fireman may retire and go upon the retired list and receive pension benefits, means 21 years during which he actually performed the duties of a fireman. *Wessel v. City of Lincoln* 357
9. Under statute, issuance of revenue bonds for acquisition of electric light and power plant was required to be submitted to electors for approval. *May v. City of Kearney* 475
10. When bonds or other evidences of indebtedness are about to be issued by public officers illegally or without complying with the statute authorizing their issue, equity has jurisdiction to grant an injunction. *May v. City of Kearney* 475
11. A municipality may be estopped by its official acquiescence in and approval of acts originally unauthorized. *May v. City of Kearney* 475
12. Ordinarily equitable estoppel cannot be invoked against a municipal corporation in the exercise of governmental functions but exceptions are made where right and justice so demand, particularly where the controversy is between one class of the public as against another class. *May v. City of Kearney* 475
13. Initiative and referendum provisions are applicable only to acts which are legislative in character, and are not applicable to those dealing with executive or administrative matters. *State ex rel. Nelson v. Butler* 638
14. The test for determining legislative from executive or administrative acts is whether the resolution or ordinance of the municipality is one making a law or one executing a law already in existence. *State ex rel. Nelson v. Butler* 638

15. When the legislature has enacted a statute delegating the power of eminent domain to municipal corporations, such statute takes precedence over any conflictive provisions in a home rule charter, except insofar as the statute preserves like or similar powers already delegated as a part of the home rule charter. *State ex rel. Nelson v. Butler* 638

Negligence.

Under laws of Wyoming the issue of negligence or contributory negligence is ordinarily for the jury, and this is even so where the testimony is undisputed if different minds may fairly arrive at different conclusions. *Howerter v. Olson* 517

New Trial.

1. Newly discovered evidence, if merely cumulative or impeaching or which probably would not change the result, does not require a new trial. *Wessel v. City of Lincoln* 357
2. A motion for new trial on ground of newly discovered evidence is addressed to the sound discretion of the court and, on appeal, the ruling thereon will not be disturbed unless a clear abuse of discretion is shown. *Jensen v. John Hancock Mutual Life Ins. Co* 409
3. Newly discovered evidence is not ground for a new trial where exercise of due diligence before trial would have produced it. *Jensen v. John Hancock Mutual Life Ins. Co.* 409
4. A party should, in preparing his case for trial, proceed on assumption that his adversary will produce evidence to make good the averments of his pleading. *Jensen v. John Hancock Mutual Life Ins. Co* 409
5. A motion for new trial on ground of surprise is properly overruled where request for continuance was not made at the trial. *Jensen v. John Hancock Mutual Life Ins. Co.* 409

Nuisances.

1. A court of equity has jurisdiction to enjoin the maintenance of a nuisance, and, where the necessities of the case require, it may enjoin the operation of the business which occasions such nuisance. *State ex rel. Johnson v. Hash* 405
2. Decree of trial court enjoining specified acts constituting a business a nuisance does not meet terms of mandate requiring abatement of nuisance by permanently enjoining operation of business. *State ex rel. Johnson v. Hash* 405

Pardons.

1. If a convict breaks his parole, he is liable to serve out his maximum term, and the time of his escape, computed from its beginning to its end or time of retaking, is to be considered as not served. *In re Application of Blackwell, Blackwell v. Pszanowski* 256
2. When a paroled convict breaks his parole and is retaken after a lapse of time, such time will not be counted as time served on his sentence, notwithstanding the declaration of his breaking or violating parole is not made by prison authorities until after the retaking of the prissoner. *In re Application of Blackwell, Blackwell v. Pszanowski* 256

Parties.

1. Proper parties to bring action to enforce lien under instrument granting an easement are those who hold title to servient tenement at time of default if there has been no severance, and if there has been a severance, those who have succeeded to the right by reason of division or severance. *Frye v. Sibbett* 600
2. An intervener takes the suit as he finds it, is bound by the previous proceedings in the case, and cannot complain of the form of the action or defects in the proceedings between the original parties. *State ex rel. Nelson v. Butler* 638
3. An intervener who is not an indispensable party cannot change the position of the original parties, or the nature and form of the action or the issues presented therein. *State ex rel. Nelson v. Butler* 638

Partnership.

1. Where promissory note is signed by individuals, in order to hold them as partners, it is not sufficient to show that a partnership existed between the makers, but it must be further shown that consideration of note was advanced to partnership and note accepted on credit of partnership. *Meyer v. Linch* 1
2. If basis for holding makers of promissory note as partners is that they held themselves out as such, then it is incumbent upon payee of note to show that he relied upon such holding out in accepting the note. *Meyer v. Linch* .. 1
3. Where two parties as individuals execute promissory note in consideration for assignment of securities by payee to one of makers, and proceeds of sale of securities are turned over to, expended and used by a partnership

composed of the two makers of the note, the note does not become a partnership obligation. *Meyer v. Linch*..... 1
4. Ordinarily one partner cannot maintain an action at law against his copartner on matters relating to the partnership business unless there has been a settlement of the accounts of the firm. *Linch v. Linch*..... 792
5. A partner may bring an action at law upon a promissory note given him by his copartner, since such an instrument constitutes an acknowledgment of a separate debt between the parties. *Linch v. Linch*..... 792
6. A loan of funds by one partner to another, evidenced by a promissory note, is a personal debt of the promisor, and may be recovered in an action at law without regard to the state of the partnership accounts. *Linch v. Linch*.... 792

Physicians and Surgeons.
1. Where a patient's physician informs a surgeon of diagnosis which physician has made, and with authority of patient employs surgeon to perform operation which physician deems advisable or necessary, surgeon may rely on such diagnosis. *In re Estate of Johnson*..... 333
2. Where physician informs surgeon of diagnosis, the surgeon is not required to make an independent diagnosis before operating, in the absence of information or conditions which would put him on inquiry as to correctness of physician's diagnosis and advisability or necessity for operation. *In re Estate of Johnson*..... 333
3. Where surgeon, employed by physician with authority of patient, relying wholly on physician's diagnosis, operates and discovers conditions which suggest a reasonable basis for a different conclusion which would make proposed operation inadvisable or unnecessary in absence of emergency, surgeon is not negligent if he refrains from completing operation until further diagnosis is made and proper course of action based thereon is determined. *In re Estate of Johnson*..... 333
4. Where surgeon, employed by physician with authority of patient, to perform operation on diagnosis which physician has made, discovers, before performing operation, conditions which contradict such diagnosis or which cause the surgeon to question the correctness of physician's diagnosis or to reach a different diagnosis, with the result that a different or no operative treatment is indicated, in absence of emergency, if surgeon operates without making an additional and proper diagnosis, he is neg-

ligent and liable in damages for such injury to patient as proximately follows. *In re Estate of Johnson* 333

Pleading.

1. Under statute, amendment to pleadings is permissible either before or after judgment, in furtherance of justice, by asserting allegations material to the case, or where the amendment does not change substantially the claim or defense by conforming the pleading or proceedings to the facts proved. *Robinson Outdoor Advertising Co. v. Wendelin Baking Co.* 112
2. An amendment to a pleading may be made at any stage of a proceeding if it does not change the issues or affect the quantum of proof as to a material fact. *Robinson Outdoor Advertising Co. v. Wendelin Baking Co.* 112
3. It is within the discretion of the trial court to permit a party, during the course of trial, to amend his pleading so as to present a new cause of action or defense. *Robinson Outdoor Advertising Co. v. Wendelin Baking Co.* 112
4. Where defendant admits the material facts in plaintiff's petition and pleads a waiver, an estoppel, or matters in avoidance as a defense thereto, such material facts will be treated as true, though the answer also contains a general denial. *Hueftle v. The Farmers Elevator* 424
5. Where amended petition is filed containing substantially the same allegations as petition to which a demurrer has been sustained, it is proper practice to file motion to strike amended petition from the files. *In re Estate of McCleneghan* 707
6. In determining whether an amended petition states a cause of action, court will not ordinarily look beyond the pleading under attack. *In re Estate of McCleneghan* 707
7. The rule that a demurrer searches the record applies only when a demurrer is filed to a pleading subsequent to the petition. *In re Estate of McCleneghan* 707
8. A superseded pleading is only evidence of the facts therein alleged, and must be introduced as any other evidence. *In re Estate of McCleneghan* 707
9. The rule that a party may invoke the language of his opponent's pleading as rendering facts indisputable applies only to statements in the pleadings upon which the case is tried. *In re Estate of McCleneghan* 707
10. Neither informality of petition nor variance with record in probate proceeding afford any ground for demurrer or warrant striking petition from files. *In re Estate of McCleneghan* 707

11. A transcript on appeal may not be referred to in determining whether a petition states a cause of action. *In re Estate of McCleneghan* 707
12. When the laches of the plaintiff and the staleness of his claim are apparent, objection may be taken by demurrer. *Bend v. Marsh* 780

Post Office.
1. Postal savings certificates may be the subject of a valid gift inter vivos, and the transaction may be completed by the voluntary transfer of possession, even though they are nonnegotiable. *In re Estate of Vanicek* 531
2. The final judgment of a court of competent jurisdiction, adjudicating the right of any person to any sum deposited in a postal savings depository, is conclusive of the title thereto and a full discharge of the United States from the claim of any other person thereto. *In re Estate of Vanicek* 531

Public Utilities.
The State Railway Commission is a constitutionally created body endowed with powers and duties which include the regulation of rates, service and control of common carriers as the legislature may provide. *In re Application of Hergott* 100

Receivers.
There is no final order affecting the rights of titleholder of real estate with respect to rents collected by receiver until order is made for distribution. *Federal Farm Mortgage Corporation v. Ganser* 589

Recognizances.
1. A recognizance is an obligation of record, entered into before a court or officer duly authorized for that purpose, with a condition to do some act required by law which is therein specified. *State ex rel. City of Sidney v. Bridd* 273
2. In absence of statutory provision, proper manner of taking recognizances is to have magistrate repeat the terms of recognizance, have recognizors agree thereto, make a memorandum thereof which it is not necessary for the parties to sign, and from the memorandum draw up afterwards the recognizance in full form and certify it. *State ex rel. City of Sidney v. Bridd* 273
3. Where legislature requires written recognizance as condition to appeal, a written recognizance in the terms and conditions provided by statute, signed by proper parties, must be presented to the magistrate and in his presence

acknowledged by the parties thereto in person and then certified by him. *State ex rel. City of Sidney v. Bridd*.... 273

Reformation of Instruments.

The rule that a conveyance, without a grantee capable of receiving the grant, is void does not apply to equitable rights growing out of such a conveyance. *Fisher v. Standard Investment Co*..... 80

Remainders.

The creation by will of a vested interest in real estate defeasible upon the occurrence of an expressed contingency is valid and enforceable. *Ingraham v. Ingraham*..... 330

Sales.

1. Conditional sales contracts contemplate that property shall retain its character as personalty, but do not apply to such articles of personalty as are sold for the purpose of being incorporated in a building and becoming a part of realty. *Columbian Steel Tank Co. v. Vosika*..... 541
2. Where removal of property sold under conditional sales contract is sought, the vendor may exercise his right of ownership and obtain possession if such possession can be obtained and removal had without material injury to the realty. *Columbian Steel Tank Co. v. Vosika*..... 541

Specific Performance.

1. Where performance of a contract is impossible and a decree for specific performance cannot be enforced, the court will deny the remedy. *Franklin v. Zarmstorf*..... 21
2. Inadequacy of consideration alone is no defense to an action for specific performance of a contract unless so great as of itself to furnish an irresistible inference of fraud. *Garsick v. Dehner*..... 73
3. Specific performance should, in general, be granted as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, and where ends of justice will be subserved thereby. *Garsick v. Dehner* 73
4. In order to enforce an oral contract for conveyance of real estate, the evidence of the contract and its terms must be clear, satisfactory and unequivocal, and the performance thereof must be such as is referable solely to the contract sought to be enforced. *Lintz v. Apking*..... 714

States.

1. The boundary between the states of Iowa and Nebraska was fixed as the center of the channel of the Missouri river by acts of Congress admitting these states to the Union. *Lienmann v. County of Sarpy* 382
2. Where main channel of the Missouri river changes by accretion and decretion, the boundary between Iowa and Nebraska follows the channel. *Lienmann v. County of Sarpy* 382
3. Where main channel of Missouri river changes by avulsion to a new course, the boundary between Iowa and Nebraska does not change but becomes fixed along the line which constituted the center of the old channel. *Lienmann v. County of Sarpy* 382
4. Lands cut off from the mainland of a state by avulsion do not change their status but remain a part of the state from which they are cut off. *Lienmann v. County of Sarpy* 382
5. An action to reform a deed of conveyance to the State of Nebraska is properly maintainable against the states. *Frye v. Sibbett* 600

Statutes.

1. Statutes relating to the same subject must be taken together and construed as if they were one law and effect be given to every provision. *In re Application of Hergott* 100
2. Special statutory provision upon a given subject controls general provisions with reference thereto. *In re Application of Hergott* 100
3. The policy or impolicy of statutory provisions is the exclusive function of the lawmaking body and not of courts. *State ex rel. Herman v. City of Grand Island* 150
4. Where the language of a statute is unambiguous there is no necessity for construction, and courts cannot change the clear language thereof. *State ex rel. Herman v. City of Grand Island* 150
5. 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. *Wessel v. City of Lincoln* 357
6. 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. *Wessel v. City of Lincoln* 357
7. When language of a statute is unambiguous there is no

necessity for construction, and courts cannot change the clear language of a statute. *Wessel v. City of Lincoln* 357
8. A statute which is enacted containing provisions identical with those contained in a prior statute will be presumed to retain the same construction that was placed by judicial interpretation upon the prior statute. *May v. City of Kearney* 475
9. Initiative and referendum provisions are applicable only to acts which are legislative in character, and are not applicable to those dealing with executive or administrative matters. *State ex rel. Nelson v. Butler* 638

Taxation.
1. By statute, all property in this state, not expressly exempt therefrom, is subject to taxation, and should be valued and assessed at its actual value, which means value in the market in the ordinary course of trade. *Novak v. Board of Equalization* 664
2. The assessment of property for taxation by the board of equalization is final, except upon appeal, and should not be disturbed on appeal unless it appears from clear and convincing proof that it is erroneous. *Novak v. Board of Equalization* 664
3. General taxes on real property are a first lien. *Polenz v. City of Ravenna* 845
4. Special assessments on real property are a lien inferior to the general taxes. *Polenz v. City of Ravenna* 845
5. Where property is sold at tax foreclosure to satisfy the lien of general taxes, it cannot be sold subject to special assessments which are a junior lien. *Polenz v. City of Ravenna* 845
6. Where title passes to a purchaser at sale to satisfy general taxes, it is free and clear of all special assessment liens. *Polenz v. City of Ravenna* 845
7. Constitutional exemption from taxation of household goods of the value of $200 does not have the effect of exempting such property from sale for the payment of taxes assessed on other property of the tax debtor not exempt from taxation. *Ryder v. Livingston* 862
8. There is no exemption of any kind or class of property from distress or seizure for nonpayment of taxes and it is immaterial that property is exempt from taxation. *Ryder v. Livingston* 862

Trade-marks and Trade Names.
1. A trade-mark is a name, sign, symbol or device which is attached to goods offered for sale to distinguish them

from similar goods, and to identify them as being made, worked on, imported, selected, certified, or sold by a particular trader or his successors. *Shepard v. Shepard* 12
2. The exclusive use of a trade-mark is limited to the particular class on which it has been actually used, and its use on one or more commodities does not give the right to use it on all, but other persons may use identical mark or name in connection with a different class of goods. *Shepard v. Shepard* 12
3. Where owner of trade-mark applies for an injunction to restrain the use of the trade-mark or trade name, it must be shown that the two businesses are in actual competition with each other. *Shepard v. Shepard* 12

Trial.
1. A party, having requested the withdrawal of an issue and having had an adverse ruling thereon, does not, by tendering thereafter instructions thereon, waive right to assert that the issue was without support in the evidence. *In re Estate of Witte* 295
2. It is the duty of trial courts to determine the issues upon which there is competent evidence and submit them to the jury. *In re Estate of Witte* 295
3. The submission of issues upon which the evidence is insufficient to sustain an affirmative finding is generally prejudicial. *In re Estate of Witte* 295
4. A motion for a directed verdict admits the truth of all material and relevant evidence on behalf of party against whom the motion is directed, and such party is entitled to have every controverted fact resolved in his favor and to the benefit of every inference reasonably deducible from the facts in evidence. *In re Estate of Johnson* 333
5. Where instructions are not inconsistent or contradictory, but considered together correctly state the law, the judgment will not be reversed because one instruction does not state the entire law on the subject, unless it appears that the jury was misled. *In re Estate of Johnson* 333
6. Where party requests an instruction to the jury which contains several propositions of law, and one or more of the propositions fail to correctly state the law, it is not error for the court to refuse to give the instruction. *In re Estate of Johnson* 333
7. A verdict may not rest on mere conjecture or speculation. *Wessel v. City of Lincoln* 357
8. Instructions relating to burden of proof should not impose a greater burden on either party than the law re-

quires nor relieve a person of the burden imposed by law. *Chard v. New York Life Ins. Co.* 429

9. In a law action it is error to direct a verdict for either party on issue of fact on which evidence is conflicting, and such issue should be submitted to jury. *Stoffel v. Metcalfe Construction Co.* 450

10. A party is entitled to have his theory of case, as disclosed by evidence, submitted to jury under proper instructions. *Stoffel v. Metcalfe Construction Co.* 450

11. Trial court is required to consider as evidence any competent and relevant facts shown by a view of the premises, and duty is imposed on Supreme Court to consider that trial court did view the premises, if the record contains competent evidence to sustain the findings. *Columbian Steel Tank Co. v. Vosika* 541

12. In suit on accident insurance policy, burden of proof rests upon plaintiff to show that death was accidental, but the law indulges in a presumption against suicide and murder, and against injuries resulting from a criminal assault or unlawful acts of the deceased. Such presumption is sufficient to establish a prima facie case. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550

13. Where plaintiff has made prima facie case with the aid of presumption against injuries resulting from criminal assault or unlawful acts of the deceased, defendant must go forward with evidence tending to overcome or remove the presumption, and if competent evidence is adduced which is contrary or inconsistent to the presumption it disappears. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550

14. After evidence has been introduced by defendant to rebut presumption against injuries resulting from criminal assault or unlawful acts of deceased, plaintiff must again take the initiative and show by other evidence that death was accidental. However if defendant's evidence is consistent with or favorable to and supporting plaintiff's theory that death was accidental, plaintiff is entitled to benefit thereof. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550

15. Motion by defendant for directed verdict at close of all of the evidence must be treated as an admission of all material and relevant evidence favorable to plaintiff and all proper inferences to be drawn therefrom, and if evidence sustains the material allegations of petition and petition states a cause of action, the case should be sub-

mitted to the jury. *Cutrell v. John Hancock Mutual Life Ins. Co.* 550
16. Where the evidence is conflicting as to whether an accident or existing disease caused the death of the insured, it is a question of fact to be determined by the jury. *Long v. Railway Mail Assn.* 623
17. Where an expert witness gives an opinion based upon facts appearing in evidence upon a matter recognized as a proper subject of expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain a verdict. *Long v. Railway Mail Assn.* 623
18. Misconduct of counsel in argument to jury cannot be properly shown by affidavit, and to preserve error the statements must be taken by the court reporter, together with the objections made thereto and the court's ruling thereon. *In re Estate of House* 670
19. An instruction which sets out a state of facts, and authorizes a verdict for one of the parties upon a finding of such facts, is erroneous unless it includes every fact necessary to a verdict in favor of such party, unless the omitted facts are conclusively established. *In re Estate of House* 670
20. Where an instruction is complete in itself, error therein is not cured by the giving of other instructions which correctly state the law or facts essential to a recovery. *In re Estate of House* 670
21. It is the duty of the trial court to instruct the jury upon the issues presented by the pleadings and evidence, whether requested so to do or not. *In re Estate of Keup* .. 729
22. Instructions to jury should be founded on and applicable to the testimony, and when they do not and are calculated to mislead the jury, the judgment should be reversed. *In re Estate of Keup* 729
23. Matters of opinion and arguments of jurors in jury room are considered as inhering in the verdict, and are not such matters of misconduct as can be proved by the jurors themselves. *In re Estate of Keup* 729
24. Provisions of statute requiring trial court to make separate findings of fact and conclusions of law upon request are mandatory. *Dormer v. Dreith* 742
25. It is essential to the validity of a deed that there be a delivery, and burden of proof rests upon party asserting it to establish delivery by a preponderance of the evidence. *Lewis v. Marker* 763
26. Statutory rule preserving error to further testimony

where objection is once interposed applies only when there is an erroneous ruling thereon by the court. *In re Estate of House* 866

27. Matters of opinion and arguments of jurors in jury room are considered as inhering in the verdict, and are not such matters of misconduct as can be proved by the jurors themselves. *In re Estate of House* 866

Trover and Conversion.

1. When a party has come into possession of property lawfully or without fault, a demand of possession is generally necessary before suit will lie. *Hansen v. Village of Ralston* 838
2. A bona fide reasonable detention of property by one who has assumed some duty respecting it, for the purpose of determining its true ownership, or of determining the right of the demandant to receive it, will not sustain an action for conversion. *Hansen v. Village of Ralston* 838
3. It is ordinarily for the jury, under proper instructions, to pass upon the existence of qualified refusal to deliver property and whether it was reasonable and made in good faith. *Hansen v. Village of Ralston* 838

Trusts.

1. Every violation by a trustee of a duty required of it by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust. *Rettinger v. Pierpont* 161
2. It is the duty of a trustee to fully inform the cestui que trust of all facts relating to the subject matter of the trust which comes to the trustee's knowledge and which are material for the cestui que trust to know for the protection of his interests. *Rettinger v. Pierpont* 161
3. A resulting trust arises when a party takes title to real estate with the intention that it shall be for the benefit of the trustee and cestui que trust, or for the benefit of the cestui que trust alone. *Auker v. Hendrickson* 687
4. A party for whose benefit a resulting trust has arisen may maintain action for an accounting and termination of the trust. *Auker v. Hendrickson* 687
5. The interest of a beneficiary in trust property is not cut off by a transfer by the trustee in breach of trust to third person who has notice thereof, and the beneficiary can compel the third person to restore the property to the trust. The third person holds the interest acquired upon a constructive trust. *Bend v. Marsh* 780

6. In the case of an implied trust, except where the trust is imposed on the ground of actual fraud which is not immediately discovered, or unless there has been a fraudulent concealment of the cause of action, the statute of limitations begins to run as soon as the trust relation is created or from the time the wrong is done, or the time when the beneficiary knew or ought to have known thereof and can assert his rights, and not from date of repudiation of trust. *Bend v. Marsh* 780
7. When an attorney receives a deed of land in settlement of a mortgage he is foreclosing for a client, the grantee named in the deed should be the mortgagee and not the attorney, even though the attorney has not been paid his attorney's fee. *Young v. Card* 857

Vendor and Purchaser.

1. A court of equity will grant a strict foreclosure of a real estate contract where in the exercise of a sound judicial discretion it would be inequitable or unjust to refuse so to do. *Swanson v. Madsen* 815
2. In granting strict foreclosure, equity gives the party in default a reasonable time to avoid its consequences by performing the contract. *Swanson v. Madsen* 815

War.

The residence of a person in military service is not affected by such service, and he does not abandon residence he had when he entered such service by being required to live elsewhere. *Means v. Means* 441

Waters.

1. In action for conversion of storage waters in which plaintiff had a beneficial use, plaintiff sustained burden of proving separation of damages resulting from conversion of storage water and damages arising from taking of the natural flow of the stream. *Robinson v. Dawson County Irrigation Co.* 32
2. Where water is impounded upon land by natural conditions whereby a lake is formed, the owner of such land had no lawful right to remove an impediment to its flowage and thereby cause such water to flow upon the land of another to his damage. *Yocum v. Labertew* 120
3. Injunction is proper remedy to prevent removal of impediment to flowage of water impounded by natural conditions. *Yocum v. Labertew* 120
4. Special annual assessments, regularly levied for payment of irrigation district bonds, become a lien against real

estate on and after October 1 in the year in which levied. *County of Garden v. Schaaf* 676

5. Irrigation district bonds are paid by revenue derived from successive annual assessments, and all the property in the district remains liable for such annual assessments until the bonds have been paid. *County of Garden v. Schaaf* 676
6. Total amount of an outstanding issue of irrigation district bonds are not a lien upon the land in the district at the time such bonds are issued. *County of Garden v. Schaaf* 676

Wills.

1. A legatee or devisee who seeks probate of a will carries the burden of proving that testator possessed the requisite mental capacity to make a will. *In re Estate of Witte* 295
2. Proponent of a will is required to make a prima facie case as to the testamentary capacity of testator. *In re Estate of Witte* 295
3. After a prima facie case is made by proponent of will the burden devolves upon objector to overcome the presumption arising out of prima facie case made by proponent. *In re Estate of Witte* 295
4. After presumption growing out of prima facie case of proponent has been overcome, burden of proving mental capacity of testator by preponderance of evidence devolves upon proponent. *In re Estate of Witte* 295
5. A person who understands the nature of his acts, the extent of his property, the proposed disposition of it, and the natural objects of his bounty, is competent to make a will. *In re Estate of Witte* 295
6. A witness in giving his opinion as to mental capacity of testator to make a will must have in mind the quality of mental capacity essential to making of a valid will. *In re Estate of Witte* 295
7. In order that a will may be rejected on ground of incompetency of testator, evidence must be sufficient to sustain reasonable inference that testator was incompetent to make a will. *In re Estate of Witte* 295
8. In the construction of a will, the court is required to give effect to the true intent of the testator so far as it can be collected from the whole instrument, if such intent is consistent with the rules of law. *Ingraham v. Ingraham* 330

9. The creation by will of a vested interest in real estate defeasible upon the occurrence of an expressed contingency is valid and enforceable. *Ingraham v. Ingraham*.. 330
10. Parties to a probate proceeding, including contest of a will, do not have power to dismiss the proceeding, but county court, and district court on appeal, have such power and may, in their discretion, dismiss the same. *In re Estate of Marsh, Messecar v. Marsh*..... 559
11. The burden of proof is upon the proponent of a will, both in county and district court, to prove execution of will and mental capacity of testator. *In re Estate of Keup*.. 729
12. If proponent makes prima facie case on execution of will and mental capacity of testator and evidence of contestant is insufficient to justify a submission of such issues to the jury, the court should direct a verdict on such issues. *In re Estate of Keup*..... 729
13. Elements to establish undue influence in will contest are (1) that the testator was subject to such influence, (2) that the opportunity to exercise it existed, (3) that there was a disposition to exercise it, and (4) that the result appears to be the effect of such influence. *In re Estate of Keup*..... 729
14. While the four elements must be established by evidence to submit issue of undue influence to jury, it is not necessary that court give an instruction setting forth the four elements separately, provided they are sufficiently contained in the instructions given. *In re Estate of Keup* 729

Witnesses.
1. Communications not necessary and proper to the discharge of a physician's professional duties or services are not privileged. *Cramer v. State*..... 88
2. A will may not be rejected on the ground that it was executed under undue influence, unless the evidence of the objector establishes that the testator was subject to undue influence, that the opportunity to exercise it existed, that there was a disposition to exercise it, and that the result appears to be the effect of undue influence. *In re Estate of Witte*..... 295
3. A nonexpert witness who is shown to have had an intimate acquaintance with a person may be permitted to state his opinion as to mental condition of such person if such condition is a material subject of inquiry, by giving the facts and circumstances upon which the opinion is based. *In re Estate of Witte*..... 295
4. An expert witness will be permitted to give his opinion

as to mental capacity to make a will if it is predicated on a proper and sufficient foundation. *In re Estate of Witte* 295

5. Hypothetical questions propounded to an expert, if so framed as to fairly and reasonably reflect the facts proved by any of the witnesses, will be sufficient, provided the subject is one proper for expert testimony. *Wessel v. City of Lincoln* 357
6. The value of the opinion of an expert witness is dependent on the facts on which it is predicated, and unless the premises upon which it is based are shown to be true, the opinion has no probative force. *Williams v. Watson Bros. Transportation Co.* 466
7. If a witness testifying to a gift inter vivos is creditable, and there is no evidence in opposition thereto, the question becomes one of sufficiency rather than the weight of the evidence. *In re Estate of Vanicek* 531
8. Where an expert witness gives an opinion based upon facts appearing in evidence upon a matter recognized as a proper subject of expert opinion, unless impeached to such an extent as to have no probative value, it is ordinarily sufficient to sustain a verdict. *Long v. Railway Mail Assn.* 623
9. An interested party is competent to testify to genuineness of the signature or handwriting of a deceased person, since such testimony does not involve a personal transaction or conversation between the witness and the decedent. *In re Estate of House* 866
10. Interested party to claim against estate of deceased person may testify that endorsement on back of note is in his own handwriting. *In re Estate of House* 866
11. When a person disqualified by statute is permitted, without objection, to testify to transaction or conversation with deceased person, it is a waiver of the benefit of the statute. *In re Estate of House* 866
12. When objection is made and erroneously overruled to admission of evidence of conversation or transaction with deceased person, the person making the objection does not waive his rights under the statute by cross-examining the witness on the same matters or offering direct evidence thereon to meet the evidence erroneously admitted. *In re Estate of House* 866
13. If either on cross-examination or direct examination, the representative of a deceased person goes beyond the scope of the inquiry to which he had previously made proper objection, and introduces evidence of other mat-

ters in regard to the transaction or conversation with deceased person, it is a waiver of benefit of the statute and any erroneous rulings of the court. *In re Estate of House* 866

Workmen's Compensation.

1. Malingering, under the workmen's compensation law, is defined as deception, practiced by a dishonest employee, by feigning, inducing or prolonging either sickness or injury, for the purpose of securing illegally or fraudulently benefits not otherwise payable. *Lee v. Lincoln Cleaning & Dye Works* 124
2. Employee may be allowed compensation for neurosis if it is a proximate result of injury and results in disability. *Lee v. Lincoln Cleaning & Dye Works* 124
3. While employee is unable to perform any substantial amount of labor, either in her particular line of work or in any other for which she is fitted, she is totally disabled within the meaning of the compensation law. *Lee v. Lincoln Cleaning & Dye Works* 124
4. When an employee appeals to the Supreme Court from a judgment denying an award in the district court, such employee is not entitled to an allowance of attorney's fees in the Supreme Court, even if judgment of district court is set aside and an award granted. *Lee v. Lincoln Cleaning & Dye Works* 124
5. The burden of proof is upon the claimant in a compensation case to establish by a preponderance of the evidence that personal injury was sustained by employee by an accident arising out of and in the course of his employment. *Chambers v. Bilhorn, Bower & Peters* 277
6. A compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that claimant incurred a disability arising out of and in the course of his employment. *Chambers v. Bilhorn, Bower & Peters* 277
7. The rule of liberal construction of the Workmen's Compensation Act applies to the law, not to the evidence offered to support a claim, and the rule does not dispense with the necessity that claimant prove his right to compensation, nor does it permit a court to award compensation where requisite proof is lacking. *Chambers v. Bilhorn, Bower & Peters* 277
8. Wages under the Workmen's Compensation Act shall be computed, ordinarily, according to the terms of the contract of hiring in force at the time of the accident. *Redfern v. Safeway Stores, Inc.* 288

9. Where employer was willing to pay compensation in accordance with judgment of Workmen's Compensation Court, and there was reasonable controversy existing between employer and employee as to the former's liability, attorney's fees should not be allowed. *Redfern v. Safeway Stores, Inc.* 288
10. Where reasonable controversy exists between employer and employee as to the employer's liability under the Workmen's Compensation Act, the employer is not liable for the penalty for waiting time during time cause is pending in the courts for final determination. *Redfern v. Safeway Stores, Inc.* 288
11. To sustain an award in a workmen's compensation case, it is sufficient to show that an injury, resulting from an accident arising out of and in the course of employment, and pre-existing disease combined to produce disability. *Yakal v. Henkle & Joyce Hardware Co.* 365
12. To sustain an award in compensation case, there must be proof that injury was occasioned by accident arising out of and in course of employment. *Hammond v. Doctor's Hospital* 446
13. Where there is no evidence in record as to how, when and where injury occurred which is alleged to have been result of an accident arising out of and in course of employment, case must fail for want of proof. *Hammond v. Doctor's Hospital* 446
14. Evidence based on speculation and conjecture is insufficient to sustain an award of compensation. *Hammond v. Doctor's Hospital* 446
15. To sustain an award, employee has burden of establishing by a preponderance of the evidence that he has incurred a disability arising out of and in the course of his employment. *Williams v. Watson Bros. Transportation Co.* 466
16. Proof must be made by evidence leading to the direct conclusion or to a legitimate inference therefrom that employee incurred disability arising out of and in the course of his employment in order to sustain an award. *Williams v. Watson Bros. Transportation Co.* 466
17. An award cannot be based upon possibilities, probabilities, or upon conjectural or speculative evidence. *Williams v. Watson Bros. Transportation Co.* 466
18. Operation of filling station under lease did not constitute a scheme, artifice or device to defeat the provisions of the Workmen's Compensation Act. *O'Brien v. Barnard* 596